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WITH KEY-NUMBER ANNOTATIONS

VOLUME 261

PERMANENT EDITION

CASES ARGUED AND DETERMINED
IN THE

CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS
OF THE UNITED STATES AND THE COURT
OF APPEALS OF THE DISTRICT
OF COLUMBIA

JANUARY — MARCH, 1920

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FEDERAL REPORTER, VOLUME 261

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OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS AND COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS, THE DISTRICT COURTS, AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

SEABOARD AIR LINE RY. CO. v. OLIVER.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1919.)
No. 3321.

DEATH \$\ightharpoonup 27\to Defenses; recovery by employe under federal Employers' Liability Act bar to personal representative's action.

Under Employers' Liability Act April 22, 1908, § 1 (Comp. St. § 8657), making railroad carrier liable to an injured employé, or in case of death to his personal representatives, and section 9, as amended by Act April 5, 1910, § 2 (Comp. St. § 8665), providing that rights of action given to a person suffering injuries shall survive, and that in such case there shall be only one recovery for the same injury, the personal representative of an injured employé, who recovered judgment for his injuries, cannot recover for his death.

In Error to the District Court of the United States for the Southern

District of Georgia; Beverly D. Evans, Judge.

Action by Edgar J. Oliver, administrator of Bud Hall, against the Seaboard Air Line Railway Company. There was a judgment for plaintiff (250 Fed. 652), and defendant brings error. Reversed.

Thomas F. Walsh, Jr., of Savannah, Ga., for plaintiff in error. Francis M. Oliver, of Savannah, Ga., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. This was an action under the federal Employers' Liability Act by the personal representative of Bud Hall, deceased. The right of the plaintiff (defendant in error here) to maintain the action was resisted on the ground that Bud Hall brought suit against the plaintiff in error for the damages sustained by him in consequence of the injury to which his death was attributed in the pending suit, and recovered judgment, which judgment has been satisfied by payment thereof. The court ruled against that defense.

So far as we are advised, the question whether the statute mentioned gives a deceased employé's personal representative the right to maintain an action when the employé himself has recovered for the injury he suffered has not heretofore been ruled on. It is not open to question that the statute provides for two distinct rights of action: One in the injured person for his personal loss and suffering, where the injuries are not immediately fatal; and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death, the damages recoverable in the one case not being the same as those recoverable in the other. Michigan Central R. R. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; St. Louis & Iron Mountain Ry. v. Croft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160.

Until the act of 1908 (35 Stat. 65, c. 149), was amended by the act of April 5, 1910 (36 Stat. 291, c. 143), the right of action given to the injured person was extinguished by his death. The act of 1908, with qualifications which need not now be mentioned, made a common carrier by railroad, while engaging in interstate commerce, "liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of" designated relatives. The following is the section added by the amendment of 1910:

"Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury."

The amendment does no more than provide for the survival of the employe's right of action if it remained in existence up to the time of his death, and that "in such cases"—that is, cases of survival of the employe's right of action—there shall be only one recovery for the same injury. If the employe had no right of action immediately before he died, his personal representative has no right of action other than such as was given by the act before it was amended. The section added by the amendment of 1910 is not applicable to such a case.

The first section of the act makes the carrier liable in damages to the injured employé, "or, in case of the death of such employé, to his or her personal representative, for the benefit," etc. The two distinct rights of action are given in the alternative or disjunctively. The language used indicates the absence of an intention to allow recoveries for the same wrong by both the injured employé and, in case of his death, by his personal representative; only one recovery being allowed when the injured employé dies without having enforced the right of action given to him. It seems to be a fair inference from that language that the right of action given to the injured employé's personal representative was intended to be unenforceable after the enforcement and satisfaction of the one given to the employé himself. From the

fact that one wrong gives rise to two or more rights of action, it does not follow that there can be more than one recovery based on that wrong. An intention to permit more than one recovery for an injury to an employé for which a statute gives a right of action to the employé, or, in case of his death, to his personal representative, is not to be inferred, in the absence of language evidencing such intention, where the wrong upon which the rights of action given are based is a tort, the inception and continued existence of which is dependent upon conduct of the employé at the time of, or subsequent to, the injury.

In this connection what was said in the opinion in the case of Western Union Telegraph Co. v. Preston, 254 Fed. 229, 165 C. C. A. 517, is pertinent. It was decided in that case that under a Pennsylvania statute providing that, when no suit for damages is brought by the person injured during life, his widow may maintain an action for the death within one year thereafter, the widow may sue, although at the time of death decedent's right of action was barred by limitation. The reasoning of the court indicates that the result would have been different if, instead of the decedent's right of action having been barred by limitation, it had been enforced by suit and recovery of judgment, which was satisfied. In connection with a reference to the case of Michigan Central R. R. Co. v. Vreeland, supra, the following was said in the opinion:

"While it is thus decided that the new action is for the death and is independent of the husband's common-law action for his injury, the courts have gone further, and have decided with equal finality, that 'the cause of action contemplated by the statute is the tort which produces death and not the death caused by the tort.' Centofanti v. Railroad Co., 244 Pa. 255, 262, 90 Atl. 558, 561; Michigan Central R. R. Co. v. Vreeland, supra. In arriving at these decisions, we discern a clear distinction made by the courts between the right of action after death given by the statutes and the cause of action on which such right of action may be enforced. This distinction has, we believe, a controlling bearing on the question before us for decision. Referring for convenience to the two rights of action respectively as the widow's right of action and the husband's right of action, it is now the law that, although the widow's right of action is wholly independent of that of her husband, it is dependent on the original wrongful injury inflicted upon him. Both rights of action spring from the same tort; therefore the same tort is the cause of action for both. The tort being the basis of both actions, the courts have held with entire consistency that the widow's right to recover in her action for the wrong done her by occasioning her husband's death depends primarily on the liability of the wrongdoer to her husband for the wrong done him. Liability for the tort is affected of course by the character of the tort, and it may even be destroyed by the injured husband in a way that will altogether deprive his widow of a cause of action to sue upon. The tort, as a cause of action enuring to the widow, is affected by considerations of the husband's assumption of risk and contributory negligence, and of negligence of a fellow servant. Liability for the tort may be released by the husband before its commission, as under a contract involving a release of a carrier from liability for future negligence of its servants (Perry v. P., W. & B. R. R., 24 Del. [1 Boyce] 399, 77 Atl. 725); and by his acceptance of a free pass similarly releasing liability (Northern Pacific Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, reversing C. C. A. Ninth Circuit. 116 Fed. 324, 54 C. C. A. 196). Liability for the tort may also be released by the husband after its commission by his acceptance of compensation for the injury he has sustained. Hill v. Penna. R. R. Co., 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754. If the wrongdoer has never been

legally liable for the wrong, or if he has in any way been acquitted of the wrong, then the tort is no longer a cause of action on which the widow can prosecute her statutory right of action, and this is for the reason that the widow succeeds to her husband's cause of action—the tort—with all its infirmities, those that are inherent, and those that have been imposed upon it by her husband."

Nothing in the act now under consideration indicates an intention to make the injured employe's right or power to deal with his employer with reference to the wrong for which the latter is made liable any different from that usually possessed by the victim of a tort. Ordinary incidents of a right to recover damages for a tort are the powers of enforcing the tort-feasor's liability therefor by suit and of discharging all liability incurred for a consideration received. Can it properly be said that the act has the effect of depriving an injured employé of the benefit of getting what his employer may be willing to pay to obtain a discharge of all liability incurred? We think not. So long as the employé lives, he alone can sue for the tort. The act does not indicate a purpose to make the amount he may recover any less than it might have been if, in case of his death, no right of action had been given to his personal representative. The right of action conferred on him is not so restricted as to prevent his enforcing all liability the employer is subjected to for the wrong done to the employé. So long as the injured employé survives, there is no limitation on his right to recover all that, in such a situation, is recoverable from the employer for the one tort committed. Language used in the first section of the act fairly negatives the conclusion that a deceased employe's personal representative is given the right to maintain an action on the tort against the deceased for which the latter sued and recovered during life. If, during the life of the injured employé, his employer's liability for the tort is extinguished by any occurrence ordinarily having that effect, the employe's personal representative has no right of action for the injury, as the single cause of action upon which a suit by him must be based has ceased to exist.

The federal Employers' Liability Act differs from Lord Campbell's Act, and other similar statutes, in that the former does not in terms make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he died. The defendant in error's lack of right to maintain his suit in such a situation as the one under consideration is due, not to the decedent's lack, immediately prior to his death, of an enforceable right of action for the injury he sustained, but to the fact that the cause of action counted on has been extinguished by payment of the judgment recovered by the decedent for the wrong he suffered.

In our opinion the court's above-mentioned ruling was erroneous. Because of that error the judgment is reversed.

GOUBLIN V. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3284.

1. INDICTMENT AND INFORMATION & PROSECUTION FOR KEEPING DISORDERLY HOUSE BY EITHER INDICTMENT OR INFORMATION.

Prosecution for violation, contrary to Act May 18, 1917, c. 15, § 13 (Comp. St. 1918, § 2019b), of order of Secretary of War as to prostitution near a military camp need not be by indictment, but may be by information.

2. CRIMINAL LAW \$\ightharpoonup 1206(5)\top-Punishment for sexual immorality near military camp.

In view of Rev. St. § 13 (Comp. St. § 14), unaffected by Criminal Code (Act March 4, 1909), or any other act, and providing that, in the absence of express provision to the contrary in a repealing statute, a repealed statute shall remain in force for purpose of sustaining action or prosecution for enforcement of penalty thereunder, one who, contrary to Act May 18, 1917, c. 15, § 13 (Comp. St. Ann. Supp. 1919, § 2019b), had violated an order of the Secretary of War against sexual immorality near a military camp, was not protected from punishment therefrom by the subsequent amendatory act of July 9, 1918; no expression therein indicating such intention, but it going more into detail in extending the provisions of the earlier act.

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Emily Goublin was convicted of violation of Act May 18, 1917, c.

15, § 13, and she brings error. Affirmed.

Marshall B. Woodworth, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. [1] The plaintiff in error, having been adjudged guilty and sentenced under her plea of guilty to an information charging her with violation of section 13 of Act May 18, 1917, c. 15, 40 Stat. 83 (Comp. St. 1918, § 2019b), seeks by writ of error to review the judgment, and she contends, first, that the judgment is void for the reason that the proceeding was by information, instead of by indictment, and for the further reason that the affidavit to support the information, although purporting to have been sworn to, omits the date of the jurat, and is otherwise defective. This contention is disposed of by the recent decisions of this court in Blanc v. United States, 258 Fed. 921, — C. C. A. —, and Brown v. United States, 260 Fed. 752, — C. C. A. —.

[2] The next point urged is that the act of May 18, 1917, as to section 13 thereof, under which conviction was had, was repealed by the amendatory Act July 9, 1918, c. 143, subc. 14, 40 Stat. 885,

passed since the conviction. But there is nothing expressed to indicate that by the latter act Congress intended that those who had violated the earlier act should escape liability. On the contrary, the later act pertained to the same subject as the earlier, and even went more into detail in extending the provisions of the statute. General saving clauses, therefore, become important, and to them we now turn.

Section 13, Revised Statutes (Comp. St. § 14), in effect December 1, 1873, is as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Section 5601 of the Revised Statutes (Comp. St. § 10598) provides:

"The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December, 1873, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any operation of the revision inconsistent therewith."

On March 4, 1909 (35 Stat. 1088, c. 321), Congress passed an act to codify, revise and amend the penal laws of the United States. After specifying that certain earlier statutes were repealed, section 341 (Comp. St. § 10515) provides as follows:

"Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

Then follows section 342 (Comp. St. § 10516), providing that the repeal of existing laws or modification should not affect proceedings had or commenced in any civil case prior to the repeal or modification, and section 343 (Comp. St. § 10517), which provides as follows:

"All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, or changed, modified or repealed by this title, may be prosecuted and punished in the same manner and with the same effect as if this act had not been passed."

These provisions of the Criminal Code became effective on and after the 1st day of January, 1910, and the argument of the plaintiff in error is that they operated to supersede section 13, supra, of the Revised Statutes of 1878. But, in our opinion, no such conclusion can be sustained. Without in the least overlooking the general rule that the revision and codification take the place of all former laws on the subject, nevertheless, as to offenses committed against a statute which has been amended or repealed, there may be applied a general existing statute by which, notwithstanding such repeal, a statute is kept alive for the purpose of sustaining a prosecution for liability under it. This is shown by section 343, which is much like section 5598 of the Revised Statutes (Comp. St. § 10595). The Supreme

Court, in United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480 referred to section 5598, and said that it was "the obvious intention of section 13 * * * to extend this provision to the repeal of any statute not embraced in such revision." The plain object of a general statute, such as section 13, is to meet a situation where, but for such a general provision, there would be a time of nonliability. Section 343 is applicable to repeals effected by the Criminal Code, but does not repeal section 13 of the Revised Statutes. By regarding section 13 of the Revised Statutes as in force, and as keeping alive the right to prosecute violations of section 13 of the act of May 18, 1917, there was no period of nonliability for doing the acts charged against the plaintiff in error.

In Hertz v. Woodman, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001, decided on May 31, 1910, after the Criminal Code took effect, the Supreme Court said that the fourth section of the act of Congress of February 25, 1871 (16 Stat. 431, c. 71 [Comp. St. § 14]), "was carried into the revision of 1878 and is now in force as section 13,

Rev. Stat.," and added:

"This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress."

In the earlier case of Great Northern Railway Co. v. United States, 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567, the court held that section 13 must be enforced, unless "either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of section 13." Again, in the recent case of Hallowell v. Commons, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409, decided in 1916, the court regarded section 13, Revised Statutes, as in force.

It is certain that there is no inclusion of section 13 in the express repealing provisions of the Criminal Code of March 4, 1909, and our opinion is that there is no repealing clause in any subsequent act which conflicts with the general rule of section 13, and of its applicability to the case before us.

The result is that the plaintiff in error was liable to prosecution under the act of May 18, 1917, and her liability was not affected by the amending act of 1918, or any clause thereof, but that under the rule of section 13, Revised Statutes, she was rightly proceeded against. The judgment is affirmed.

ROSS, Circuit Judge (dissenting). Supported by an affidavit of a police officer of the city of San Francisco, an information was filed in the court below June 14, 1918, by the United States attorney, alleging that the defendant (plaintiff in error here), on the 1st, 2d, and 3d days of June, 1918, and particularly on said 3d day, entered and remained in a certain house of ill fame located at No. 362a Third street, San Francisco, for the purpose of prostitution, in violation of section 13 of the act entitled "An act to authorize the President to in-

crease temporarily the military establishment of the United States," approved May 18, 1917, and the order of the Secretary of War made and issued on the 17th day of January, 1918, in pursuance of that act, designating the distance of five miles from a military camp, fort, post, cantonment, training or mobilization place, within which distance it should be unlawful to enter or reside in, for immoral purposes, any such house of ill fame—the information further alleging the house to be within five miles of the Presidio and Ft. Mason, and that they are military posts and forts, and used as such at the times mentioned. The affidavit of the police officer stated:

"That Emily Goublin did, during the month of June, 1918, and particularly on the 3d day of June, 1918, at No. 362a Third St. street, in the city of San Francisco, state of California, enter and remain a house of ill fame wherein for the purpose of prostitution; that said house of ill fame was and is within five miles of a military post, to wit, the Precidio and Ft. Mason; that said Precidio and Ft. Mason, durling all of the said time, being used by the United States government for millatary purposes."

The defendant having pleaded guilty, judgment was entered against her June 15, 1918, that she be imprisoned for the period of six months in the San Francisco county jail. Subsequently she procured counsel, and the present writ of error was sued out in her behalf; one of the grounds being that the offense could only be prosecuted by indictment, which point has just been adjudged without merit in the case of Brown v. The United States, No. 3290, 260 Fed. 752, — C. C. A. —.

Assuming that a supporting affidavit was essential to the filing of the information, I think it unnecessary to pass upon the question raised as to its sufficiency, because of the view I take of the point made that the law upon which the prosecution was initiated ceased to exist subsequent to her sentence. Section 13 of the act of May 18, 1917, mentioned in the information, is as follows:

"That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdyhouses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both." Comp. St. 1918, \$ 2019b, Appendix.

It is conceded by the plaintiff in error that on January 17, 1918,

the Secretary of War made certain orders, rules, and regulations to carry out the provisions of that act, by the fourth of which every person was prohibited—

"to enter or reside, for any immoral purposes, in any house of ill fame, brothel, or bawdyhouse located within five miles of any military camp, station, fort, post, cantonment, training, or mobilization place."

Both the statute and the order made by the Secretary of War thereunder were founded upon the authority of the Constitution of the United States. Pappens v. United States, 252 Fed. 55, 57, 164 C. C. A. 167; Grancourt v. United States, 258 Fed. 25, — C. C. A. —. It will be at once seen, from the language of the above-mentioned act of Congress, that it was the alleged violation of the order of the Secretary of War which constituted the misdemeanor charged against the plaintiff in error.

It appears that shortly after her commission thereof, and sentence therefor, to wit, on the 9th of July, 1918, Congress passed an act (40 Stat. part 1, Public Acts and Resolutions, 1917–1918, p. 885), which,

among other things, provided:

"That section thirteen of the act entitled 'An act to authorize the President to increase temporarily the military establishment of the United States,' approved May eighteenth, nineteen hundred and seventeen, be, and the same is hereby, amended to read as follows, subject to the same modifications as prescribed in the act approved October sixth, nineteen hundred and seventeen:

"'Sec. 13. That during the present emergency [which emergency I understand to mean the emergency of the then existing state of war] it shall be unlawful, within such reasonable distance of any military camp, station, fort, post, cantonment, training or mobilization place as the Secretary of War shall determine to be needful to the efficiency and welfare of the Army, and shall designate and publish in general orders or bulletins, to engage in prostitution or to aid or abet prostitution or to procure or solicit for purposes of prostitution, or to keep or set up a house of ill fame, brothel, or bawdyhouse, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or to permit any person to remain for purposes of lewdness, asssignation, or prostitution in any vehicle, conveyance, place, structure, or building; and any person, corporation, partnership, or association violating the provisions of this chapter shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment, and any person subject to military law violating this chapter shall be punished as provided by the Articles of War; and the Secretary of War is hereby authorized, empowered, and directed to do everything by him deemed necessary to suppress and prevent violation thereof."

The concluding clause of the act of July 9, 1918, is:

"That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

It is so well settled that where a criminal statute is repealed, and the right to prosecute for a prior offense is not saved by the repealing act, such right is extinguished, that a citation of authorities to that effect is unnecessary. This is enough, in my opinion, to show that section 13 of the Revised Statutes has no application to the present case. Moreover, that section was taken from a preceding act, that of February 25, 1871. The Revised Statutes took effect two and more years later—that is to say, December 1, 1873—and by its last section declared:

"The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from or conflict with any provision contained in said revision, they are

to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith." Comp. St. § 10598.

Here was an express provision, in effect, that all acts passed subsequent to the revision, as well as all acts passed subsequent to December 1, 1873, should have effect "as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

Besides, March 4, 1909 (35 Stat. 1088), a Penal Code was enacted, entitled "An act to codify, revise, and amend the penal laws of the United States," the preamble of which reads:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the penal laws of the United States be, and they hereby are, codified, revised, and amended, with title, chapters, headnotes, and sections, entitled, numbered, and to read as follows."

Sections 342 and 343 thereof are as follows:

"Sec. 342. The repeal of existing laws or modifications thereof embraced in this title shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause prior to said repeal or modifications, but all liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made.

"Sec. 343. All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, or changed, modified, or repealed by this title, may be prosecuted and punished in the same manner and with the same effect as if this act had not been passed."

By its terms the Penal Code was made to take effect "on and after the 1st day of January, 1910," and providing, as it does by section 343, that all offenses and all penalties incurred prior to its going into effect "under any law embraced in, or changed, modified, or repealed by this title, may be prosecuted and punished in the same manner and with the same effect as if this act had not been passed," and section 341 of the same Code, repealing as it does, various specified sections of the Revised and other preceding statutes, and "also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as they are embraced within and superseded by this act, are hereby repealed, the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed," it seems to me clear that the provisions of section 13 of the Revised Statutes have no application to the offense here in question, committed, as it was, long subsequent to the going into effect of the Penal Code.

As the act of July 9, 1918, contains no saving clause, I proceed to inquire whether section 13 of the act of May 18, 1917, was repealed by the above-quoted provision of that of July 9, 1918. The latter, as above shown, expressly declares that section 13 of the former act is thereby so amended "as to read as follows." In Sutherland on Statutory Construction (2d Ed.) § 237, it is said of an amendment "so as to read as follows":

"The amendment operates to repeal all of the section amended, not embraced in the amended form. The portions of the amended section which are merely copied without change are not to be considered as repealed and again

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enacted, but to have been the law all along, and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule."

And in the succeeding section it is said of a simultaneous repeal and re-enactment:

"Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, nor pending proceedings or criminal charges affected by such repeal and re-enactment of the law on which they respectively depend."

The Circuit Court of Appeals of the Eighth Circuit, in the case of Great Northern Ry. Co. v. United States, 155 Fed. 945, 84 C. C. A. 93, referred with approval to the foregoing statements of the law by Sutherland, and to the decisions of the Supreme Court in Steamship v. Joliffe, 2 Wall. 450, 458, 17 L. Ed. 805; Murdock v. Memphis, 20 Wall. 590, 617, 22 L. Ed. 429; Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 11, 17 Sup. Ct. 7, 41 L. Ed. 327; Holden v. Minnesota, 137 U. S. 483, 490, 11 Sup. Ct. 143, 34 L. Ed. 734; Campbell v. California, 200 U. S. 87, 92, 26 Sup. Ct. 182, 50 L. Ed. 382, together with numerous other cases, and said:

"Generally speaking, where a statute is amended 'so as to read as follows,' or is re-enacted with changes, or is in terms repealed and simultaneously re-enacted with changes, the amendatory or re-enacting act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation."

Agreeing with these views, and applying those principles to the case now before us, I think it must be held that the law under and by virtue of which the charge against the plaintiff in error was made, and under which the judgment against her was entered, was repealed by the subsequent act of July 9, 1918, for the charge against her constituted a crime only by reason of being a violation of the order made by the Secretary of War, since by the very terms of section 13 of the act of May 18, 1917, for one to enter or reside for any immoral purpose in any house of ill fame, etc., within five miles of any military camp, station, fort, post, cantonment, training, or mobilization place, was made a crime only when done in violation of an order of the Secretary of War and in the event it was not "otherwise punishable under the Articles of War." That provision of section 13 of the act of May 18, 1917, was entirely omitted from the amendatory act of July 9, 1918, which prescribed no penalty for any violation of any order, rule, or regulation of the Secretary of War, but itself expressly defined certain acts declared to be unlawful and criminal, and punishable under certain specified conditions. It would seem to be clear that the act charged against the plaintiff in error, for the commission of which judgment was given against her, is wholly unaffected by the subsequent statute itself specifically defining and making criminal another offense, even though of the same nature. As said by the Supreme Court in United States v. Tynen, 11 Wall. 88, 95 (20 L. Ed. 153):

"By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In Norris v. Crocker [13 How. 429, 14 L. Ed. 210] the court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case, 'The repeal of the law imposing the penalty is of itself a remission.' In the case at bar, when the thirteenth section of the act of 1813 was repealed, there was no offense remaining for the court to punish in virtue of that section."

In my opinion, the judgment should be reversed, and the case remanded to the court below, with directions to dismiss the information—further consideration of the question having convinced me that this court was in error in holding in the case of De Four v. United States, 260 Fed. 596, 599, — C. C. A. —, that the Act of July 9, 1918, did not repeal section 13 of that of May 18, 1917.

SEGURA V. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 29, 1919.)
No. 3288.

HOMICIDE \$250-SUFFICIENCY OF EVIDENCE.

Evidence on a trial for murder, including the testimony of defendant, held to sustain a conviction.

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska.

Criminal prosecution by the United States against Mailo Segura. Judgment of conviction, and defendant brings error. Affirmed.

Leroy Tozier, of Fairbanks, Alaska, and Fernand De Journel and De Journel & De Journel, all of San Francisco, Cal., for plaintiff in error.

R. F. Roth, U. S. Atty., Harry E. Pratt, Asst. U. S. Atty., both of Fairbanks, Alaska, and Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was charged by indictment with the deliberate and premeditated murder of one J. E. Riley, known as George Riley, near the town of Flat, on Otter creek, in the territory of Alaska, May 5, 1918, of which crime he was convicted by the verdict of a jury, without the qualification authorized by the Code of Alaska, to which a sentence to imprisonment at hard labor for life would have attached. Thereafter the judgment of death was imposed

upon him by the judgment here brought for review. Sections 1883, 1884, Comp. Laws of Alaska, pp. 648, 649. In the court below a motion was made for a change of the place of trial from the town of Flat, where the court was held, to Fairbanks, or some other place within the Fourth judicial division of the territory, to be designated by the court, upon the alleged grounds that there was "reason to believe that an impartial trial could not be had at Flat," and that "the ends of justice would be promoted by the change." The additional transcript that has been brought here pursuant to the writ of certiorari heretofore issued out of this court shows that two affidavits were filed in support of the motion, one by the plaintiff in error and the other by his attorney, and five on the part of the government, all of which—in view of the fact that the plaintiff in error is under sentence of death—we have carefully examined and considered, regardless of any technical objections, and are unable to hold that the trial court committed any error or abuse of discretion in denying the motion, in addition to which it may be said that it appears from the supplemental transcript that the trial at Flat actually demonstrated that, while a number of persons summoned there as jurors disqualified themselves as such by reason of prejudice against the defendant to the indictment, there was no difficulty in securing a sufficient number of qualified jurors to whose service as such no valid objection was interposed, and no exception taken to any action of the trial court respecting them.

The only other point urged on behalf of the plaintiff in error is that the evidence was insufficient to justify the verdict that was returned, which point the record clearly shows to be without merit. There was evidence going to show that the deceased was engaged in dredging for gold, and owed, among others, the plaintiff in error, the indebtedness being for wood furnished by the latter, and which indebtedness had existed, according to the testimony of the plaintiff in error, for about two years, during which time he had made many efforts to collect it without success; the deceased refusing to execute to him any paper acknowledging such indebtedness, although verbally promising to pay it.

The plaintiff in error went again to Riley's place of business May 5, 1918, and in his testimony gives this account of what occurred there,

and of his movements immediately preceding his going:

"Q. You were speaking a few minutes ago about the morning of the 5th day of May, 1918. You may go ahead and state what you were going to say when I interrupted you. On the morning of the 5th of May, what time did you get out of bed? A. I got up about half past 7, maybe 8 o'clock; about half past 7, something like that; and I went to the restaurant on Discovery.

"Q. Did you have your breakfast at the restaurant on Discovery? A. I had a cup of coffee and something like that; sat there a few minutes and go

out again.

"Q. Then where did you go? A. Went to Riley's office.

"Q. Who did you see at Riley's office, if anybody? A. I came to Riley's office and Riley's bookkeeper was there, and I say, 'Good morning.' 'Yes, sir; mister.'

"Q. You said that? A. No; Riley's bookkeeper said that—'Yes, sir; mister.' I say, 'Did Riley tell you about that thing what he owes me to make any receipt for me?' He says, 'He never told me anything about that.' I says, 'Did he tell you anything about that at all?' He says, 'No; You come around

again.' The only thing he could tell me was, 'Come around again.' He says, 'You go and see him.' I says, 'Where he are?' He says, 'Around the machine shop some place, or around the dredge some place.'

"Q. I don't know that all the jurors can hear you. You say that you asked

Riley's bookkeeper where Riley was? A. Yes.

"Q. And the bookkeeper told you that he guessed he was around the machine shop, or around the dredge, some place. A. He says, 'He is around the machine shop, and around the dredge, some place, but I don't know exactly the place.' And I went out again and came to the machine shop, and looked around the machine shop inside, and I couldn't see him around there. Then I went to the dredge, and looked around the dredge, and I can't see him; and I went to the boiler house, and when I came to the boiler house Riley was alongside of the boiler house, about a couple or three feet from the boiler house, right near the front. I holloed, 'Good morning.' 'Yes, sir.'

"Q. What is that? A. 'Yes, sir; what is it?' I say, 'I just come to ask you for that receipt again, to make me that receipt for what you owes me, so I can see, so I can understand how much you owes me. I can't understand how much you owes me without getting that receipt from you. I owe lots of money to people around, and if I can sell that receipt to the bank, or to the store, I got to pay my own debts, because people don't want to wait. I owe some money to people.'

"Q. What did he say then? A. He says: 'I told you that, lots of times, I don't want to make any receipt for you. I don't want to pay you any now, either. I have got lots of things in my head besides that.'

"Q. Speak louder. A. 'I couldn't make any receipt for you. I couldn't do anything for you right now, anyway. It don't make any difference what you owes to anybody; don't make any difference to me. I owes lots of money was to anybody; don't make any difference to file. I owes not so inches myself. That receipt won't do any good to you. I liable to go broke any day. People knows what kind of shape I am in. I don't think anybody would take any of my receipts. It won't make any difference to you.' I say: 'Mr. George, will you make me a receipt for the thing what you owes me, if you please?' Just like that (shakes his head). He stay there a couple or three minutes, something like that; in a couple or three minutes, turned around and spoke to the men that were working in the boiler house, and to Mr. Thibault, who was standing here, he spoke to him something about driving wood, and how much wood was burned up in a day, something like that, and George Riley stood up like that (indicating), and look around at something. I don't know what he looked around at; and I come back to him again, and I say: 'Will you, please, let's go to the office and make me that receipt for what you owes me, if you please.' He just looked like that at me (indicating). He turned his head like that. I come back to him again and say: 'Let's go in the office, if you please, and make me that receipt for what you owes me.' 'No; no; I don't want to write any; I have got lots of things to do like that.' And I stand off a couple or three minutes, hardly more than that, and Jim comes around, Riley's foreman comes around, and said something. And I stood by a pile of pipes a few minutes, and then Riley walked around there, around the boiler house, and took some kind of hose, and turned that hose on, and cleaned the ashes from the pipes with the hose. I stand on the track a few minutes, and I told him again-I say: 'Will you please go to the office and make me that receipt for what you owes me, because that receipt is good for me'-like that. He don't make me a receipt or pay me the cash what he owes me. He just look at me like that (indicating), and he says: 'You know what you got to do?' And he just look at me and he says: 'I give you some shells. That is all you can get from me.'

"Mr. Roth: What is that? You say Riley said, 'I give you some shells'? Before that there was something I couldn't hear and didn't understand.

"The Court: Speak louder.

"A. I says: 'I like to get that receipt from you. I like you to make me a receipt to pay me off. I don't know what I going to do with you'-just like that. He says: 'You know what you can do with me? You know what you can do with me?' 'With me' or 'with that.' I couldn't tell you—'with me' or 'with that.' He says, 'I give you some shells.' And he was working with his (261 F.)

right hand. I says, 'There will be no time for you,' and I took out the revolver from this place (showing) and I shot him once. He fell down and never holloed. I couldn't tell you I shot him in the shoulder, or what place I shot him. I shot him right in front, but he swung himself as soon as he saw me working with my right hand (showing); he swung himself from the left to the right, and fell. At the time I don't know what place the bullet catch him. He fall, and I was afraid of him, that he would bluff me, and then I shot him two times, one after the other.'

"Mr. Tozier: Q. How many times did you shoot him? A. I shot him three

times."

There was testimony given by a witness for the government that, soon after the killing the defendant, when asked whether the deceased was facing him when shot, answered that he was; but the evidence on the part of the government, including the testimony of the doctor who examined the deceased very shortly after he was killed, was to the effect that all three of the shots were fired into the back of the deceased, and that the front part of his body had no bullet wound upon it, and that all three of the bullets lodged in the body, either one of which would have proved fatal within a very short time. And the witness Thibault testified to seeing the last shot fired into the prostrate body of the deceased.

Respecting the alleged premeditation with which the killing was done, the witness Keen testified that, during a conversation he had with the defendant, about March 1, 1918, regarding the money due him from Riley, defendant said: "I will kill the s—of a b—"—the witness adding:

"The last words he said, when he left my place, was that, if Riley didn't settle with him, he intended to kill him."

The witness Cadwallader also testified that the defendant had expressed to him a like intention; and the witness Knutsen testified that, after the deed was done, the defendant, referring to the body of the deceased, said:

"There is my \$2,000. It is worth \$2,000 to me."

Other testimony of like character and effect was given by the witness Matsen.

We are of the opinion that the judgment must be affirmed. Ordered accordingly.

CLEVELAND-CLIFFS IRON CO. et al. v. ARCTIC IRON CO. *
(Circuit Court of Appeals, Sixth Circuit, October 7, 1919.)
No. 2758.

1. CORPORATIONS 5-187—CONTROVERSY BETWEEN STOCKHOLDERS; DISREGARD OF CORPORATE FORM.

Where two tenants in common of real estate created a corporation, with equal division of stock and of directors between them, for handling the common property, in a controversy between them neither party is entitled to obtain an advantage over the other by reason of the corporate form adopted, which may properly be disregarded by a court of equity, and the matter determined with reference only to their individual rights.

2. CORPORATIONS \$\infty 318-Validity of contracts between; COMMON DIRECTOR.

Where corporations A and B contract with each other with reference to known adverse and conflicting interests, and have a common director, who withdraws from and abandons his functions as director of A, and negotiates only on behalf of B, and so notifies his associate directors of A, and they accept his notice and ensuing responsibility, the strictest rule is only that the contract may be voidable by A, if in fact unfair to it.

3. Corporations 318-Validity of contract; interest of director.

That a director in a corporation owning ore land, which had determined not to mine, but to lease, the property, is interested in a lease made by the other directors without his participation, and after his express withdrawal, with notice to adverse directors that he favored the lease, held not to render him accountable to the corporation, as trustee, for the profits made.

4. Corporations \$\iff 318\text{-Validity of contract; lease of ore lands.}

Where two tenants in common of ore land formed a corporation to handle it, with an equal division of stock and directors between them, and one faction refused to mine the property as desired by the other, but after one opposing director had withdrawn leased the same at a royalty satisfactory to it, the fact that its cotenant, through a contract with the lessee, participated in the mining, from which it realized a profit, held not to render it accountable to the corporation as a trustee for such profits.

5. EQUITY \$\infty 65(2)\$\to Right to relief; unclean hands.

Where two directors, who owned one-half the stock of a corporation owning ore lands, as a condition to assenting to a lease of its lands, with other lands owned by them individually, secretly required the lessee to purchase an interest in their lands at an exorbitant price, the corporation held not entitled, at their instance and for their benefit, to maintain a suit in equity to require the other directors, who owned the other half interest, to account for profits made through an agreement with the lessee for an interest in the lease.

Appeal from the District Court of the United States for the West-

ern District of Michigan.

Bill by the Arctic Iron Company against the Cleveland-Cliffs Iron Company and another. From a decree for complainant, defendants appeal. Questions certified to the United States Supreme Court. Case remanded for dismissal of bill.

Certified questions dismissed 248 U.S. 178, 39 Sup. Ct. 91, 63

L. Ed. 198.

A. C. Dustin and Horace Andrews, both of Cleveland, Ohio, for appellants.

A. C. Angell, of Detroit, Mich., and S. W. Shaull, of Glendale,

Cal., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SANFORD, District Judge.

PER CURIAM. As a result of the consideration which we gave to this case after it was submitted, we certified to the Supreme Court several matters which we thought to be questions of law arising upon the record, and each of which might have been decisive of the entire case. The Supreme Court held that the questions were not such as

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the statute contemplated (section 239 of the Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1157, Comp. St. § 1216]), and dismissed the certificate. 248 U. S. 178, 39 Sup. Ct. 91, 63 L. Ed. 198. After the case was remanded to this court, further argument was permitted, and we now proceed to consider the questions involved as best we

may and as far as necessary.

The controlling facts, and what we thought the decisive questions, appear from our certificate, which we reproduce at the foot hereof and adopt as a statement of facts and as a part of this opinion. We do not need to say that this case must be decided, not merely upon a discussion of the general and familiar principles which are invoked by the respective parties, but upon the application of those principles to its own peculiar and essentially unique facts, and some comment is

fitting upon the most striking of such facts.

[1] 1. Whatever standing plaintiff has to demand the relief sought depends upon a rule of corporate law, and upon the fact that the interests of the parties were represented by stock in a corporation. This corporation, with its equal division of stock between the two beneficial interests and with its four directors, two allotted to each interest, was the convenient form by which the two tenants in common of real estate made the estate indivisible by the act of either, and provided that nothing should be done with it without the consent of both. The beneficiaries have continually dealt with the property as tenants in common would do. Any such corporation forms as they observed were of no effect as to their substantial mutual relations. When any step was to be taken, it was not considered at a stockholders' or directors' meeting, but was taken up and decided independently by the two interests. If they agreed, the corporate signature was attached; if they disagreed, nothing was done. When the Cliffs, the owner of one-half, desired a lease, it went directly to the owners of the other half and negotiated. When the Oliver sought a lease, it bargained separately and independently with the owner of each half.

The courts have often considered the extent to which the existence of a corporate form dictates the appropriate rule of law. The latest controlling discussion is that found in the opinion of the Supreme Court in Chicago Co. v. Minneapolis, 247 U. S. 490, 38 Sup. Ct. 553, 62 L. Ed. 1229. The principle of the decision is that—

"Where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies, * * * the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

This language is used with regard to two corporations, which, for convenience, put their common interests into a third subsidiary corporation, which became merely their instrument for doing their business. It is not easy to see why the principle may not apply as well to stockholding individuals as to stockholding corporations, nor why

the existence of the corporate shell and corporate forms, without more, should transform what is right into what is wrong; yet, save for the supposed effect of such shell, this suit would never have been brought. We do not overlook the fact that the Chicago-Minneapolis Case is more nearly the converse, than the parallel, of this. There the real parties were not allowed to use the corporate instrument to get an advantage otherwise unlawful; here defendants' proposition is that the corporate cloak should not deprive the parties of a business advantage otherwise lawful—but this distinction may not make the cases any less truly analogous.

The very title of this case involves a fundamental misconception. If we look to the bottom of things, this is not a guarrel between the Arctic Company and the Cliffs Company. It is, and always has been, really a controversy between two hostile and exactly equal groups of stockholders in the Arctic. The man who happened to be president had no more inherent right to bring this suit in the name of the Arctic to impeach the Oliver-Cliffs transaction than the man who happened to be treasurer would have had to bring a suit in the name of the Arctic to affirm it. The suit never was authorized at any stockholders' or directors' meeting; and while that is not in itself finally important, it should be noticed, because it forces us to remember that this suit never could have been authorized at such a meeting, and that such authority was impossible, because an equal part of the corporation approved and an equal part disapproved. There is no real question here, worthy of our study, except whether Mather and the Cliffs did a wrong to Kauffman and Breitung. In such a controversy, no one else has a cent's worth of interest, and the attention of a court of equity should—so far as permitted by rules which it is not safe to vary—be centered upon the real parties in interest and not upon the clothes they wear. It is not necessary to say that there could be no cases—indeed, there might be many—where, in spite of an equal division of stockholding interests and directorships, there would be such real or presumptive dependence by both parties upon all the directors as would leave the normal fiduciary obligations unimpaired. This is not such a case. This is one where the actual relation of the two factions is more important than the theoretical relation which might have existed but did not. So far as appears, there never had been dependence or reliance by either owner upon the other; but, however that might be, it is sure that, before the present series of transactions had been reached and during their continuance, the two factions or interests were occupying positions adverse to each other and were dealing together at arms' length, and both of them fully realized it.

Neither is it necessary to say that this peculiar situation, by which the corporation had become and was the instrumentality of the two real estate owning tenants in common for the unitary and convenient handling of their property, is alone sufficient to dispose of the case; it at least permeates and colors every other question involved, and, before the mere fact of the existence of a corporate form can be allowed to control, calls for the clearest demonstration that fixed and invariable rules for corporate conduct have been violated.

[2] 2. Where a corporation makes a contract with one of its directors, and his concurrence as a director is essential to the corporate action, public policy may require it to be always voidable; but where corporations A and B contract with each other with reference to known adverse and conflicting interests, and have a common director, who withdraws from and abandons his functions as director or officer of A, and negotiates only on behalf of B, and so notifies his associate directors of A, and they accept his notice and the ensuing responsibility, the strictest rule is only that the eventual contract may be voidable by A, if, in fact, it is unfair to A. We know of no principle or precedent which goes further than this. opinion of the New York Court of Appeals in Globe Co. v. Utica Co., 224 N. Y. 483, 121 N. E. 378, is one of the latest and one of the most extreme applications of the rule that we have seen. It was there held that for the common director merely to withdraw from the dealing was not enough, but that he owed to the first corporation the affirmative and positive duty to disclose the unfair advantage which he knew or should have known would result to the second corporation. and of which it was to be assumed his associates in the first were ignorant. This rule and this principle do not reach the present case. The contract involved no unfairness to the Arctic. At the insistence of the parties now complaining, the Arctic had decided not to mine, but to lease. The royalty price obtained from the Oliver was a fair price. These parties (Kauffman and Breitung) were given a free hand to get the best price they could, and this was the best price that could be obtained from anybody—save only that those now charged with fraud offered a higher price, which those now complaining refused to accept. There is no substantial ground upon which the latter can be heard to say that the contract was burdensome, disadvantageous, or in any way unfair to the Arctic.

It is urged that, even though the ultimate result of the transactions attacked was wholly fair and just, there lurked therein a danger which must condemn them, in that Mather and Hayden continued to be directors of the Arctic, with power to participate in any dispute which might arise between the Arctic and the Oliver as to operations under the lease, and that, in such participation, they would be acting as agents of the Arctic, while in fact they would be interested adversely. Up to the time of bringing suit, no such situation had arisen. because there had been no controversy, and thereafter it never could arise, because their adverse interest was known; but the possibility originally existed. We cannot be content to let this possibility have controlling effect in a situation like this (though it well might in others): whether there is unfairness at the time of the transaction challenged must, ordinarily, be the vital question; whether any future question will arise is wholly problematical; it is difficult to say whether the interested directors will continue to be directors the next year, or the year after; and when, to these contingencies, we add the peculiar character of the relations between the equally divided owners in this corporation, and the natural presumption that those men, if they continued to be directors, would meet any such question as

they met the original problem, and decline to act in the matter at all on behalf of the Arctic, we cannot, merely upon this ground of continuing directorship, characterize this transaction as fraudulent in law.

[3] 3. At the basis of all the legal rules invoked and all the decided cases relied upon by plaintiff lies the idea that it is a wrong for the corporate director to get for himself a profit or an advantage which might have been had for his corporation. We find no justification anywhere, in this class of cases, for repudiating a corporate contract, unless this feature is expressly or presumptively present. From the present case it is utterly absent. The Arctic, yielding to the views of Kauffman and Breitung, and overruling the desire of Mather and the Cliffs, declined to take the risks of a mining operation, but the Cliffs (by the contract now demanded by the Arctic) agreed to buy the ore at the mine and for the cost of mining—and since the mining was to be done by a company which it did not control, this was even more speculative than if it had done the mining itself; and, as pointed out in our statement of facts, the right to purchase one-fourth of the ore, which right the Oliver granted to the Cliffs, could not have been had for the Arctic: First, because the Arctic would not have accepted it with the attendant obligations; second, because the Cliffs, which was paying an independent consideration, would have refused to pay it for the benefit of the Arctic; and, third, because the Oliver would have refused to transfer the right, except in exchange for the outside advantages which the Cliffs alone could give.

We find no substantial basis for any thought that the Arctic has lost any advantage which it might have had, unless it lies in the suggestion that if the expectant interest of the Cliffs in the ore had been disclosed and this had resulted in an abandonment of the entire deal by everybody concerned, the old leases would have remained in existence, and, since the old royalty was higher, this would have turned out to be to the advantage of the Arctic. This is too speculative. The situation must be viewed as it then appeared to all of the experienced and able business men concerned. They all agreed that the old leases were a burden to the Arctic, because the royalty was so high as to discourage, if not forbid, mining; and with the utmost deliberation, and with unimpeached good judgment, Kauffman and Breitung decided that the new long-term lease to the Oliver at about 15 cents (with an annual \$37,-500 minimum) was a better asset than the old and nearly expired leases to bankrupt companies at about 40 cents (with an \$18,000 minimum). That the market price of the ore would increase so greatly as it did could not be foreseen by anybody; and it is not possible to say that the transaction, which substituted for an existing contract one which seemed to be better, and which everybody in good faith believed was better, should be condemned as a fraud because conditions in later years so developed as to make the old contract more desirable than it had

There is still other ground for thinking that the Arctic lost nothing it had any right to get. Ore in the ground is raw material in its rawest form, like timber on the stump. Excavating and hoisting it, to be ready for sale at the mouth of the mine, is a quasi manufactur-

ing process, like converting standing trees into logs. Ore in the ground, like timber on the stump, has a value in that basic form, and the owner could rightly complain if deprived of any part of this basic value: but the owner has no interest, legal or equitable, in the added value to be given by mining or logging, unless he elects to engage in these manufacturing operations. If a timber-owning corporation has distinctly decided that it will not do any logging, but will sell its timber on the stump, it has renounced the contingent additional return which it might get by the logging operation; and it has small equity to complain if one of its directors enters the field where the corporation has refused to go. If he pays his company the highest price it could get from any one, and still makes a profit, he is making it from exercising a right which the corporation never had perfected—it had only the right to acquire this right—and, in so far as this is true, it becomes immaterial whether the corporation knew of the director's intended conduct. The chance of prejudice to the corporation's real interest is in the danger that the director's undisclosed intention to engage in manufacturing would tend to chill the bidding—to diminish the price which the corporation would get for its raw material; but, if the raw material is sold in good faith to the highest bidder, or if, as here, the sale is actually conducted by the other officers and agents without any participation by the interested director, or if, as here, the interested director himself offers a higher price than the figure at which the others had determined to and did sell, all prejudice is done away with and no reason remains for hesitating to say that the corporation has lost nothing which it had any right to claim.

4. The withdrawal of Mather from the negotiations was unusually complete and unusually indicative. It was not the mere withdrawal of the common director to safeguard against a theoretical, but unknown, conflict of interest. It was accompanied or preceded by express notice to, and knowledge by, Kauffman and Breitung that Mather and the Cliffs had reached an agreement with the Oliver regarding the whole subject-matter, and were prepared to acquiesce in the Oliver lease, and inferentially that the Oliver was paying the Cliffs a satisfactory consideration for this consent to the new contract. When Mather withdrew from the negotiations, he did not leave them in the hands of subordinate or friendly associates; he turned the whole matter over to his hostile and co-equal owner, who was equally competent and who in no degree depended on Mather, but who accepted the entire responsibility of acting for the Arctic in making the contract. Mather, in substance,

said to Kauffman and Breitung:

"The Cliffs is interested in this subject-matter and in ways antagonistic to the Arctic; my primary duty is to the Cliffs, which is my corporation; I therefore turn the whole matter over to you, to negotiate and make the best contract you can for the Arctic; and, since you will not, on behalf of the Arctic, accept the better contract which the Cliffs is offering you, we will accept whatever contract you make. I abdicate to you all authority as director of the Arctic, and as an officer of the Arctic I will sign such contract as you wish me to sign."

Any other course by Mather was beset with doubt and difficulties. To disclose the fact that the Oliver had agreed to resell some of the ore to the Cliffs would have been to reveal, to an adversary, knowledge which he had received as a director of the Cliffs, it would have been to throw away the results of a legitimate business advantage which the Cliffs had bought and paid for, and it would have been to betray the principal to which his primary allegiance was due, and which all parties knew he really represented on the board of the Arctic. In many analogous situations, a director could resign and shift the duty to an impartial successor; but here that could not be done. To carry out the intent of the parties, his successor would have to be also a nominee of the Cliffs and subject to the same duties. To have substituted a successor or nominee who did not happen to have personal knowledge of the transaction would have been to adopt a discreditable subterfuge. Nor could Mather resign without a successor and leave the corporation in control of Kauffman and Breitung as a majority of the board, nor Mather and Hayden resign and leave a board with no quorum. One course would lead to control by Kauffman and Breitung, in violation of the basis of organization, and would be a plain wrong to the Cliffs; the other would prevent any realization from the property or else bring litigation and a receivership.

[4] 5. The principles invoked by plaintiff, if properly applicable, would lead to the conclusion that the Arctic might rescind the contract, even as against the Cliffs. It is not at all clear that they lead farther and permit the Arctic to affirm and adopt the Oliver-Cliffs contract and to recover from the Cliffs its profits (as has been done by the decree below), and this in a situation where it was plainly impossible to refund or make good to the Cliffs the independent consideration it had paid. The Cliffs had bought the entire of the old leases and a half interest in the Arctic stock, and had proceeded thereunder, all with a view to the power which it would have in the matter of disposing of the Arctic ore. The Cliffs was not a trustee; this conduct and these objects were legitimate; Kauffman and Breitung could not have failed to understand their purpose; but, by the decree below, the Cliffs found itself still the owner of half the Arctic stock, but shorn of its control over the disposition of the ore, and subject to a disposition thereof, to which it would not have consented, except for the consideration which is now taken away from it. In respect of these facts, also, the case is unique; and, to say the least, they raise grave doubt as to the plaintiff's right to the remedy it is here pursuing.

6. Of pervading importance is the fact that the transaction now attacked accomplished even-handed justice, and that to upset it would do substantial wrong. Kauffman and Breitung beneficially owned one half of the ore, and the Arctic was a mere trustee for them; the Cliffs beneficially owned the other half, and the Arctic was a mere trustee for it. The Cliffs desired to take the risk of mining and get the expected profits; Kauffman and Breitung refused to do this, and demanded a fixed and certain royalty; the ultimate result is, as the matter stood before this suit was brought, that Kauffman and Breitung get their fixed royalty upon their half of the ore and at the figure which they themselves made, and the Cliffs takes the risk and

gets its profits upon its half of the ore. This is a result which is

essentially fair and just to both.

We would not disparage or fritter away the salutary rule that, since a man may not serve two masters, a trustee may not profit from his trust; lest we should seem to do so is our chief anxiety as to this discussion. The legal formulæ invoked by plaintiff were devised to prevent wrong and fraud and unfair advantage; to use them to permit Kauffman and Breitung to get, not only their own share, but part of their associates' share, of the property, and to reap where they not only have not sown, but where they refused to sow, would be, we think, to exalt the letter of these rules to the destruction of their spirit.

7. The views heretofore expressed are those of a majority of the court. One of us is not satisfied that even the considerations recited justify a refusal to extend the rule of law fixing a director's duty so far as to reach this case; but, when we add still another element of the situation, we find ourselves unanimous in the result reached; and in considering this further element we assume, but only for the argument, that defendants' conduct involved a breach of a director's duty. The fourteenth paragraph of the findings discloses conduct by Kauffman and Breitung which makes it unfitting for a court of equity to give relief which is, in effect, for their sole benefit. It is not to be distinguished, in broad principle, from those acts by Mather and the Cliffs of which Kauffman and Breitung complain. They took advantage of their position as directors of the policy of the Arctic, in order to get a personal advantage for themselves, just as the Cliffs used its control of the situation in order to favor its individual interests and plans.

It is not material that the advantage gained by the Cliffs was a degree closer to the subject-matter of the Arctic property than was the benefit seized by Kauffman and Breitung. This benefit was not remote. Kauffman and Breitung owned one-half the fee; the Arctic owned half; the lease to the Oliver was to cover the entire. Kauffman and Breitung required the Oliver to buy one-quarter of this same fee, covered by this very lease, and to pay to them \$67,750 more than the then fair value of this quarter. Kauffman and Breitung took their benefit at the beginning; the Cliffs got its interest at the end; but both were incidents of the same transaction. However, it is urged, and it is true, that Kauffman and Breitung were under no obligation to put their personal one-half into the lease, and that it should be inferred that they required the purchase as a condition of their personal action, rather than of their conduct as Arctic directors. Just so is it true that Mather owed to the Arctic no duty to put into the deal the Cliffs' existing outside interests, and the inference is urged that the Cliffs bought the quarter interest in the lease by these external concessions, rather than by Mather's consent as Arctic director. Each inference is correct in part; neither one stands upon the whole truth. There is close analogy between the acts and positions of both parties.

Nor is it material that the Cliffs learned of the advantage taken and submitted to it. It would be otherwise, if the Cliffs were seeking to press an affirmative claim for itself or for the Arctic on account of this loss or damage; but, if a plaintiff has been guilty of a wrong which makes it unfitting that a court of equity should "incline her gracious ear" to him, his hands are no cleaner just because defendant

originally submitted to the wrong as the lesser of two evils.

Nor yet can we think it vital that the court has power to compel—as did the decree below—restitution by Kauffman and Breitung. They took advantage of the situation to sell their property—which, in itself, was taking undue advantage—and they received \$67,750 of specially unfair benefit. The Oliver was willing to pay this amount beyond and above what the fee was rightly worth. It is fairly to be inferred that the Oliver would have paid this amount to the Arctic as a bonus, if that condition had been made. Thus Kauffman and Breitung exacted and received that which, when they speak of the action of the Cliffs, they call a bribe. They received this for their own use and intended to keep it themselves permanently. Only when they find that the Cliffs has made a larger profit than they have out of an analogous breach of trust do they ask an accounting as between the two unlawful gains. Courts will not take accountings, as between wrongdoers; they will be left where they are found.

Neither can we think it would be of controlling importance if the finding of facts overstates the reluctance of the Oliver to purchase this fee, nor if the purchase, in the course of years, has turned out to be a good one for the Oliver. The vital thing is that Kauffman and Breitung are asking a court of equity to go beyond any direct precedent, and to the verge of, if not beyond, the applicable legal rule, in order to preserve untarnished a principle of fair dealing; and it appears that they were flagrantly violating the same principle in the same general subject-matter. Whatever limitations ought rightly to be, and often are, imposed upon the doctrine which forbids relief to those with unclean hands, or upon the rule that a court of equity will leave all participating parties where it finds them, we think none of such limitations reach this case.

It is another form of the same underlying thought to say that, by their conduct in using their power to compel a personal benefit, Kauffman and Breitung renounced or denied their trusteeship. They can justify themselves for their conduct regarding the fee only by claiming that their trusteeship did not extend so far, but merely covered the duty to get the best obtainable royalty contract for the Arctic. Indeed, when they refused the Cliffs' offer of a better contract than

¹ Counsel aptly illustrate by a supposititious case: "Suppose A. and B. are partners in business, and, as such partners, are engaged in negotiations for the sale of partnership property to C. Assume that during the negotiations A. goes secretly to C. and demands \$100 on the side as a condition to his assenting to the firm selling the property. Assume that B. likewise goes secretly to C. and demands \$500 as a condition of his assenting to the sale. Upon B. making his demand, C. informs B. that A. is also making a demand on him, but that A. is only asking \$100. However, C. assents to the demand of both parties. The transaction is closed and the bonuses paid, \$100 to A. and \$500 to B. Later A. discovers that B. got \$500, and A. goes into equity for an accounting, asking that B. be required to restore this \$500 into the treasury of the firm."

they were getting from the Oliver, they seem to have renounced even that duty. No court can allow them to deny their own trust obligation and at the same time enforce that of their fellow directors.

Holding these views as to the composite effect of these matters, it becomes unnecessary further to consider the other questions involved in the case, some of which were specified in the certificate and others of which are additionally urged in argument. We cannot say that we have studied in detail all of the more than 250 citations by the parties, but we do not think we have overlooked any theory or any authoritative decision urged to support the decree below. It is enough to say that we find no controlling or persuasive case which, either by the exact point decided or by the principles upheld, would justify giving to plaintiff in this case the relief sought, in the face of the inevitable effect of the special facts which we have recited.

We think the bill should have been dismissed, and the case must be remanded for that purpose.

Certificate Sent to the Supreme Court.

PER CURIAM. For a due understanding of the questions to

be certified, we make the following findings of fact:

(1) Prior to 1883, William P. Healy and Edward Breitung, both of Marquette, Mich., arranged to purchase in equal interests an undivided one-half of a large tract of land in that vicinity supposed to contain iron ore. For the purpose of holding title to this purchase, they formed, under the laws of Michigan, a corporation named the Arctic Iron Company (hereinafter called the Arctic). This was in 1883. Its \$500,000 of capital stock was paid up by the transfer to it of this half interest in this land. Nominal amounts of stock were issued to Mrs. Healy and Mrs. Breitung, and the total capital held, one-half by Mr. and Mrs. Breitung and one-half by Mr. and Mrs. The articles of association provided for four directors. Breitung was president, and Healy secretary and treasurer. Thereafter occasional stockholders' and directors' meetings were held, annual reports to the state were made, and conveyances and contracts were, from time to time, executed in corporate form. The corporation had charter power to engage in the mining business, either by itself or by lessees, on that tract of property which it had so acquired. Its actual business, from its organization until 1899, consisted in leasing portions of its property under customary mining leases and receiving royalties therefrom, although, in the earlier part of the period, it did some exploration work. With this exception, the corporate expenses were negligible. There were no salaries paid. In practice Breitung (and, later, Breitung's successors) and Healy consulted and agreed upon what leases should be made, and Healy, in the name of the company, collected the royalties and disbursed them, onehalf to Breitung and one-half to himself. These disbursements were entered by Healy on his books as dividends, but were made without any action by the directors. It was the specific intent of Healy and Breitung, in providing for four directors, to effect a perfect balance of power between the two interests.

Breitung also purchased, individually, the other undivided half of parts of the same tract in which the Arctic owned a one-half interest, and also purchased, individually, the entire title to some adjoining properties. About 1886, Breitung died. All his interests in the Arctic and in the real estate which he owned passed to his son, Edward Breitung, Jr., and his widow, Mary Breitung, who afterwards became Mrs. Kaufman. The Breitung interests in these properties were thereafter handled by these parties (hereinafter designated as Kaufman and Breitung) in the same manner as by Breitung, in his lifetime, and the relations between Healy and the Breitung successors continued the same as between Healy and Breitung.

(2) The Cleveland-Cliffs Iron Company (hereinafter called the Cliffs) was a corporation organized under West Virginia laws, having its principal places of business at Cleveland and at Ishpeming, Mich., near Marquette. It had a paid-in capital of substantially \$5,000,000. William G. Mather was president and treasurer. He held \$14,100 par value of the stock, and relatives held about \$236,000, making a total of about \$250,000, or 5 per cent. of the entire capital.

The Cliffs owned stock in various subsidiary corporations.

(3) The Oliver Iron Mining Company (hereinafter called the Oliver) was a corporation with its principal office in Pittsburgh. It was largely engaged in iron mining in the Marquette vicinity. It was a subsidiary of and the Michigan operating branch of the Carnegie Steel Company, and later of the United States Steel Corporation. In 1898 and 1899, the Cliffs and the Oliver were the chief operators in the Marquette region, and were the natural and the leading competitors for any mining leases which might be offered; that is to say, the owner of iron ore had the choice between mining, called operating, and offering it for lease to those in the business of operating, reserving a royalty for himself. Such leases were in very common use, and while their details differed, the essentials were three:

(1) The amount of royalty per ton; (2) the minimum tonnage guaranteed for each year; and (3) the cash bonus sometimes paid by the lessee for the privilege of getting the lease upon its fixed terms.

(4) On different dates, from 1886 to 1889, the Arctic, as owner of one-half the fee, and Kaufman and Breitung (and, in two of the leases, others, also), owning the other half, executed four mining leases, each for 20 years, covering parcels of the property in which the Arctic was thus interested. A few years later, the lessee's rights under all these leases became vested in two corporations, the Queen Company and the Blue Company (hereinafter collectively referred to as the Queen), and the stock of these corporations was owned by a partner-ship, Corrigan, McKinney & Co. (hereinafter referred to as Corrigan). The four parcels were thereafter operated under Corrigan together as one enterprise.

(5) Before 1897, the Cliffs had united with another mining operator in building a railroad intended to carry iron ore from the mining districts to the water at Marquette. Each became a large stockholder. In addition, it was agreed that, after the bonds had been paid from earnings, certain additional stock should be divided between them

in proportion to the traffic that each should have brought to the railroad. In that year, a contract was made between the Cliffs, the Queen, and Corrigan whereby the Queen was to give to the Cliffs' railroad the carriage of all ore produced by the Oueen mines, at a stated price per ton and until an agreed total had been carried, including all ore produced by other properties which the Oueen might thereafter control, and also the carriage of all its traffic of coal and other supplies in the reverse direction, and the Cliffs was to loan \$250,000 to the Oueen for a stated period upon notes guaranteed by Corrigan. As security for payment of the debt and performance of the traffic contract by the Queen, it transferred to the Cliffs the four mining leases, and Corrigan transferred to the Cliffs all the stock of the Queen with the right to control the Queen by naming directors. The debt was due serially, \$50,000 April 2, 1898, 1899, 1900, 1901, 1902. The assignment of the leases to the Cliffs was recorded in Marquette county; and, in February, 1898, Kaufman and Breitung were notified in writing by the Cliffs that it had become interested in these leases and desired notice in case the lessor made any change or in case the lessees made any default.

(6) The terms of royalty and of minimum in the Queen leases were such that whether the lessees could mine profitably depended on the market price of ore at Lake Erie ports. Some of the time prior to 1897 mining under the Queen leases had been profitable; in 1897 and 1898 market prices were low, the Oueen could not pay the agreed royalty or meet the minimum without loss, and the lessors had, from time to time, accepted less than the agreed rates rather than forfeit the leases. In the summer of 1898, the iron market was extremely depressed, but a revival of business was anticipated for 1899. Queen and Corrigan were largely indebted, and Corrigan desired to sell all the rights and interests of the Queen. Kaufman and Breitung were notified of this, and were informed that in this connection Corrigan, or his vendees, would wish to negotiate a new lease with terms more suitable to the existing market, and Kaufman and Breitung indicated a willingness to take up such negotiation. Corrigan undertook to interest both the Cliffs and the Oliver, as competitive customers for the Queen interests, in connection with such new lease. The Cliffs notified Kaufman and Breitung that it desired to negotiate and take such a lease of the Queen properties, but no progress was made towards the arrangement of terms.

(7) On November 30, 1898, the Cliffs purchased from Mr. and Mrs. Healy their one-half of the Arctic stock. Kaufman and Breitung were at once notified of this purchase. One share of the stock was issued to Mather, one share to Hayden, the Cliffs' attorney, and the remainder to Mather, as trustee for the Cliffs. On December 30th a stockholders' meeting of the Arctic was held, at which Kaufman, Breitung, Mather, and Hayden were unanimously chosen the four directors, and Kaufman was made president and Mather secretary. This choice of directors was in recognition and execution of the plan that two directors should be selected by each stockholding

interest. This make-up of officers and directors continued there-

after without change.

(8) During December, the Cliffs definitely offered to take a new lease at an 11-cent royalty and an annual minimum of 100,000 tons. At about the same time the Oliver offered to take such a lease at a higher royalty and a larger minimum. Both offers, as well as the subsequent negotiations by each, contemplated a joint lease from the Arctic and Kaufman and Breitung, so covering the entire title, and were made to and with Kaufman and Breitung as representing themselves and the Arctic. Each offering company, the Cliffs and the Oliver, was of the highest standing, both financially and for integrity and fairness, and for skill in mining, and save for the terms which might be offered, there was no reason for preferring one to the other as lessee: but, by reason of personal feeling held by Kaufman and Breitung, or one of them, against Mather, they had a fixed determination not to lease to the Cliffs, nor permit the Arctic to do so, but rather to lease to the Oliver, if, and as soon as, they could get from it satisfactory terms. In January, Kaufman and Breitung, for themselves and the Arctic, promised the lease to the Oliver at a 15-cent royalty, on condition that the minimum and other terms could be thereafter agreed upon. Learning of this, the Cliffs offered to take the lease at the same terms in all respects which the Oliver had offered or might offer, and, in addition to pay a substantial bonus. Kaufman and Breitung refused, alleging that they were fairly bound to carry out the arrangement with the Oliver. Shortly thereafter, Kaufman and Breitung were notified that the Cliffs would not consent to this Oliver lease. They threatened legal proceedings to compel the Cliffs to consent, but never took any steps in that direction. They knew that the Oliver lease could not be made without the Cliffs' consent, and for two reasons: (1) The Cliffs was an equal stock-holder in the Arctic, and two of the four directors had been selected as representatives of the Cliffs. (2) The deal for a new lease involved the payment by the Oliver of (about) \$100,000 to Corrigan for the interests of the Queen under the existing leases controlled by the Cliffs, and the elimination of these leases; it required the consent of the Cliffs to the cancellation of the traffic contract between the Queen and the Cliffs, or the acceptance by the Cliffs of another party in substitution for the Queen in this contract; and it required the consent of the Cliffs to accept payment of the debt due it from the Queen but which was not due for an average of two years. The old leases could not be surrendered by the Queen, without the Cliffs' consent, and they could not be canceled by the lessors, if the Cliffs, as assignee of the lessees, was willing to make good whatever default by the lessees might exist.

The Cliffs thus had it in its power to, and did, absolutely block the proposed lease to the Oliver; Kaufman and Breitung had it in their power to, and did, block any lease to the Cliffs; and this deadlock continued for some time and until broken as hereafter

stated.

Although, as the iron ore market later developed, it turned out that under the existing leases and during their term the Arctic would have received much more royalty returns than it later did receive during the same period under the new lease, yet at the time good business judgment dictated the acceptance by the Arctic of the proposed new lease on the terms offered by the Oliver (and, of course, on the better terms offered by the Cliffs); and the action of each Arctic faction in refusing to consent was inspired by motives of independent interest or feeling aside from interest in the Arctic.

- (9) At the instigation of Corrigan, the Cliffs and the Oliver took up negotiations between themselves to see if the Cliffs could not be induced to withdraw its objection to the Oliver lease and to its substitution for existing leases. It resulted that the Cliffs offered the Oliver to withdraw objection if it should be permitted to buy from the Oliver, each year, at cost of mining, one-fourth of the ore taken out by the Oliver under the lease. The Oliver consented, and this arrangement was made, subject to the final negotiation of all the terms of the lease between the Oliver, on the one side, and Kaufman and Breitung, on the other. The Cliffs, at the time, alleged as its reason for taking this fraction of the ore, that, in substantial effect, Kaufman and Breitung owned three-fourths and the Cliffs one-fourth of the ore in the ground, and that, in substantial effect, this arrangement permitted Kaufman and Breitung to lease their three-fourths on any terms they could agree upon, and permitted the Cliffs to keep its one-fourth for itself.
- (10) This understanding between the Cliffs and the Oliver being had, Kaufman and Breitung were directly or indirectly informed and fully understood that an agreement had been reached between the Oliver and the Cliffs, because of which the Cliffs would no longer object to the Oliver lease; that Kaufman and Breitung were at liberty to go ahead on behalf of themselves and the Arctic and negotiate the best terms they could get from the Oliver; and that, when terms had been agreed upon satisfactory to Kaufman and Breitung and the Oliver, the Cliffs, as the controller of the existing leases which blocked the way, would consent to their cancellation; and the Cliffs, as a stockholder in the Arctic, would sanction, and Mather and Hayden, as directors in the Arctic, would approve, and Mather, as an officer of the Arctic, would execute, a lease embodying such terms. Kaufman and Breitung made no inquiry concerning the terms of the agreement which they thus learned had been made between the Cliffs and the Oliver.
- (11) The Cliffs knew that, if Kaufman and Breitung learned that it was thus getting one-fourth of the ore they would refuse to go on. The Cliffs and Mather, therefore, then and thereafter, did not disclose to them this fact, and requested the Oliver not to disclose the same, and the Oliver complied. Both the Cliffs and the Oliver took pains to put the deal in such shape that papers likely to be seen by Kaufman and Breitung should not reveal this fact. By these means it came about that Kaufman and Breitung did not learn that the Cliffs was to be interested in the ore.
 - (12) Thereupon, on the one hand, Kaufman and Breitung, for

themselves and the Arctic, and, on the other hand, the Oliver, proceeded to agree upon the details and all the terms of the lease. Kaufman and Breitung insisted upon many concessions, and, in the end, procured the best terms in all respects for the Arctic that could have been procured from the Oliver or from any one—i. e., 15 cents and 250,000 tons minimum—(except as the fact that the Cliffs was willing to offer better terms, and other facts herein specifically found, may affect this conclusion). In the negotiations with the Oliver, neither the Cliffs nor Mather took any part, excepting as to certain details affecting other interests which the Cliffs had in the subjectmatter, and which other interests we have not stated, since their connection with the questions now involved is remote. The contract so agreed upon having been reduced to form, and being approved as to form in all details by counsel for Kaufman and Breitung, for the Cliffs and for the Oliver, it was approved by a stockholders' meeting of the Arctic, the Cliffs' stock being voted in the affirmative, and was approved by a directors' meeting of the Arctic by the unanimous vote of the three directors present, Kaufman, Breitung and Hayden (Mather being not present); and having been signed by Kaufman and Breitung in their individual rights, and the signature of the Arctic having been attached by Kaufman, as president, Mather, as secretary of the Arctic, attested the signing.

(13) The general understanding existing between the Cliffs and the Oliver prior to the executing of the Arctic-Oliver lease, was later carried out by the following definite agreement, and its provisions are to be taken as contemplated at the earlier period: That they would organize a corporation, the Regent Mining Company, with a cash capital of \$450,000, of which the Oliver would pay in threefourths and the Cliffs one-fourth; that the new lease would be assigned to the Regent which would assume and carry out the traffic contract and pay to the Cliffs its \$250,000 debt, and pay to Corrigan and the Queen 100,000 tons of ore (then worth about \$100,000) for their interest in the old leases; that in lieu of dividends, the Oliver would buy of the Regent, at the cost of mining, three-fourths, and the Cliffs would buy one-fourth of the ore mined each year; and that the Cliffs would pay the Oliver, in cash, one-fourth of the \$131,-500 which the Oliver had paid Kaufman and Breitung for one-fourth of the fee in some of the parcels leased, as hereinafter stated. was further provided that, by notice given in any year before the season of navigation opened, the Cliffs could limit the amount of ore which it would take under the contract during the then current year (it being contemplated that all ore shipments would be by water between April and December).

This arrangement between the Oliver, the Cliffs, and the Regent went into effect in the spring of 1899. In 1904, Kaufman and Breitung first acquired knowledge of the fact that the Cliffs had this interest in the lease. Thereupon, and without any action by the stockholders or directors of the Arctic or any request therefor, Kaufman and Breitung caused the bill of complaint in this cause to be filed in the name of the Arctic, as complainant, and executed by Kaufman,

president, and Breitung, director. By this bill, they sought a decree that all the interests in the lease held by the Cliffs or Mather, including the one-sixteenth interest in fee bought from the Oliver and including the Cliffs' stockholding interest in the Regent, were held in trust for the Arctic, and were, in equity, the property of the Arctic, and should be conveyed to the Arctic upon payment to them by the Arctic of what, upon an accounting, might be found to be the actual, legitimate cost thereof to the defendants; that the defendants account to the Arctic for all profits from the ores received by them under the lease and under the Regent stockholding—the Arctic offering to pay to defendants any sums which might be found equitable on account of the prayed substitution of the Arctic for defendants in these property interests; and that the defendants be enjoined from otherwise disposing of this property, and that plaintiff have general relief. The district court, on final hearing, decreed the existence of the trust as prayed, and directed an accounting; upon such accounting, which covered the period till 1913, the master found that the Cliffs, in the course of carrying on one branch of its general business, had made, from the resale of the ore which had come from the one-fourth of the lease, profits amounting to \$900,000. The district court thereupon rendered judgment against the Cliffs and Mather for the amount of profits so found. The \$112,500 paid by the Cliffs for its share of the Regent capital was credited to the Cliffs, in stating the account of profits.

(14) In one of the leased parcels only an undivided one-fourth of the fee had belonged to Kaufman and Breitung, until they had purchased another one-fourth thereof from Rees. In closing the terms of the lease with the Oliver, they insisted, as a condition of making the lease, that the Oliver should buy this Rees one-fourth interest in the fee of this parcel for \$131,500 cash. The Oliver acquiesced and paid that sum. Kaufman and Breitung did not disclose to the Cliffs that they were making this sale in connection with the lease; but the Cliffs learned this fact from the Oliver, and, as a condition of getting one-fourth of the ore taken under the lease, the Cliffs acquiesced in the Oliver's request that the Cliffs should buy from it one-fourth of this interest or one-sixteenth of the fee for the price of \$32,875, and the Cliffs paid that sum in cash to the Oliver. The price so received by Kaufman and Breitung, \$131,500, was twice the then fair value of the one-fourth interest purchased, and the Oliver purchased the same, not because it otherwise desired such interest but because it was necessary to make the purchase at this price in order to get the lease from Kaufman and Breitung. In the account-

ing, this \$32,875 was credited to the Cliffs.

(15) Wherever the action of the Cliffs is herein referred to, it acted immediately by Mather, its president and treasurer. He consulted, from time to time, with members of the executive committee of the Cliffs' board of directors, but no formal action at stockholders' or directors' meetings was taken in regard to any of the subject-matter. In fact, Mather acted wholly on behalf of the Cliffs and in no respect in his personal interest (except as such interest existed

through his stockholding in the Cliffs). It was fully understood by Kaufman and Breitung that Mather was thus speaking and acting for the Cliffs. Mather neither expected nor received any personal benefit whatever from any of the transactions herein recited.

- (16) Kaufman and Breitung were very large owners of iron ore lands in Michigan and other states. They were men of great business experience and ability in all matters pertaining to iron ore. In these respects, they were on an equality with Mather, and in concluding, as directors of the Arctic, to make the Oliver lease, they did not in fact rely in any degree upon Mather's judgment, but relied upon themselves and their own ability to make a good bargain. Mather exercised no influence or efforts to bring about the making of the lease to the Oliver, nor did he in any way mislead or deceive or defraud Kaufman and Breitung in the subject-matter—unless such misleading or fraud is to be inferred as matter of law from his directorship in the Arctic and his keeping from his fellow directors knowledge that the Cliffs was acquiring an interest.
- (17) By the secret coming in of the Cliffs as partial lessee, the Arctic suffered no prejudice, but rather benefit, since the Cliffs' interest had a tendency to increase the minimum to which the Oliver would agree in advance, and to increase the amount mined and paid for every year. It would have been impossible for Mather to have procured for the Arctic this concession of one-fourth the ore at cost, which was procured for the Cliffs. This is for three reasons: (1) The Oliver would not have consented, as it could not have received from the Arctic the considerations it was getting from the Cliffs. (2) Kaufman and Breitung, for the Arctic, would not have consented, since their fixed policy was to lease on royalty and not to undergo any of the risks of mining or of dealing in ore; and, by the advance notice provision, the Cliffs could only minimize, not escape, mining and market risks. With this fixed policy, it is certain that Kaufman and Breitung would not have allowed the Arctic to invest \$145,375 cash with the Oliver in the Regent. (3) The Cliffs would not have consented, since it would not allow the Arctic to get the benefit of concessions resulting from the Cliffs' control of the situation.
- (18) Upon the whole transaction, on the one hand, the Cliffs received: (a) The chance of profit on the one-fourth of the ore; (b) full payment of its debt from the Queen. On the other hand, it paid, invested in, or submitted to: (a) The chance of loss on the ore; (b) \$32,875 in a fractional fee interest it did not want; (c) \$25,000 (about) to Corrigan for the Queen interest in the old leases; (d) \$87,500 (\$112,500—\$25,000) toward the working capital of the Regent, a corporation in the control of others; (e) the substitution, as its traffic debtor, of a corporation in the control of a competitor for a corporation controlled by itself.

Upon these facts we desire the instruction of the Supreme Court for our proper decision of the following questions of law arising thereon (which for clarity we state in alternative form):

1a. Is the Cliffs, stockholder in the Arctic and also Mather's independent principal, so far affected by any fiduciary duties which may have rested on its agent, Mather, as a director in the Arctic, that the Arctic may recover from the Cliffs the latter's profits under the lease, although no trust rested directly upon it, and although the director, Mather, received no personal benefit? or,

1b. Is plaintiff's remedy, if it has any as against the Cliffs, confin-

ed to rescission?

2a. Does the conduct of Kaufman and Breitung, in insisting upon benefit to their outside interests as a condition of their consent to the lease, bar them, in their own names or in the name of the Arctic, from complaining in a court of equity of the conduct of the Cliffs, in insisting upon benefit to its outside interests as a condition of its consent to the lease? or,

2b. Did their conduct pertain to a matter so distinct from that conduct of the Cliffs, of which they complain, that the rule of clean hands

does not apply?

3a. When Kaufman and Breitung were informed that the Cliffs had reached with the Oliver such an agreement that the Cliffs was willing to withdraw further objection to the Oliver lease, were they then and there bound to inquire as to the terms of such agreement, and when they did not, but proceeded without inquiring, did they thereby so far acquiesce in whatsoever terms were included in the agreement that a court of equity will not entertain their later complaint? or,

3b. Were they justified in assuming that the agreement did not pertain to the lease itself, but to some outside matters of conflicting

interests between the Cliffs and the Oliver?

4a. Under the existing make-up of the Arctic, did Mather, as one of the Cliffs' directors of the Arctic, owe any duty to the Arctic or to the Breitung directors thereof to disclose that he had an outside interest in a contract which was about to be made by the Arctic and which was in fact well advised and for the best interest of the Arctic? or,

4b. Was his directorship duty, under the existing relations of the two bodies of stockholders to each other and to the Arctic, and after he had offered to procure for it an even better contract, satisfied so long as he did nothing to promote the proposed contract and left the decision whether it should be made and the terms thereof wholly

to the Breitung directors?

5a. When it appeared that the Cliffs had interests and desires pertaining to the new lease which might conflict with the course Kaufman and Breitung desired the Arctic to take, did the Cliffs and Mather perform every duty which by law rested upon him as director of the Arctic and through him upon the Cliffs when Mather withdrew from any further participation in the matter and notified Kaufman and Breitung that they could go ahead and make for the Arctic a contract satisfactory to them, and that the Cliffs and Mather would acquiesce therein? or,

5b. Was it the duty of Mather, as director in the Arctic, either to disclose to Kaufman and Breitung what he had done and the knowl-

edge he had acquired as an officer of the Cliffs and on behalf of the Cliffs, or else to resign as a director in the Arctic?

6a. If it was the legal duty of Mather to disclose to the Breitung directors the fact that the Cliffs was to be interested in the lease, is the further fact, that, as the net result of the transaction, Kaufman and Breitung leased their beneficial three-fourths in the ore upon their own terms and the Cliffs retained its one-fourth interest in the ore, sufficient to bar a court of equity from enforcing any trust which might otherwise arise in favor of the Arctic in and to such one-fourth interest? or,

6b. Did such trust, as matter of law, become so fixed that a court of equity will proceed according to the legal rights of the Arctic without regard, in this particular, to the relative beneficial interests of the stockholders?

Since we are of the opinion that there was no fraud or misleading or breach of directorship duty by Mather, unless the same arose, wholly as matter of law and as a presumption of law, from the relations of the parties herein set out, the question so presented has seemed to us proper for certifying to the Supreme Court. This question is thought to be stated in its most inclusive form by No. 5. What we regard as a narrower phase of the same matter is formulated by No. 4. Nos. 1, 2, 3, and 6 present other problems, each of which will be controlling of the case, if answered adversely to plaintiff, and those questions are included in this certificate because we desire the instruction of the Supreme Court thereon, and because we assume that the Supreme Court may prefer to conclude that it is unnecessary to answer 4 and 5 because of some matter involved in another question. However, we consider that No. 5 presents the question of law which is, in the view most favorable to plaintiff, the ultimate one; and we desire that this question be answered, without prejudice from the inclusion of others in this certificate, if it shall be thought that the inclusion of the others is not in accordance with the practice of the Supreme Court in this respect.

We have considered—and reached a conclusion concerning—several issues of law not covered by any questions certified, and several issues of fact not mentioned herein.

NEW MARTINSVILLE OIL CO. v. BARNETT OIL & GAS CO. (Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1706.

MINES AND MINERALS 574—RIGHT TO RESCIND CONTRACT FOR FRAUD WAIVED BY MODIFICATION OF CONTRACT.

A purchaser of oil property held under lease, which took possession and after operating the wells thereon for seven months, being in default in payments, secured a modification of the contract, by which it obtained better terms, and under which it continued making payments for several months, held to have thereby ratified the original contract, and to have lost any right it may have had to rescission on the ground of misrepresentation of the property.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge. Suit by the Barnett Oil & Gas Company against the New Martinsville Oil Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 254 Fed. 481.

Osman E. Swartz, of Clarksburg, W. Va. (E. Bryan Templeman, of Clarksburg, W. Va., on the brief), for appellant.

J. M. Ritz, of Wheeling, W. Va. (John A. Howard, of Wheeling,

W. Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. In the view we take of this case, it will suffice to outline the somewhat complicated facts out of which the litigation arose. The New Martinsville Oil Company, appellant here, was organized in 1909 under the laws of West Virginia. Prior to January, 1916, it had acquired from one Morgan the lease of a tract of land in Wetzel county, containing about 208 acres, on which it had at that time some ten producing oil wells. The company had been at least moderately successful, was in excellent financial condition, and doubtless believed this property to be of great value. Its outstanding capital stock consisted of 200 shares, of the par value of \$20,000.

The appellee company was organized in December, 1915, under the laws of Delaware, and under the name of Federal Oil, Heat & Light Company, with an authorized capital of \$1,000,000. In the following month the name was changed to Barnett Oil & Gas Company, and not long afterwards the authorized capital increased to 2,500,000 shares, of the par value of \$1 per share. It was incorporated for the purpose of acquiring and developing oil properties, and was promoted by I. W. Barnett, who was its president, his brother, C. W. Barnett, and L. M. Stephens, who was vice president. Stephens associated himself with E. H. Clarke, a New York broker, who undertook to float the stock. At the time of its organization only the nominal sum of \$300 was paid in; the company depending upon the sale of stock for money to carry on its operations. As we understand the matter, there was an arrangement between the company and the brokers, by which the latter accounted to the former at the rate of 90 cents for each share of stock sold, retaining for themselves whatever they got from purchasers above that amount.

Some time in the early part of January, 1916, J. W. Barnett, who lived at Clarksburg, W. Va., and was on the lookout for investments for the enterprise he was promoting, happened to meet one W. T. Robinson, whom he had known for several years, learned from him of the New Martinsville property, and asked him to obtain it for his company. This Robinson undertook to do. He had been from the first a stockholder in the New Martinsville company, owning 19½ shares, but had sold his holdings in the previous December for \$1,-897.50 per share, which represented a value of nearly \$350,000 for the property, after deducting cash assets then about to be distributed.

On the 22d of January, in connection with one Stallings, who was also an original stockholder, but had sold out some years before. Robinson secured from the individual owners options on the stock of the New Martinsville company, or the most of it, on the basis of \$350,000 for its property, and upon the agreement to pay \$44 per share per week; the options expiring on the 1st of March. Barnett was, of course, informed of this transaction, and early in February paid Robinson and Stallings \$5,000, but it does not appear that any part of this sum was turned over to the stockholders. By contract dated the 29th of February, but not signed till the 7th of March. Barnett agreed to buy from Robinson and Stallings the entire capital stock of the New Martinsville company for \$350,000, of which \$10,000 was to be paid on the 4th of March, and the like sum on the Saturday of each succeeding week until the whole amount was paid. The contract also provided that Barnett should have immediate possession of the property, with the right to manage the same, but was not to "shoot" any of the wells or sell any of the oil produced before full payment of the purchase price. As just stated, the options expired the 1st of March. but on the following day there was an agreement for their renewal, and on March 4th and March 17th two payments, of \$10,000 each, were made by Barnett to Robinson and Stallings. Of this sum they retained \$2,400, and distributed the balance, \$17,600, to the stockhold-The actual transfer of possession seems to have been made, or regarded as made, on the 5th of March, as from that date the Barnett company assumed all expenses of the business, paid the employés, and accounted for the oil produced. The management and operation of the property were committed to one Culp, an experienced oil man, who some time before had been engaged for that purpose.

In the meantime, beginning perhaps early in February, Clarke and Stephens had been selling stock of the Barnett company to the public on the representation that it owned the property in question and statements of daily production which were false and misleading, and apparently some \$25,000 had been realized from such sales when the company took possession. After making the first two weekly payments, as above recited, the company was unable to meet the further installments due in March, and the New Martinsville stockholders thereupon threatened a forfeiture. The situation was obviously serious. To say nothing of the false statements regarding production and capacity, it had been represented that the Barnett company owned the Morgan lease, when in fact all it had was Barnett's contract for the purchase of the stock of the New Martinsville company, on which contract only a comparatively small amount had been paid. In this predicament the Barnett company sought the advice and assistance of Mr. John A. Howard, a prominent lawyer of Wheeling. He at once saw the necessity of getting title to the property, as otherwise grave consequences might ensue to those who had represented that it was already owned. There were various meetings and negotiations, the details of which may be here omitted. The result was an agreement, carried into effect on the 2d of May, by which the New Martinsville company conveyed or assigned the Morgan lease to the Barnett company for \$308,000, of which \$255,400 was secured by deed of trust on the property. A cash payment of \$35,000, with the \$17,600 previously paid to the stockholders, made up the balance of the consideration. The abatement from the \$350,000 which Barnett had agreed to pay for the stock, namely, \$42,000, represented the amount which Robinson and Stallings were to get as their "commissions." So much of this amount as then remained unpaid was by agreement with them assumed by the Barnett company, in addition to the \$308,000, but how it was to be paid or secured the record does not disclose. The \$255,400 and interest thereon, secured by the deed of trust, was to be paid in installments of \$10,000 a month for the first three months and \$20,000 a month thereafter, and there was a further provision that the purchase price would be reduced to \$277,400, if the balance to make up that amount were paid in a lump sum within three months.

The Barnett company met the installments due in June, July, and August, but was unable to make the September payment of \$20,000. Meetings and negotiations followed during that month, which need not be detailed. The outcome was the payment of enough money to reduce the unpaid balance to \$185,400, for which sum and interest thereon a new deed of trust was given, on the same and some other property, dated the 2d of October, and payable in monthly installments of \$2,500, beginning the 1st of November. At the same time a second deed of trust was given to Robinson and Stallings for \$26,872.74, the unpaid balance on their \$42,000, payable in 53 monthly

installments.

The installments due the New Martinsville company under this arrangement were paid, at or soon after maturity, for the months of November, December, January, February, and March; but those subsequently maturing remain unpaid. There were some interviews after the default, and a proposal by the Barnett company to pay up all arrears and meet future installments, provided \$40,000 was abated from the purchase price and permission given to "shoot" the wells. proposal was rejected, and shortly afterwards the New Martinsville company began proceedings to sell the property under the deed of Thereupon, on July 14, 1917, the Barnett company brought this suit to rescind the contracts under which the property was acquired, on the ground that its purchase had been induced by misrepresentation, or to recoup the losses alleged to have been sustained thereby, and to enjoin the foreclosure sale. A temporary injunction was granted, and on final hearing the court below entered a decree substantially as prayed for by the plaintiff. The New Martinsville company appeals.

The contentions of the parties are these: Plaintiff asserts that Robinson and Stallings were the authorized agents of the New Martinsville company and its stockholders; that Robinson, in his negotiations with Barnett and Stephens, falsely and fraudulently represented the settled production of the property as greatly in excess of the actual fact; that they and the Barnett company relied upon these representations and believed them to be true; that so believing, and not otherwise, Barnett contracted to buy for the benefit of his company

the New Martinsville stock on which Robinson and Stallings had obtained options; and that the subsequent agreements to purchase the property after discovery of the fraud, first on the 2d of May, and again on the 2d of October, were not an irrevocable election, and do not prevent the maintenance of this suit, because those agreements were made under a species of duress arising from the peculiar hardship of the situation. On the other hand, defendant avers that Robinson and Stallings were not its agents at any time or for any purpose; that they were merely self-constituted middlemen, who got from the individual owners options on their stock at a certain price, with the view of selling the same to Barnett at a much greater price; that Barnett was but the assignee of the option rights of Robinson and Stallings, standing in their shoes and responsible for any misstatements made by them; that Robinson and Stallings did not in fact, nor did either of them, misrepresent the property; that, if they did, their representations were not relied upon and did not induce the purchase; and that in any event the two several ratifications, after full knowledge of the actual production of the property, constitute an irrevocable election by which the plaintiff is bound.

Although the testimony seems to us not altogether convincing, and many circumstances discredit the plaintiff's contention, we may assume, without so deciding, that Barnett was induced to purchase the New Martinsville stock by the false and fraudulent representations of Robinson as to the productive capacity of the property, and that the defendant company and its stockholders are responsible for those representations; in other words, that the original contract was voidable by reason of the gross deceit of Robinson, and that Barnett and his company, upon discovery of the fraud, had the undoubted right to rescind that contract and recover back the moneys paid on account thereof. But it is quite another thing to say, in view of what afterwards happened, that any such right existed at the time this suit was brought, some 16 months later. The governing principle of law is well settled and familiar. In Pomeroy's Equity Jurisprudence, § 897, it is thus stated:

"All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the representations."

In Shappirio v. Goldberg, 192 U. S. 232, 242, 24 Sup. Ct. 259, 261 (48 L. Ed. 419) the Supreme Court says:

"It is well settled by repeated decisions of this court that, where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own, the right of rescission is gone, and

the party will be held bound by the contract. Grymes v. Sanders, 93 U. S. 55 [23 L. Ed. 798]; McLean v. Clapp, 141 U. S. 429 [12 Sup. Ct. 29, 35 L. Ed. 804]. In other words, when a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged by the rescission of the contract. If he choose the latter remedy, he must act promptly, 'announce his purpose and adhere to it,' and not by acts of ownership continue to assert right and title over the property as though it belonged to him.'

Application of this principle to the facts assumed decides the controversy. As above stated, Barnett was put in possession of the property on the 5th of March, in accordance with the provision in his contract with Robinson and Stallings for the purchase of the stock, and installed Culp, an expert in the operation of oil wells, as manager of the business. From that time Barnett and his company knew or had the means of knowing—for the sources of information were at their command—approximately, if not exactly, the output of the wells from day to day. It was nearly two months later that the Morgan lease itself was assigned, the first deed of trust executed, the unpaid installments reduced from \$10,000 a week to \$10,000 a month, and the commissions of Robinson and Stallings assumed by the Barnett company. In the meantime there had been default of payment under the original contract, charges of misrepresentation made, and negotiations for a settlement carried on under the direction of Mr. Howard, whose aid was obtained about the 1st of April. It is quite difficult to believe that the parties who claim to have been so grossly defrauded were still ignorant of the true state of affairs on the 2d of May, when the property. was transferred, and their willingness to enter into the contract of that date may be otherwise explained. Some of them at least, solely by their own fault, were in an embarrassing, if not dangerous, position, for they had sold stock to the public on the false representation that the Barnett company owned the Morgan lease, and they were therefore under peculiar inducement to have the property acquired at almost any cost. Taking into account the situation then existing, we may concede, for the purpose of deciding the appeal, that the right of rescission was not lost by the execution of the May contract, but survived to the plaintiff for a reasonable time thereafter.

This brings us to what subsequently occurred. For the 5 months following, from May 2d to October 2d, with complete possession of the property under title that is unquestioned, and with every opportunity to know precisely what it was producing, the plaintiff took no steps to rescind the contract then in force, and gave no sign of any intention to disaffirm it, or to claim further abatement of the price. Payments as agreed were made for June, July, and August, and the failure to pay the September installment was put upon the ground, not that the purchase had been induced by fraud and deceit, but distinctly on the ground that plaintiff was without funds to meet its obligations. Then came the settlement, to so call it, of October 2d, when \$40,000 more was paid and a new trust deed given, with payments on the amount secured thereby reduced to \$2,500 a month. It seems

little short of puerile to say that at that time, after 7 months of possession and operation, the officers and promoters of the plaintiff company did not know all that could be known about this property. If they did not know, it must be because they purposely remained in ignorance. Yet with full knowledge of the facts, or chargeable with such knowledge, they deliberately and intelligently chose, not to cancel the contract because it was claimed to be fraudulent, but to make a new promise, somewhat more favorable in terms, to keep what they had bought and pay the balance of the purchase price. We cannot doubt that this was an irrevocable election by which the plaintiff is bound. As the Supreme Court said in Fitzpatrick v. Flannagan, 106 U. S. 648, 660, 1 Sup. Ct. 369, 379 (27 L. Ed. 211):

"A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise made under similar circumstances; and no one, acting with full knowledge, can justly say that he has been deceived by false representations. Volenti non fit injuria."

Nor does it appear to us that plaintiff, in making the October contract, was influenced by anything that at all resembles duress, as that term has been repeatedly defined. True, it was then in financial straits, and the sale of its stock would have been greatly hampered, if not brought to an end, by any attempt to withdraw from the undertaking, or by losing the property under a foreclosure sale. But this was a situation for which the promoters of the enterprise were wholly responsible, and it was for them to decide whether they would suffer the discredit of failure, and whatever consequences might follow, or try to make the best of a bad bargain. They were under no sort of compulsion, save business interest; and so, with clear comprehension of the facts and of what they were doing, and under the advice of an able and experienced lawyer, they elected to take the latter alternative, and it seems undeniable that they could not thereafter be heard to say that they had been deceived.

But this is not all. Following the October arrangement, and as then agreed, plaintiff paid the installments falling due in the next 5 months, without protest and without indicating any purpose to demand relief from the contract. Indeed, it was not until after default for the subsequent 3 months or more, and when defendant had given notice of sale under the deed of trust, that this suit was brought, and the purchase made nearly 16 months before sought to be set aside on the ground that it had been procured by fraud.

We deem it unnecessary to indulge in further comment, for the facts themselves furnish the sufficient argument. Even if plaintiff's version be accepted, it must nevertheless be held upon principle and authority that the action comes too late. The alleged fraud upon which it is based was known to plaintiff's officers and advisers, in full measure and extent, in the previous October, 9 months before, when upon mature deliberation it was decided to affirm the contract of purchase. By the election then made, to say nothing of what afterwards happened, plaintiff waived the charge of deceit, and lost irrevocably the right of rescission or abatement.

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The decree appealed from is reversed, and the cause remanded, with instructions to vacate the injunction and dismiss the bill. We do not perceive that defendant at this time needs affirmative relief.

Reversed.

WASHBURN et al. v. GILLESPIE.

(Circuit Court of Appeals, Eighth Circuit. September 22, 1919. Rehearing Denied January 10, 1920.)

No. 5238.

1. EVIDENCE 393(1)—PAROL EVIDENCE INADMISSIBLE IN ABSENCE OF MISTAKE OF FRAUD.

A written oil and gas lease cannot be varied by parol evidence, unless mutual mistake or fraud be present.

2. Mines and minerals &= 78(2)—Right to forfeiture of oil and gas lease.

Where the lessee under an oil and gas lease agreed to complete a well within one year, or pay at the rate of \$40 for each additional three months completion should be delayed from the time fixed, the lease cannot be forfeited because the lessee made no effort to start drilling a well until the year had nearly expired.

8. Mines and minerals \Leftrightarrow 79(3)—Forfeiture of oil and gas lease for non-payment of rentals,

Where payment of first quarter's rent due under oil and gas lease was tendered before it was due, and there was no requirement in the lease for payment in advance, the lease cannot be forfeited because tender for a subsequent quarter was not made until after the quarter began.

4. Courts \$\infty\$ 359—Federal courts should follow local law as to validity of gas leases.

The federal courts should follow the local law in determining the validity of oil and gas leases.

5. MINES AND MINERALS \$\ightarrow\$58-OIL AND GAS LEASE NON-UNILATERAL.

Provision in an oil and gas lease, allowing the lessee on payment of \$1 to surrender the lease for cancellation, does not render the lease unilateral, so as to give the lessor a right of cancellation.

6. EQUITY \$\infty 65(3)\$—RIGHTS OF LESSEE UNDER OIL AND GAS LEASE.

Though oil and gas lease provided that the lessee should complete a well within one year or pay stipulated sum for each three months period completion was delayed, held that, where the lessee knew a test well was being sunk in that field by another, and encouraged the work by assigning a nearby lease, the lessee's delay in beginning drilling until the test well was completed did not deprive him of the right to proceed under the lease and to have interference with drilling enjoined on the theory that he did not come into court with clean hands.

7. Specific performance \$\sim 51\$—Injunction against interference with oil and gas lease.

An oil and gas lease on a royalty basis *held* not so unfair as to deprive the lessee of the right to an injunction preventing the lessor from interfering with drilling, on the ground that the suit was in essence one for specific performance.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by E. N. Gillespie against Jesse C. Washburn and others. From a decree for complainant, defendants appeal. Affirmed.

Horace Speed, of Tulsa, Okl., and Henry S. Johnston, of Perry, Okl. (Johnston, Robinson & Rice, of Perry, Okl., on the brief), for ap-

pellants.

C. B. Ames, of Oklahoma City, Okl., and A. Mitchell Palmer, of Stroudsburg, Pa. (William A. Sipe, Jr., of Tulsa, Okl., Mr. Robert J. Dodds and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., and Ames, Chambers, Lowe & Richardson, of Oklahoma City, Okl., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. Appeal by defendants from decree in favor of lessee (Gillespie), enjoining lessors from preventing or interfering with drilling for oil and gas on land owned by lessors and covered by an oil and gas lease to Gillespie, dated September 24, 1915, set out in the margin. At the time this lease was executed the parties executed a supplemental contract as follows:

"Know all men by these presents: That, whereas, on the 24th day of September, 1915, Jesse C. Washburn and Anna M. Washburn, his wife, of

Agreement, made and entered into the twenty-fourth day of September, A. D. 1915, by and between Jesse C. Washburn and Anna M. Washburn, his wife, of Billings, Oklahoma, parties of the first part, lessors, and E. N. Gillespie,

of Freeport Penn., party of the second part, lessee,

Witnesseth, that the said parties of the first part for and in consideration of the sum of \$1.00 to them in hand well and truly paid by the said parties of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the second party to be paid, kept and performed, have granted, demised, leased and let and by these presents do grant, demise, lease and let unto the said second parties, his heirs, executors, administrators, successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines and of building tanks, powers, stations and structures thereon to produce and take care of said products, all that certain tract of land situate in the county of Noble, state of Oklahoma, described as follows; to wit: The northwest quarter (N. W. ¼) of section fifteen (15), township twenty-three (23) north, range two (2) west, containing 160 acres more or less.

It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil and gas or either of them is produced from said lands by the party of the second part, heirs, administrators, executors, successors or assigns. In consideration of the premises said

party of the second part covenants and agrees:

1st. To deliver to the credit of the first parties, their heirs, or assigns, free of cost in the pipe line to which it may connect its wells, the equal one-eighth

(1/8) part of all oil produced and saved from the leased premises.

2d. To pay the first parties at the rate of one hundred and fifty dollars each year in advance for the gas from each well where gas only is found, while the same is being used off the premises, the first parties to have gas free of cost from any such well for all stoves and all inside lights in the principle dwelling house on said land during the same time, by making their own connections with the well.

3d. To pay the first parties for gas produced from any oil well and used off the premises at the rate of twenty-five dollars per year, for the time during which such gas shall be used, said payments to be made each three months

n advance.

The party of the second part agrees to complete a well on said premises within one year from the date hereof, or pay at the rate of forty dollars for

(261 F.)

Billings, Okl., signed, sealed and delivered to E. C. Funk, of Tulsa, Okl., an oil and gas lease covering 160 acres of land described as the northwest quarter of section 15, township 23 north, range 2 west, Noble county, Oklahoma: Therefore it is hereby expressly agreed by and between the parties hereto that if the party of the second part fails within 90 days to secure sufficient acreage to warrant operations that the party of the second part shall return this lease, thereby relieving and surrendering all rights, title and interest thereto."

The issues here are whether or not (1) the supplemental contract as executed represents the actual agreement; (2) Gillespie failed to perform, giving right of rescission which was exercised by appellants; (3) the appellants could or did terminate the lease through the so-called "surrender" clause thereof; and (4) the evidence shows lack of equity in that Gillespie comes with unclean hands to enforce an unfair lease.

[1] As to the first contention, appellants claim that the supplemental contract, as written and signed, does not express the agreement actually made, and that as expressed it is ambiguous. A reading of the writing reveals no uncertainty as to its meaning, which is that this lease was to be canceled unless within 90 days from its date Gillespie secured sufficient acreage in that field to warrant operation. Appel-

each additional three months, such completion is delayed from the time above mentioned for the full completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

The party of the second part shall have the right to use, free of cost, gas, oil and water produced on said land, for its operations thereon, except water from wells of first party.

When requested by first party the second party shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn on said premises.

Second party shall pay for damages caused by drilling to growing crops on said land.

The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

The party of the second part shall not be bound by any change of owner-ship of said land until duly notified of any such change, either by notice in writing duly signed by the parties to the instrument of conveyance, or by receipt of the original instrument of conveyance, or a duly certified copy thereof.

All payments which may fall due under this lease may be made directly to Jesse C. Washburn of Billings, Okl., or deposited to his credit in the Billings State Bank, of Billings, Okl.

The party of the second part, its successors or assigns, shall have the right at any time on the payment of one dollar to the party of the first part, their heirs or assigns, to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine: Provided this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease or any of its terms, or to recover possession of the leased land or any part thereof, against or from the lessors, their heirs, executors, administrators, successors or assigns or any other person or persons. All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators or assigns.

lants say that the agreement as it was really made and should have been written was that a well should be commenced on this leasehold within 90 days. The contract was drawn by Gillespie's agent, in the presence of the notary and Washburn, and possibly of Mrs. Washburn, who was in and out of the room during the visit of the agent. It was then read by the agent to Washburn, and possibly Mrs. Washburn, in the presence of the notary. It was then signed by the agent and the Washburns and witnessed by the notary, after which it was given to Washburn and retained by him. The agent kept no copy. To explain their signing the contract as written, the Washburns claim that the agent either mistakenly or fraudulently misread it to them, so that they thought it expressed the agreement as claimed by them. Gillespie contends that the clear written contract cannot be varied by parol evidence. This is true, unless mutual mistake or fraud be present. A careful study of the entire evidence convinces that the contract was read as written and that there was neither mistake nor fraud.

[2,3] The contention of nonperformance is based upon the claim that no well was drilled within the first year, nor were the rental payments promptly made, as required by the lease as follows:

"The party of the second part agrees to complete a well on said premises within one year from the date hereof, or pay at the rate of forty dollars for each additional three months, such completion is delayed from the time above mentioned for the full completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease."

The facts are that nothing was done toward drilling a well on this leasehold until the last day of the first year, when Gillespie brought to the land a load of rig material and was denied admittance by Washburn. The rental payment for the first quarter, which began September 24, 1916, was tendered August 22, 1916, and refused, and thereafter placed in the bank named in the lease as depository, where it remained. January 3, 1917, the tender for the second quarter, which began December 24, 1916, was made and refused. The only objection touching the rentals is that the second tender was overdue 9 or 10 days. This is based on the theory that the lease required the quarterly payments to be in advance, which would make this payment due December 23, 1916. There is no such requirement in the lease. The contention as to the failure to drill the well is that there must be a bona fide effort to complete one during the first year. A similar contention was urged in Guffey v. Smith, 237 U. S. 101, 105, 116, 35 Sup. Ct. 526, 59 L. Ed. 856, and disapproved.

[4, 5] The third contention is that the surrender clause of the lease, which gives the lessee the right to surrender and terminate the lease at any time, on the payment of \$1, makes the lease so unilateral as to give the lessors a right of cancellation which they exercised. The validity and interpretation of this character of surrender clause has been before the courts on several occasions. Guffey v. Smith, 237 U. S. 101, 113, 35 Sup. Ct. 526, 59 L. Ed. 856, settles the law that this is a kind of question which should be settled by the local law, in so far

as it affects the validity of the lease. The latest expressions of the Oklahoma Supreme Court favor the validity of such provisions. Northwestern Oil & Gas Co. v. Branine (Okl.) 175 Pac. 533; Rich v. Doneghey (Okl.) 177 Pac. 86. It is true that these two cases were decided after this case was tried below, and that up to that time the Oklahoma Supreme Court had taken the contrary view. The evidence here shows that a large percentage of the oil and gas leases in Oklahoma, covering millions of acres of land, contain this or similar claus-There should not be opposed rules of property affecting so many persons and so much property within the same state. These leases should all be valid, or all be invalid, no matter whether they be tested in state or federal courts. Harmony and absence of confusion are desirable. Guided by this pressing need of harmony in decision, by the consideration that this is the character of question where the state courts would be unhesitatingly followed were there no difference in such decisions, by our own view that this clause should be held valid, and by the view, expressed by the Supreme Court concerning such a surrender clause, that "it is difficult to perceive how it could be declared inequitable" (Guffey v. Smith, 237 U. S. 101, 117, 35 Sup. Ct. 526, 59 L. Ed. 856), we shall follow these last decisions of the Oklahoma Supreme Court declaring the surrender clause valid and as applicable to the lessee alone.

[6] The claim that Gillespie comes with unclean hands is unfound-This is based on the statement that he knowingly procured a number of leases in the vicinity, by giving and fostering the impression among the lessors that he would forthwith begin drilling on the leaseholds, and that the leases required him so to do, while he had held the leases without drilling, waiting for developments by third parties to determine whether it would be profitable for him to drill. We are not here concerned with what may have been told other lessors by Gillespie's agent, and, if we were, we doubt if mere statements of intentions to drill forthwith, though made to Washburn, should stop a court of equity. Besides, Gillespie seems to have acted reasonably in this re-The territory was entirely undeveloped, with no facilities for caring for oil or gas, if found. A test well would not only tend to develop the presence of gas and oil, but would give information very valuable in furthering drilling, since it would reveal the character of formation and necessary depth, thus determining the kind of rigging and size of hole and of casting best suitable. It was the part of wisdom for all operators in this untried field to ascertain these facts. Before he had secured all of the leases in his "block" Gillespie had learned of a well to be sunk by the Mid-Co Company, and actively encouraged that test hole by agreeing to, and subsequently assigning, a nearby lease. The contract with the Mid-Co for this well was dated November 19, 1915, the well begun January 18, 1916, and pushed to completion, showing valuable oil and gas August 17, 1916. In a little more than a month afterwards Gillespie was endeavoring to erect drill rigs on this and other leases held by him. The testimony shows that he is an operator on a large scale, and not a speculator in leases. There is

no evidence that he did not intend to develop the land, and the delay was natural and sensible, under the circumstances.

[7] It is urged that this suit is in essence an action for specific performance of the lease and that the contract is so unfair that the court should not compel its performance. We cannot agree with this contention as to the contract. The expressions of the Supreme Court in Guffey v. Smith, 237 U. S. 101, 115, 116, 35 Sup. Ct. 526, 59 L. Ed. 856, are applicable to this case, although that was not a case of specific performance.

The decree is affirmed.

WRIGHT v. GILLESPIE.

(Circuit Court of Appeals, Eighth Circuit. September 22, 1919.)

No. 5346.

1. EVIDENCE \$\infty 448\$—Parol evidence inadmissible to contradict written lease.

A written instrument, as an oil and gas lease, cannot be contradicted by parol, where unambiguous.

2. Mines and minerals -79(6)—Tender of Performance of oil and gas lease by lessee.

Where a lessee under an oil and gas lease tendered payments by check, but the payments were refused, as were offers of cash, the lessor claiming he was not bound by the lease for reasons unrelated to the rental payments, further tenders were unnecessary for the lessee to protect his rights.

3. Mines and minerals \$\iff 78(7)\$—Restraining lessor from interfering with drilling, remedy at law being inadequate.

A suit by a lessee under an oil and gas lease to enjoin the lessor from interfering with drilling, etc., may be maintained despite the claim that an adequate remedy at law exists; the suggested remedy of unlawful detainer, which is designed to change possession of real estate, being inadequate.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by E. N. Gillespie against Frank Wright. Decree for complainant, and defendant appeals. Affirmed.

John B. Arnold, of New York City, and P. W. Cress, of Perry, Okl., for appellant.

Robert J. Dodds, of Pittsburgh, Pa., and C. B. Ames, of Oklahoma City, Okl. (W. A. Sipe, Jr., of Tulsa, Okl., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. Appeal by defendant from decree in favor of lessee (Gillespie), enjoining lessor (Wright) from preventing or interfering with oil and gas drilling on land owned by lessor and covered by an oil and gas lease to Gillespie. This lease, as well as those in the Washburn v. Gillespie (261 Fed. 41, — C. C. A. —), O'Donnell v. Gillespie (261 Fed. 48, — C. C. A. —), and Howe v. Gillespie v. Gillespie (261 Fed. 48, — C. C. A. —), and Howe v. Gillespie v. Gillespie (261 Fed. 48, — C. C. A. —), and Howe v. Gillespie v. Gil

pie (261 Fed. 48, — C. C. A. —) cases—were procured at about the same time, and as part of a "block" of leases Gillespie was securing in that vicinity. The four cases were tried together and considered in

one opinion.

The lease was identical in form with that in the case of Washburn v. Gillespie, 261 Fed. 41, — C. C. A. —, decided at this term, with these exceptions: There was no supplemental agreement as in that case, and this lease had this additional provision: That the initial well to be drilled by Gillespie should "be drilled on or within 1½ miles of this tract of land."

The contentions of appellant are that the lease was given on the promise that a well would be commenced within 60 days, within 1½ miles of this land, and promptly completed; failure to tender rental money; right of lessor to terminate lease because of "surrender"

clause therein; and existence of an adequate legal remedy.

- [1, 2] The evidence was conflicting as to what conversation took place between appellant and the agent of Gillespie at the time the lease was executed. This, however, is true, that the appellant signed the lease and retained a copy of it, and that the lease is a complete contract, and is not, in any particular here challenged, ambiguous. This claim of defendant would amount in effect to a variation of the written contract. We have carefully read and reread the evidence in this and the kindred cases, and we see no reason for disturbing the conclusion of the trial court that there was no such arrangement as contended for by appellant shown by the evidence. As to the location of the initial well, the evidence shows that appellee has sought to drill on several tracts within 1½ miles of appellant's land, but has been prevented, and that this suit is brought to permit drilling on this land. As to the rental payments, the facts are that a check was sent in time for the first quarter to the depository bank named in the lease, and upon the first day of the second quarter a similar attempt to pay the second quarter rental was made. These were refused by appellant. There is no evidence nor question that the checks were not good for the amounts they represented, and they were not declined by appellant because of the form of payment. The position of appellant was that he was not bound by the lease for other reasons unrelated to the rental payments. As said in the Washburn Case, there was no requirement in the lease that these payments be made in advance. A few days after the above attempts cash was offered in payment and refused. Appellee had done all he could to pay the rental and had fully complied with the contract requirements. In the face of appellant's announced and acted upon intention not to receive such payments the appellee was not obligated to continue futile offers. He need only stand ready to pay, and the evidence is conclusive in his favor upon that point. The contention as to the surrender clause is the same as in the Washburn Case, and, for the reasons therein stated, is not allowed.
- [3] The claim that an adequate remedy at law exists is ill founded. The remedy suggested is unlawful detainer. That remedy is designed to change possession of real estate. Here no such relief is sought.

The appellee merely desires to go upon land in the possession of appellant and there prosecute his right of oil and gas exploration given by the lease. Under the lease he could make no such proofs and show no such title as required in a suit for unlawful detention.

The decree should be affirmed.

HOWE v. GILLESPIE.

(Circuit Court of Appeals, Eighth Circuit. September 22, 1919.)
No. 5343.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by E. N. Gillespie against R. F. Howe. From a decree for complainant, defendant appeals. Affirmed.

John B. Arnold, of New York City, and P. W. Cress, of Perry, Okl., for appellant.

Robert J. Dodds, of Pittsburgh, Pa., and C. B. Ames, of Oklahoma City, Okl. (W. A. Sipe, Jr., of Tulsa, Okl., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. This is another of the cases tried with Washburn v. Gillespie, 261 Fed. 41, — C. C. A. —, determined at this term. The contentions are the same, except that this appellant claims that his lease was to be the same as that given by Frank Wright and involved in Frank Wright v. E. N. Gillespie, 261 Fed. 46, — C. C. A. —, also decided at this term. The trial court found against this claim, and a thorough examination of the evidence reveals no substantial reason for disturbing that conclusion.

The decree is affirmed.

O'DONNELL v. GILLESPIE.

(Circuit Court of Appeals, Eighth Circuit. September 22, 1919.)
No. 5347.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by E. N. Gillespie against Dennis O'Donnell. From a decree for complainant, defendant appeals. Affirmed.

John B. Arnold, of New York City, and P. W. Cress, of Perry, Okl., for appellant.

Robert J. Dodds, of Pittsburgh, Pa., and C. B. Ames, of Oklahoma City, Okl. (W. A. Sipe, Jr., of Tulsa, Okl., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. This is another of the similar cases tried with Washburn v. Gillespie, 261 Fed. 41, — C. C. A. —, decided at this term. The contentions are embraced in those determined in the case of Washburn and the case of Wright v. Gillespie, 261 Fed. 46, — C. C. A. —, also decided at this term. The additional claim that the lease was to have been like the Wright lease and was to be nonassignable was determined adversely by the trial court, with whose conclusion we agree.

The decree should be affirmed.

SUTHERLAND v. GILLESPIE.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1919.)

No. 5345.

Appeal from the District Court of the United States for the Western Dis-

trict of Oklahoma; John H. Cotteral, Judge.
Suit between Z. W. Sutherland and E. N. Gillespie. From a decree for the latter, the former appeals. Affirmed.

John B. Arnold, of Duluth, Minn., and P. W. Cress, of Perry, Okl., for appellant.

Robert J. Dodds, of Pittsburgh, Pa., and C. B. Ames, of Oklahoma City, Okl. (W. A. Sipe, Jr., of Tulsa, Okl., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. This case is a companion case to Frank Wright v. E. N. Gillespie, 261 Fed. 46, — C. C. A. —, Dennis O'Donnell v. E. N. Gillespie, 261 Fed. 48, — C. C. A. —, and R. F. Howe v. E. N. Gillespie, 261 Fed. 48, — C. C. A. —, decided during this term. For the reasons given in those cases, the judgment in this case is affirmed.

RENFROW v. GILLESPIE.

(Circuit Court of Appeals, Eighth Circuit, November 5, 1919.)

No. 5344.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit between William A. Renfrow and E. N. Gillespie. From a decree for the latter, the former appeals. Affirmed.

John B. Arnold, of New York City, and P. W. Cress, of Perry, Okl., for appellant.

Robert J. Dodds, of Philadelphia, Pa., and C. B. Ames, of Oklahoma City, Okl. (W. A. Sipe, Jr., of Tulsa, Okl., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. This case is a companion case to Frank Wright v. E. N. Gillespie, 261 Fed. 46, — C. C. A. — (Dennis O'Donnell v. E. N. Gillespie, 261 Fed. 48, — C. C. A. — and R. F. Howe v. E. N. Gillespie, 261 Fed. 48, - C. C. A. —, decided during this term. For the reasons given in those cases the judgment in this case is affirmed.

KUMPULA v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3326.

1. ARMY AND NAVY \$\infty 40-Indictment and information \$\infty 110(3)-Espion-AGE ACT; INDICTMENT IN LANGUAGE OF STATUTE.

Where the charge is the willful and intentional doing of certain acts. by making certain statements with certain intentions, and such acts are made criminal by Espionage Act, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, § 10212c), an indictment which follows the language of the statute, and gives a statement of facts and circumstances sufficient to identify the acts charged as an offense, is good.

2. Abmy and navy \$\sim 40\$—Espionage Act; instruction as to character of I, W. W.

Evidence, in a prosecution for violation of Espionage Act, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, § 10212c), held not to justify the court in instructing as matter of law that the I. W. W. is a disloyal and unpatriotic organization, and that its adherents owe no allegiance to any organized government; the literature properly admitted in evidence, and which would warrant the instruction, not being conclusively shown to be an authorized statement of the attitude of the organization as a whole.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Criminal prosecution by the United States against Elmer Kumpula. Judgment of conviction, and defendant brings error. Reversed.

Kumpula was convicted under five counts of an indictment which charged him with violation of section 3, tit. 1, c. 30, of the act of Congress approved June 15, 1917 (40 Stat. 219), as amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c), known as the Espionage Act. The first two counts charge that Kumpula, in the presence of certain named persons, stated "in substance and to the effect as follows, to wit: That the Liberty Bonds (meaning the bonds issued by the United States for loans) were no good and not worth the paper they were written on; that the United States was not a free country; that the United States was no good for the workingman; that the United States was always extorting every cent from the workingman." The first count charges that these statements were made with willful intent to interfere with the operation and success of the military and naval forces of the United States and to promote the cause of its enemies. The second count charges that the statements were made with intent to obstruct the sale of bonds and other securities of the United States and the making of loans to the United States. The third, fourth, and fifth counts charge the defendant with willfully and knowingly, in the presence of named persons, making statements "in substance and to the effect as follows, to wit: To hell with the government (meaning thereby the government of the United States); that it was an outrage to compel the workingman to subscribe to Liberty Bonds; that the United States was not a free country; that the United States was no good for the workingman; that the United States was always extorting every cent from the workingman; that now that the United States was at war the time was ripe for the workingmen to get together and to strike for their rights; that if all the unions and trades would strike while the United States was at war they could get anything they wanted." Count 3 charges that the statements were made with intent to urge and incite a curtailment of production by the United States of things and products essential to the prosecution of the war. Count 4 charges that the statements were willfully and knowingly made with intent to incite, encourage, and provoke resistance to the United States and to promote the success of its enemies in time of war. Count 5 charges that the statements were willfully and knowingly made with intent to support and favor the cause of a country with which the United States was then at war and to oppose the cause of the United States therein.

James E. Fenton, of Portland, Or., for plaintiff in error. Bert E. Haney, U. S. Atty., and John C. Veatch, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT and HUNT, Circuit Judges, and RUDKIN, District Judge.

HUNT, Circuit Judge (after stating the facts as above). [1] It is contended that the indictment was insufficient, in that "the alleged libelous matter must be set out according to its tenor, and not according to its substance and effect." If the indictment under consideration were for libel, such a position would require consideration; but where the charge is the willful and intentional doing of certain acts by making certain statements with certain intentions, and the acts are made criminal by statute, an indictment which follows the language of the statute, and gives a statement of facts and circumstances sufficient to identify the acts charged as an offense, is good. Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; Rhuberg v. United States, 255 Fed. 865, — C. C. A. —.

wherein the court said that evidence had been introduced for the purpose of showing that defendant was connected in some way with the I. W. W., and told the jury that such testimony should be considered, but that such evidence was offered for the purpose of showing the bent of the defendant's mind, or his attitude of mind—whether or not he was in sympathy with the government of the United States or opposed to it, whether he was in sympathy with Germany and desirous that Germany should succeed in the war rather than the United States.

To such directions the court added the following:

"The I. W. W. is a disloyal and unpatriotic organization. Adherents thereof owe no allegiance to any organized government, and so far as the government is concerned the organization itself is thoroughly bad."

Defendant testified that about a year previous he had been connected with the I. W. W., but was not affiliated with it at the time of the trial; that he had never been opposed to the United States or its laws; that he had bought \$200 of Liberty Bonds, and that he had not read any of the pamphlets and books found in his room.

The positive instruction that the I. W. W. is a disloyal and unpatriotic organization, and that adherents thereof owe no allegiance to any organized government, must have been based upon the contents of certain pamphlets in evidence, and which were found in defendant's room. Of the two pamphlets which seem material, one is entitled "Preamble and Constitution of the Industrial Workers of the World." Among other matters the preamble asserts:

"The working class and the employing class have nothing in common. There can be no peace, so long as hunger and want are found among millions of working people, and the few, who make up the employing class, have all the good things of life. * * * Instead of the conservative motto, 'A fair day's wages for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.' It is the historic mission of the working class to do away with capitalism. The army of production must be organized, not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old."

The constitution itself pertains to the composition of the organization as of "actual wage-workers," brought together in an organization "embodying Industrial Departments" and unions, and contains, among "Resolutions," the following:

"Whereas, The primary object of the Industrial Workers of the World is to unite the workers on the industrial battlefield; and whereas, organization in any sense implies discipline, through the subordination of parts to the whole, and of the individual member to the body of which he is a part: Therefore be it resolved, that to the end of promoting industrial unity, and of securing necessary discipline within the organization, the I. W. W. refuses all alliances, direct or indirect, with existing political parties or antipolitical sects, and disclaims responsibility for any individual opinion or act which may be at variance with the purposes herein expressed."

The other pamphlet is a translation of an article entitled "The Revolutionary I. W. W., by Grover H. Perry." While there is no evidence at all as to who Grover H. Perry was, or whether he was authorized to write or speak for the order, or to announce its aims, the imprint indicates that the pamphlet was put out under the auspices of the I. W. W. organization, and we hold it was properly admitted in evidence as bearing upon the character and aims of the I. W. W. organization. State v. Lowery (Wash.) 177 Pac. 355. The pamphlet defines the I. W. W. organization as a "labor union that aspires to be the future society," sets forth the "interests in common" of all workers and the power that the I. W. W. would have if, when a strike is called, a whole industry could be paralyzed, and thus an employer "would be forced to accede to the demands of the workers. That is the way the I. W. W. proposes to organize." Further along we find this language:

"The Industrial Workers of the World is an international movement; not merely an American movement. We are 'patriotic' for our class, the working class. We realize that as workers we have no country. The flags and symbols that once meant great things to us have been seized by our employers. To-day they mean naught to us but oppression and tyranny. As long as we quarrel among ourselves over differences of nationality, we weaken our cause; we defeat our own purpose. The practice of some craft unions is to bar men because of nationality or race. * * *

"Organizing a New Social System.—The I. W. W. is fast approaching the stage where it can accomplish its mission. This mission is revolutionary in character. The preamble of the I. W. W. constitution says in part: 'By organizing industrially we are forming the structure of the new society within the shell of the old.' That is the crux of the I. W. W. position. We are not satisfied with a fair day's wages for a fair day's work. Such a thing is impossible. Labor produces all wealth. Labor is therefore entitled to all wealth. We are going to do away with capitalism, by taking possession of the land and the machinery of production. We don't intent to buy them, either."

If the preamble and constitution of the organization are correctly expounded by the Perry pamphlet, the flag of the nation means only "oppression" and "tyranny," and the "mission" and purposes of the I. W. W. organization are to be accomplished by force, violence, and other unlawful means. Of course, where it is proven that an organization has such purposes, it should be held to be disloyal and unpatriotic. But without some further evidence to show that the pamphlet was issued by some one whose position in the order was such that the writing should be regarded as an authoritative statement of the attitude of

the organization as a whole toward the government of the United States, rather than the expression of the individual views of a member of the association, we are not satisfied that it justified the conclusion that, as a matter of law, the organization is disloyal and unpatriotic, and that its adherents owe no allegiance to any organized government.

In our opinion the evidence was of sufficient strength to go to the jury, but not to warrant a conclusive determination by the court. True, the court told the jury that, even if defendant did belong to the I. W. W., that of itself would not condemn him under the charge. But we are not satisfied that this qualification could relieve defendant of the feeling, and especially in time of war, that naturally must have arisen in the minds of the jury by the declaration of the court that the organization to which he admitted he had once belonged was disloyal and unpatriotic, and that adherents of it owed no obligation to the government.

The judgment is reversed, and the cause is remanded, with directions

to grant defendant a new trial.

EQUI v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3328.

1. Indictment and information \$\informaller{1}30\top-Espionage Act.

An indictment charging different offenses in violation of Espionage Act, § 3, as amended by Act May 16, 1918, c. 75, § 1 (Comp. St. 1918, § 10212c), in separate counts, held sufficient.

2. Constitutional Law & 90—Freedom of speech; Espionage Act.

The Espionage Act held not unconstitutional, as abridging the freedom of speech.

3. Army and navy \$\iff 40\$—Espionage Act; evidence of former utterances. On trial of defendant for violation of Espionage Act, \sqrt{3} (Comp. St. 1918, \sqrt{10212c}), by making public statements which were disloyal and intended to obstruct recruiting, incite resistance to the United States, and promote the cause of its enemies, statements made in speeches by defendant prior to the passage of the act held admissible on the question of purpose and intent, where properly limited.

In Error to the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Criminal prosecution by the United States against Marie Equi. Judgment of conviction, and defendant brings error. Affirmed.

The indictment in this case charges a violation of section 3 of Espionage Act June 15, 1917, c. 30, tit. 1, 40 Stat. 219, as amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c). In general terms the charge is that the plaintiff in error on June 27, 1918, while the United States was at war with the Imperial German government, at a public meeting in a hall of the Industrial Workers of the World in the city of Portland, state of Oregon, in the presence of certain persons named and a large number of other persons to the grand jurors unknown, did willfully, knowingly, unlawfully, and feloniously state in substance and to the effect as follows, to wit:

"(1) That she (meaning the said defendant) and all of her fellow workers (meaning the members of the Industrial Workers of the World) were not fighting for the flag containing the red, white and blue, nor the British flag, nor for a flag of any country, but that the fellow workers and the I. W. W. platform (meaning the members and platform of the Industrial Workers or the World) stood for the industrial flag, the red banner that stood for the blood of the Industrial Workers.

"(2) That the ruling class had been in power long enough, with the law and the army and navy behind them, and that they (meaning the members of the Industrial Workers of the World) knew that there were fellow workers pulled into the army against their wills, and were placed in the trenches to

fight their own brothers and relatives.

"(3) That the members of the Industrial Workers of the World were clean

fighters, and not like the dirty, corruptible scum of the army and navy.

"(4) That it was against the I. W. W. platform (meaning the platform of the Industrial Workers of the World) to injure or kill another fellow worker, but if it was necessary to do this, to gain their rights, that she for one, and every man or woman packing a red card (meaning a membership card in the Industrial Workers of the World) would be willing to sacrifice all they had, their life, if need be, for the cause of industrial freedom.

"(5) That the Irish revolutionists now had a chance to throw off their master (meaning the kingdom of Great Britain and Ireland), while he was weak and mable to stop them, and that the Irish were taking advantage of this condition, and were asserting their rights, and that the I. W. W.'s (meaning the members of the Industrial Workers of the World) should do likewise."

The indictment contains eight counts in all, but a verdict of not guilty was directed by the court as to counts 1, 4 and 8. The second count charges that the foregoing statements were calculated to and intended to cause and attempt to cause, incite and attempt to incite, insubordination, disloyalty, mutiny, and refusal of duty within and among the military and naval forces of the United States. The third count charges that the statements were made with intent to prevent, hinder, delay, and obstruct, and attempt to obstruct, the recruiting and enlistment service of the United States. The fifth count charges that the statements were made, and consisted of disloyal, profane, scurrilous, and abusive language about the military and naval forces of the United States, and were made with intent, and were calculated to and intended to bring the military and naval forces of the United States into contempt, scorn, contumely, and disrespect. The sixth count charges the same with reference to the flag, while the seventh count charges that the language was calculated and intended to incite, provoke, and encourage resistance to the United States, and to promote the cause of its enemies.

The jury returned a verdict of guilty as to counts 2, 3, 5, 6, and 7, and the present writ of error was sued out to reverse the judgment and sentence

which followed the verdict.

James E. Fenton, of Portland, Or., and George F. Vanderveer, of Seattle, Wash. (C. E. S. Wood, of Portland, Or., of counsel), for plaintiff in error.

Bert E. Haney, U. S. Atty., and Barnett H. Goldstein, Asst. U. S. Atty., both of Portland, Or.

Before MORROW and HUNT, Circuit Judges, and RUDKIN, District Judge.

RUDKIN, District Judge (after stating the facts as above). While a considerable number of errors have been assigned, they all go either to the sufficiency or form of the indictment, or to the competency of certain testimony admitted by the court over the objection of the plaintiff in error. The objections to the indictment are threefold: First,

because the crime defined by the Espionage Act is analogous to the crime of libel, and the indictment under consideration does not conform to legal requirements in such cases; second, because the several counts of the indictment are duplicitous; and, third, because the Es-

pionage Act itself is unconstitutional and void.

[1] The distinction between the crime of libel and the crime defined by the Espionage Act was pointed out by this court in the recent case of Kumpula v. United States, 261 Fed. 49, — C. C. A. —, where a similar indictment was upheld. The charge of duplicity is not discussed in the brief, and the indictment seems to conform to common usage in such cases. It charges the willful use of language well calculated to produce the different results condemned by the statute; it informs the defendant of the nature of the accusation against her; it is sufficiently definite to enable her to take advantage of a former conviction or acquittal, and to enable the court to determine whether the facts charged, if proved, constitute a crime under the law. More than this the law does not require.

[2] The validity of the Espionage Act is assailed upon two grounds: First, because the crime there defined is treasonable, and is punishable as treason, or not at all, under section 3 of article 3 of the Constitution of the United States; and, second, because it is violative of article 1 of the Amendments to the Constitution of the United States, in that it abridges the freedom of speech and of the press. These criticisms are fully answered by recent decisions of the Supreme Court of the

United States.

In Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561, the court said:

"Some reference was made in the proceedings and in argument to the provision in the Constitution concerning treason, and it was suggested on the one hand that some of the matters dealt with in the act of 1917 were treasonable, and punishable as treason, or not at all, and, on the other, that the acts complained of not being treason could not be punished. These suggestions seem to us to need no more than to be stated."

In Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 249, 63 L. Ed. 470. the court said:

"We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. Akins v. Wisconsin, 195 U. S. 194, 205, 206, 25 Sup. Ct. 9, 49 L. Ed. 147. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

So in the Debs Case, 249 U. S. 211, 39 Sup. St. 252, 63 L. Ed. —, the court said:

"The main theme of the speech was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service, and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech."

The general government has full power to declare war and raise armies, and it has every power necessary and appropriate to carry these express powers to a successful issue, and to deny to it the power to prohibit acts which directly interfere with the operation of the government in raising armies and in prosecuting the war is to deny to it one of the most common and ordinary attributes of sovereignty.

[3] The court admitted testimony tending to show the import of speeches and declarations made by the plaintiff in error in the city of Portland prior to the date in question and prior to the passage of the act under which the indictment was returned. The reason for admitting this class of testimony was thus explained by the court:

"Evidence has been received, also, of things claimed to have been done and said by her on still other occasions. All this evidence, as I have stated to you and now repeat, was admitted solely for one purpose, namely, that you might determine therefrom, and from the other evidence on the point, what defendant's purpose or intent was in making the statements imputed to her in the indictment, in the event that you find such statements were actually made."

Counsel earnestly insisted that this ruling was erroneous, for the reason that an illegal intent can never be inferred from a legal act. This argument is based upon the ground that the prior statements and declarations of the accused were made at a time when such statements and declarations were not prohibited by law, and therefore the testimony was incompetent. This objection has also been answered by this court in Rhuberg v. United States, 255 Fed. 865, — C. C. A. —. Similar testimony was there admitted, and its application similarly restricted by the court, and in passing upon the objection this court said:

"This evidence of statements of the defendant made prior to the entry of the United States into the war, thus restricted and limited by the court, was clearly admissible under a well-known rule of evidence upon that subject."

The theory upon which such testimony is admissible is that—

"A repetition of acts of the same character naturally indicates the same purpose in all of them; and if, when considered together, they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act." New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997.

While the statements and declarations made by the plaintiff in error prior to the passage of the act under which the indictment was returned were not criminal, it was nevertheless competent for her at that time to oppose the war, and commit every act which was later prohibited, and

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her intent and purpose did not depend in the slightest degree upon the state of the law at the time of her several utterances.

This disposes of all the assignments we deem worthy of notice, and,

finding no error in the record, the judgment is affirmed.

COMPANIA ANONIMA MARITIMA UNION v. STRACHAN SHIPPING CO.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1919. Rehearing Denied December 6, 1919.)

No. 3357.

1. Shipping 39—Charter party; construction of cesser clause.

A charter party containing a cesser clause is to be so construed, it possible, as not to have the effect of terminating the charterer's liability to the shipowner for breach of a provision which is not left or made enforceable against the cargo or a person or thing other than the charterer.

2. Shipping \$\instruction\$ 177—Demurrage; construction of cesser clause in Charter party.

Though the cesser clause of a charter party found in the printed provisions declared that on shipments of cargo and acceptance by the master, and on settlement of dead freight, if any, or any freight not represented by bills of lading, the charterer shall be deemed to have fulfilled the charter party, etc., held that, where the charterer did not have the cargo discharged at destination within the period fixed by a written provision of the charter party, the written provision prevalls over the cesser clause, under the rule that, where there is a repugnancy between written and printed provisions of a contract, the writing will prevail; hence the charterer was liable for the delay.

3. Shipping \$\infty\$177-Demurrage; delay in unloading.

Where a charter party fixed a reasonable time for discharge of cargo, the charterer is liable for failure to discharge the cargo within that time, it having failed to provide a berth as required by the charter party, notwithstanding the charter party provided that the master of the vessel should pay the stevedore selected by the charterer.

4. Shipping \$\infty\$177-Demurrage; delay in unloading.

Where a charterer failed to discharge cargo within the time fixed by the charter party, and the owner of the vessel thus lost profits, the charterer is liable in damages to the owner.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Libel by the Compania Anonima Maritima Union against the Strachan Shipping Company. From a decree dismissing the libel, libelant appeals. Reversed.

A libel in personam was filed by the appellant, the owner of the steamship Jupiter, against the appellee, the charterer of that ship, for the carriage or cargo from Savannah and Charleston to Barcelona and Genoa, one or both. The libel was for the recovery of damages claimed to have been sustained by the libelant in consequence of the alleged wrongful detention of the vessel for the space of 51 days over and above the time allowed for discharging the cargo at Genoa. The charter party was made an exhibit to the libel. It was averred that part of it was printed, and that the following clause of it was written and not printed: "If full cargo shipped to Genoa, fourteen (14) running days (Sundays and holidays excepted), to be allowed for discharging.

Part cargo proportionate time—time counting on her arrival off port, berthed or not, any custom of the port to the contrary notwithstanding."

Among the printed provisions of the charter party are the following: "And having arrived at the port or ports of discharge as ordered, or so near thereto as she may safely get, shall then deliver the same, in such docks, places, anchorages, or alongside such wharves as the charterers may appoint, and when she can tie safely afloat, agreeably to bills of lading, on being paid freight, in full of all port charges and pilotage, etc. * * The captain shall sign bills full of all port charges and pilotage, etc. * * * The captain shall sign bills of lading as and when presented * * * without prejudice to this charter the said steamship to be discharged with all possible disparty, patch according to the custom of the port of discharge. * owners shall have a lien on the cargo for all freight, detention, demurrage and dead freight, if any, but upon shipment of the cargo and acceptance by the master, and on settlement of dead freight, if any, or of any freight not represented by bills of lading, and of demurrage if any at port of loading, charterers shall be deemed to have fulfilled this charter party, and shall be under no liability thereafter, under any provisions thereof, for any matters, past or future, or for any loss, damage or other claim of breach of charter party,

* * * charterers to have the right of nominating a stevedore for discharging the cargo at port or ports of discharge, but the stevedore to be employed and paid by the owners at not exceeding current rates."

The printed part of the charter party contained provisions for the freight being collected by the agents of the charterer; it being agreed that the vessel should be consigned to said agents. It was alleged that the charterers refused, when demanded by the master, to incorporate into bills of lading signed by them the conditions of the charter party, and signed "clean bills of lading," under which there was no lien on cargo for loss or damage resulting from the alleged wrongful detention of the vessel at Genoa. It was averred that after discharging as ordered the part of the cargo which was consigned to Barcelona, the ship, on March 13, 1915, proceeded to the port of Genoa, and arrived off the port and in the outer harbor of Genoa on March 14, 1915; that without fault or remissness on the part of the libelant, respondent by its own fault failed to provide and appoint docks, places, or anchorages where the ship could deliver and discharge the part of the cargo consigned to Genoa, that part being two-thirds of the entire cargo, until the 27th day of April, 1915, when the discharging first commenced, it not being finished until May 17, 1915, whereby the ship was detained for the space of 51 days over and above the time allowed for discharging cargo at Genoa, and that by such detention the libelant lost the earnings of said ship for 51 days, was prevented from filling other contracts of affreightment then existing, and lost the use of the ship in making other voyages and earning freight, to the damage of the libelant in the sum of \$46,313.96.

The appellee excepted to the libel on the following ground, among others: "The said libel does not set forth any cause of action against this respondent." The court dismissed the libel "as being insufficient in law to state a case against respondent." The appeal is from the decree to that effect.

George T. Cann, of Savannah, Ga., for appellant.

Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge (after stating the facts as above). The action of the court in dismissing the libel is shown by the opinion rendered to have been the result of the conclusion reached that the libelant was deprived of any right to recover for a breach of the above-quoted written clause of the charter party by the provision of the above-quoted printed clause, commonly called the cesser clause, that:

"Upon shipment of the cargo and acceptance by the master, and on settlement of dead freight, if any, or of any freight not represented by bills of lading, and of demurrage, if any, at port of lading, charterers shall be deemed to have fulfilled this charter party, and shall be under no liability thereafter, under any provision hereof, for any matters, past or future, or for any loss, damage, or other claim of breach of charter party."

[1] The cesser clause now in question differs from such clauses involved in reported cases to be referred to in that it expressly provides for the termination of the charterer's liability:

"Upon shipment of the cargo and acceptance by the master, and on settlement of dead freight, if any, or of any freight not represented by bills of lading, and of demurrage, if any, at port of loading"

—without the shipowner being given any other means, in lieu of the lien on cargo which it had before, of securing indemnity for breaches of provisions of the charter party which could not be performed, and could not even be entered upon, until after the ship left the loading port. It is settled that a charter party containing a cesser clause is to be so construed, if possible, as not to have the effect of terminating the charterer's liability to the shipowner for the breach of a provision which is not left or made enforceable by the shipowner against the cargo, or a person or thing other than the charterer. Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106. The charter party under consideration in the case cited contained the following:

"Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage. Charterers' responsibility to cease when vessel is loaded and bills of lading are signed."

The bills of lading signed gave no lien for demurrage at the discharging port. It was held that the cesser clause there in question did not, under the circumstances stated, relieve the charterers from liability for the demurrage incurred at the discharging port. In the opinion in that case it was said:

"The charter party, like many mercantile instruments in common use, is drawn up in brief and disjointed sentences, and must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause, taken by itself."

Following that statement was an approving reference to the decisions in the cases of Clink v. Radford, [1891] 1 Q. B. 625, and Hansen v. Harrold, [1894] 1 Q. B. 612, and the opinion quoted as follows from the opinions rendered in the first mentioned of those two cases:

"In Clink v. Radford, Lord Esher said: 'In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract.' Lord Justice Bowen said: 'There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally

come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility, which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability. And Lord Justice Fry added: "The rule that we are prima facte to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this: That the two are to be read, if possible, as coextensive. If that were not so, we should have this extraordinary result: There would be a clause in the charter party the breach of which would create a legal liability, there would then be a cesser clause destroying that liability, and there would then come a lien clause which did not recreate that liability in anybody else." [1891] 1 Q. B. 627, 629, 632.

Under the above-stated rules for construing charter parties, it is questionable whether, in the absence of a circumstance to be mentioned, the literal meaning of the clause providing for a cesser of the charterer's liability to the shipowner would be followed, when to do so would result, in situations likely to arise, in depriving the shipowner of any benefit from such a provision as the one specifying the time allowed to the charterer for discharging cargo at its destination. It well might be inferred that it was contemplated that the expressed intent of the parties in reference to such a matter as the one dealt with in the last-mentioned provision would prevail over an inconsistent intent expressed by the broad general terms of the charter party's cesser clause, and that it was not intended that the ship-owner was to relinquish all benefit of the stipulation as to discharging cargo without being compensated in some way for doing so.

[2] But the contention urged in behalf of the appellee that, in the circumstances disclosed, the printed cesser clause has the effect of depriving the appellant, the shipowner, of any remedy at all for a breach of the above-quoted written provision of the charter party cannot be sustained without a disregard of the well-settled rule that, if there is repugnancy between the printed and written provisions of a contract, the writing will prevail, on the ground that presumably it expresses the specific and paramount intention of the parties. Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845; Hagan v. Scottish Ins. Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229. The last-cited case involved a marine insurance policy made out by using a blank printed form and adding provisions in writing. It was said in the opinion in that case:

"Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application."

If the cesser clause now in question is given the effect of terminating all liability of the charterer "upon shipment of the cargo and acceptance by the master, and on settlement of dead freight, if any, or of any freight not represented by bills of lading, and of demurrage, if any, at port of loading," the result would be, on the happening at the

port of loading of things which well might be expected to happen, to make the written clause specifying the time allowed for discharging cargo at Genoa a promise which the charterer with impunity could fail or refuse to comply with; the shipowner being left without any remedy for the breach. The incorporation of the cesser clause in the printed charter party form was unaccompanied by any intention to affect the charterer's liability for a breach of a provision specifying the time allowed for discharging cargo, as the latter provision was not part of the printed form, but was added in writing. It cannot be supposed that the parties contemplated that that provision could be breached wrongfully without any enforceable liability to the shipowner being incurred.

Nor can it be supposed that the provision would have been inserted, if the parties had had it in mind that the shipowner would be deprived of the benefit of it upon the happening at the port of loading of the things to which the terms of the printed cesser clause give the effect of terminating all liability of the charterer under the charter party, without there being any substitution of liability and without the shipowner being compensated for the loss of the benefit of the written provision. So to suppose would involve the conclusion or assumption that the parties in writing inserted a provision, a breach of which would create a legal liability in favor of the shipowner against the charterer, and intended that, under a printed provision of the contract, all liability of the charterer for the breach would be destroyed by the happening at the port of loading of things such as might be expected to happen there in the ordinary course of events, and the happening of which would have no relation to or bearing upon the matter dealt with in the written provision. If controlling effect is given to the cesser clause, the written provision is rendered substantially useless, in a situation which the parties must have contemplated as likely to arise. Under the circumstances disclosed effect cannot be given to both the written provision in question and the printed cesser clause. The two provisions are repugnant, if the latter is given the literal meaning expressed by its words. That being so, the written provision prevails.

[3] The obligation imposed on the charterer by the written provision that the cargo be discharged within the time stated was not affected by the provision which gave the charterer the right of nominating a stevedore for discharging the cargo at a port of discharge, the stevedore so nominated to be employed and paid by the shipowner. When under a charter party it is incumbent on the charterer to provide a berth for the ship at the port of discharge, and to discharge the cargo within a stated time, and delay in discharging cargo is due to the charterer's breach of those obligations, a detention of the vessel due to such causes is made none the less chargeable against the charterer by the fact that the shipowner employs and pays the stevedore nominated by the charterer for discharging cargo. The fact that the master employs and pays the stevedore nominated by the charterer does not stand in the way of delays in getting the vessel berthed and in discharging the cargo being chargeable against the charterer. Pos-

sible controversy as to what is a reasonable time for discharging cargo is avoided by specifying the number of days allowed the charterer for

discharging.

[4] The averments of the libel show that the charterer was at fault in delaying to provide a berth for the ship at Genoa, and in taking greatly more time than was allowed for discharging cargo shipped to that port, and that the detention of the ship thereby caused resulted in financial loss to the libelant. If the libel's averments of damage were not sufficiently definite to disclose how the loss alleged was caused by the breach of duty complained of, as suggested in grounds of exception which were not ruled on, the defect was one which was curable by amendment. Where the averments of a libel in admiralty show, with reasonable certainty, the existence of a legal duty owing to the libelant, a default therein, and consequent injury, it should not be dismissed on the ground that it does not disclose a cause of action. Loss of profits, or of the use of a ship, caused by its detention at the port of discharge, due to the fault of the charterer, gives a right of action to the shipowner. The Conqueror, 166 U.S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; The El Monte, 252 Fed. 59, 164 C. C. A. 171. As the averments of the libel here in question show the existence of such a cause of action in the libelant, it was not subject to be dismissed on the ground on which it was dismissed, without an opportunity being given to cure amendable defects it may have had.

From what has been said, it follows that the decree appealed from

was erroneous. That decree is reversed.

In re WESTERN CONDENSED MILK CO.*

WILSON v. BENHAM et al.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3356.

BANKRUPTCY \$\iff 350\)—Priorities; Given preference under state statutes. Claims of laborers, filed and allowed as preferred debts by a state court under L. O. L. \\$ 7435, against a corporation under receivership, held entitled to priority on the subsequent bankruptcy of the corporation by virtue of Bankruptcy Act July 1, 1898, \\$ 64b, cl. 5 (Comp. St. \\$ 9648), as debts given priority by the laws of the state, although the services were rendered more than three months prior to the bankruptcy.

Petition for Revision of Proceedings of the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

In the matter of the Western Condensed Milk Company, bankrupt. On petition of James G. Wilson, trustee, to revise an order allowing claims of A. J. Benham and others as preferred debts. Affirmed.

George B. Guthrie, of Portland, Or., for petitioner.

O. A. Neal, of Portland, Or., for respondent.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

(261 F.)

HUNT, Circuit Judge. Petition for the revision of an order of the District Court made under the provisions of section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. § 9608]). The facts are as follows:

More than 90 days before the adjudication in bankruptcy the affairs of the bankrupt milk company, a corporation, were in the hands of a receiver appointed by a state court in Oregon in a suit pending in the state court. In that proceeding Benham, respondent herein, and others who were labor claimants, within the time allowed by the statute of the state, filed their several claims for priority of payment for their labor and services rendered to the bankrupt corporation within 90 days immediately preceding the appointment of the receiver. objection was made, and the claims were approved by the state court pursuant to the provisions of section 7435 of the laws of Oregon. That section, so far as material, provides that, when the business or property of a corporation shall be placed in the hands of a receiver, then the debts owing to laborers or employés which have accrued by reason of their labor or employment to an amount not exceeding \$100 to each employé, for work or labor performed within 90 days next preceding the seizure or transfer or assignment of such property, shall be considered and treated as preferred debts, and such laborers or employés shall be considered and treated as preferred creditors and shall first be paid in full, but if there be not sufficient to pay them in full, then the same shall be paid pro rata after paying costs.

On July 26, 1918, the corporation was adjudged a bankrupt in the United States Court in Oregon and Wilson was duly appointed trustee.

Section 64b of the Bankruptcy Act (Comp. St. § 9648) provides that: "Debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be * * * (4) wages due to workmen, clerks, traveling or city salesmen or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who, by the laws of the states or the United States, is entitled to priority."

After bankruptcy proceedings were instituted, the trustee objected to paying him, on the ground that Benham was not entitled to preference, because the labor which he had performed had not been done within 90 days prior to the commencement of the proceedings in bankruptcy. The referee in bankruptcy ruled against Benham's claim of preference. Upon petition to review, the District Court reversed the order of the referee and sustained the claim of Benham. By stipulation it is agreed that there are claims of certain other creditors involving issues like those presented by the claim of Benham.

The labor claimants interested in the present proceeding having filed their claims as required by the statute of Oregon (section 7435, Lord's Oregon Laws) with the receiver appointed by the state court and within the time required, their claims were properly allowed by the circuit court of the state, and under section 7437 of the Oregon statutes the claimants were entitled to priority of payment over other creditors. The section just cited expressly provides that no attachment or execution shall be discharged, and no seizure or sale of prop-

erty seized shall be abandoned, and no assignee or receiver shall be discharged until every claimant presenting his claim under the act of which section 7437 is part shall have been paid in full or pro rata as provided in the Act, or shall have consented to discharge or abandonment.

The claimants, therefore, having held claims which were entitled to priority of payment under the laws of Oregon, should the federal court deny their claims to such priority because, after a period of more than 90 days had elapsed from the time the labor claimants had performed the work or labor for which they filed their claims with the receiver appointed by the state court, the corporation was adjudged a bankrupt under the Bankrupt Act? The cases are not of one accord upon the point. In the Matter of Bennett, 153 Fed. 673, 82 C. C. A. 531, the Court of Appeals for the Sixth Circuit considered whether the claims of appellees, who were materialmen, against a bankrupt estate, were entitled to priority under section 64b (5) of the Bankruptcy Act. The claims were held to be entitled to priority under the statutes of Kentucky. The court, through Judge Lurton, said:

"If under section 2487, Ky. St. 1903, a priority is accorded to claims of creditors of such companies as the bankrupt corporation for materials and supplies furnished to carry on the business of the bankrupt, is that right of priority lost by reason of the operation of the bankrupt law? It is not a question as to whether the bankrupt law is a law superior within its field to a state law in the same field, but a question whether a priority given is preserved by the bankrupt law. This is answered by section 64b (5) of the Bankruptcy Act. That provides that 'debts owing to any person who by the laws of the state or of the United States is entitled to priority' shall be entitled to priority in the distribution of the bankrupt's general estate. It is idle to consider whether a state law can of its own force determine priority under a national bankrupt law. No such contention is made or could be sustained. But it is another thing when the national bankrupt law prescribes that effect shall be given to state laws which do give priority to certain debts. Congress might have dictated a single and uniform rule of distribution. If it had, that would have been the absolute law, notwithstanding state laws prescribing a different rule. But Congress has elected to prescribe as one rule of distribution that debts entitled to priority under any state law or law of the United States shall be accorded a like priority in the distribution of a bankrupt's estate. The law which we administer is thus the national bankrupt law; that is, the preference in bankruptcy, thus accorded, is a preference prescribed by the bankrupt law which for this purpose adopts the law of the state as the applicable federal law. This is the view which has been taken by many careful judges and accords with our own view.'

In Globe Bank v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, the Supreme Court referred approvingly to the opinion of Judge Lurton in Re Bennett, and to the opinion of Judge Day in Re Laird, 109 Fed. 550, 48 C. C. A. 538, as recognizing that the purpose of Congress in passing section 64b was to maintain statutory liens and preferences in appropriate cases in the distribution of the bankrupt's estate.

The Laird Case, supra, was quite like the one at bar. Certain labor claimants filed their claims for labor performed for the bankrupt company within three months preceding the appointment of a receiver in the state court. Thereafter the company was adjudicated a bankrupt in the federal court. Laird filed his claim in bankruptcy as a

preferred claim after the expiration of three months subsequent to the time of the performance of the labor. Objections were based upon the ground that he was not a preferred creditor under the provisions of the Bankruptcy Act. The United States District Court held that the labor claims were not preferred, but the Court of Appeals reversed the ruling of the District Court, and after construing the statute of Ohio, which gave to the laborers a lien upon the real property of their employers for their labor, discussed the effect of the petition in bankruptcy, and held that upon the facts disclosed a lien was created under the state statute in favor of the labor claimants which was not divested by the proceeding in bankruptcy, and that the lien should be recognized and enforced in the bankruptcy court and that where the lien attached before the fund was turned over to the bankruptcy court and was one not avoided by the Bankruptcy Act, it would be respected although it might have arisen under a state statute.

Falconio v. Larsen, 31 Or. 144, 48 Pac. 703, 37 L. R. A. 254, is cited by the appellant as holding that under the statute of Oregon no lien is given upon the property itself, but that the creditor is merely given the status of a preferred creditor. The question before the court there was the right to assign a labor claim and whether the assignee could maintain an action in his own name on a claim which had been objected to. It was in the discussion of this question that the Supreme Court of the state said that the enactment did not create a lien, but invested the laborer with the rights and privileges incident to the relation of preferred creditor and directs the order of his payment out of a fund which is already in the custody of the law, for the purpose of administration in subordination to its rules and regulations. We do not regard the case as in conflict with the doctrine of the federal cases which we have cited.

Our conclusion is that the just construction of the Bankruptcy Act is that Congress, by adding to section 64b, clause 5, protected priorities recognized under the laws of the state, as well as those recognized under the laws of the United States, and, as Judge Lurton, for the Court of Appeals in the Bennett Case, said, referring to section 64b clause 5, of the Bankruptcy Act:

"That provides that 'debts owing to any person who by the laws of the state or of the United States is entitled to priority in the distribution of a bankrupt's general estate."

The order under review is affirmed.

CUDAHY PACKING CO. v. FREY & SON, Inc. (Circuit Court of Appeals, Fourth Circuit. July 16, 1919.) No. 1571.

Monopolies �⇒17(2)—Manufacturer's fixing of resale price.

Manufacturer's announcement in advance that customers were expected to charge the price fixed by it, and that penalty for refusal to maintain price would be refusal to sell to the offending customer, observance of the request to maintain price by customers generally, and the actual enforcement of the penalty by refusing to sell to a customer failing to maintain the price, does not constitute a violation of the statutes against monopolies.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by Frey & Son, Incorporated, against the Cudahy Packing Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

See, also, 243 Fed. 205.

Gilbert H. Montague, of New York City (Joseph W. Goodwin, of New York City, and Thomas Creigh, of Chicago, Ill., on the brief), for plaintiff in error.

Charles Markell and Horace T. Smith, both of Baltimore, Md. (Daniel W. Baker, of Washington, D. C., on the brief), for defendant in error.

Charles E. Hughes, Charles Wesley Dunn, and Mason Trowbridge, all of New York City, for Colgate & Co., as amici curiæ.

Henry S. Mitchell, Sp. Asst. Atty. Gen. (G. Carroll Todd, Asst. Atty. Gen., on the brief), for the United States, as amici curiæ.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this action for damages under the federal statute forbidding combinations and discrimination in restraint of trade the District Judge refused to direct a verdict for the defendant and the plaintiff recovered judgment. Exceptions were taken at almost every step of the trial; but the vital question on which all others turn is whether the testimony, viewed most favorably to plaintiff, tended to prove an unlawful combination or unlawful discrimination to which the defendant was a party. There was a mass of testimony and a great number of objections to its introduction, and the case comes here on 141 assignments of error covering 85 pages of the record; but there was so little real conflict in the testimony on the vital issue that, except on the measure of damages, the case might well have been tried without prejudice on the following as an agreed statement of facts:

The defendant manufactured and sold Old Dutch Cleanser, and developed a large trade in that article by extensive advertisements in newspapers and magazines and by circulars and solicitors. Considering the maintenance of a fixed price necessary to an adequate profit, defendant adopted the following means of promoting sales and maintaining the wholesale price: It sold only to jobbers and wholesalers who were expected to sell only to retailers. Soliciting agents were sent to retail merchants, and orders taken from them at the list price, to be transmitted to any jobber that the retailer named of the jobbers to whom the defendant was selling. These jobbers selected by defendant, though called distributing agents, were purchasers to whom defendant sold at a fixed deduction or discount from the list price. This discount was intended as the jobber's profit. By circulars and personal interviews jobbers were insistently exhorted to maintain the fixed prices

in their own interest and that of the defendant. The jobbers knew they were expected to maintain the prices fixed by the defendant and that they were liable to be cut off if they refused. There was occasional underselling by dealers, and perhaps occasional disregard by the defendant of isolated acts of underselling. But the plan of the defendant was generally acquiesced in by jobbers, and its requests or demands that the prices be maintained were generally complied with. There was no formal written or oral agreement with jobbers for the maintenance of prices.

The plaintiff was a jobber on defendant's list of "distributing agents," who had a considerable trade in Old Dutch Cleanser. Believing that by the elimination of certain expenses usually incident to the wholesale business, it could afford to sell Old Dutch Cleanser at less than the price enjoined by defendant, plaintiff reduced the price below that fixed by defendant. For that reason the defendant refused to sell plaintiff at its usual discount from the list price, thus cutting off its business by making it impossible for it to compete with other jobbers at

a profit.

The vital question is whether defendant's method of business, coupled with the acquiescence of its customers therein by observing its requests or demands to maintain prices, was such co-operation between seller and purchasers as amounted to a combination in restraint of trade within the rule laid down in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and other following cases. We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in United States of America v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992. decided June 2, 1919. The court expressly held that the announcement in advance that customers were expected to charge a price fixed by the seller and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to maintain the price, did not constitute a violation of the trust statute. Nothing more was done by the defendant and its customers in this case.

Since the defendant, under the Colgate Case, merely exercised the right reserved by the Clayton Act (Act Cong. Oct. 15, 1914, c. 323, § 2, 38 Stat. 730 [Comp. St. § 8835b]) to dealers of "selecting their own customers in bona fide transactions and not in restraint of trade," the plaintiff cannot recover under its charge of unlawful discrimination in price.

Reversed.

WELCH GRAPE JUICE CO. v. FREY & SON, Inc.

(Circuit Court of Appeals, Fourth Circuit. July 16, 1919.)

No. 1561.

In Error to the District Court of the United States for the District of

Maryland, at Baltimore; John C. Rose, Judge.
Action by Frey & Son, Incorporated, against the Welch Grape Juice Company. There was a judgment for plaintiff, and defendant brings error. Re-

Certiorari denied by Supreme Court, 40 Sup. Ct. 56, 251 U. S. --. 64 L.

Charles P. Spooner, of New York City (John Hinkley, of Baltimore, Md., on the brief), for plaintiff in error.

Horace T. Smith and Charles Markell, both of Baltimore, Md. (Daniel W. Baker, of Washington, D. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this action for damages under the federal statutes forbidding combinations and discriminations in restraint of trade, on the first trial the verdict was for the defendant. The judgment was reversed for error in the admission of testimony. 240 Fed. 114, 153 C. C. A. 150. The case is here again on a writ of error from a judgment on the second trial in favor of the plaintiff.

The vital question on which all others turn is whether the testimony, viewed most favorably to plaintiff, tended to prove an unlawful combination or unlawful discrimination against the plaintiff, to which defendant was a party. The facts differ in no essential particular from those in the case of Cudahy Packing Co. v. Frey & Son, 261 Fed. 65, — C. C. A. —, decided this day, and for the reasons stated in the opinion in that case the judgment must be reversed.

LAUGHTER v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. November 11, 1919. Rehearing Denied December 6, 1919.)

No. 3415.

1. Army and navy \$30-Continuance of Selective Service Act in effect AFTER CESSATION OF HOSTILITIES.

The provisions of Selective Service Act, § 12 (Comp. St. 1918, § 2019a), prohibiting the sale of intoxicating liquors at any military station, cantonment, camp, etc., as well as prohibiting the sale of liquors to officers or men in uniform, are not limited to the emergency which called the act into being, but continued in force after the cessation of active hostilities.

2. Indictment INFORMATION \$203-REVERSAL FOR INSUFFICIENT AND COUNTS, WHERE OTHER COUNTS SUPPORT SENTENCE.

Where a conviction on the third and fourth counts of the indictment was sufficient to sustain the sentence imposed, the failure of other counts of the indictment to charge the commission of an offense will not warrant reversal of the judgment rendered.

In Error to the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

Lucian C. Laughter was convicted of violating the Reed Amendment, and he brings error. Affirmed.

Albert J. Baskin, of Ft. Worth, Tex., for plaintiff in error. W. M. Odell, U. S. Atty., of Ft. Worth, Tex., and W. B. Harrell, Asst. U. S. Atty., of Dallas, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. The indictment in this case against the plaintiff in error and another was filed on the 19th day of April, 1919, and contained six counts, the fifth and sixth of which were dismissed on motion of the district attorney. After a severance had been ordered, and a motion of the plaintiff in error to quash the first, second, third, and fourth counts had been overruled, he pleaded guilty to the third and fourth counts, and not guilty to the first and second counts. Following a verdict of guilty on the four counts on which he was tried, he was sentenced to imprisonment in the penitentiary for the term of 15 months.

The first count of the indictment charged a conspiracy to commit an offense under the provision of the act of Congress approved March 3, 1917 (39 Stat. 1069, c. 162 [Comp. St. 1918, § 8739a]), commonly referred to as the Reed Amendment. The second count charged the commission of an offense denounced by that provision. The third count charged that, on or about the 10th day of March, 1919, the persons indicted conspired to transmit, carry, and transport specified alcoholic liquors—

"into and within a certain military zone, five miles around a certain military camp located in Tarrant county, Texas, known and designated as 'Camp Bowie,' at which officers and enlisted men, not less than two hundred and fifty in number, were and had been stationed for more than thirty consecutive days next before said March 10, 1919; said transactions being under such circumstances that same did not come within any of the exceptions or exemptions set out and specified in the act of Congress, approved May 15, 1917, known and referred to as the 'Selective Service Law,' or of any of the regulations made, established and promulgated by the President of the United States, as Commander-in-Chief of the Army of the United States, under and by virtue of the terms and provisions of said law."

The fourth count charged the doing of the thing which the third

count charged was conspired to be done.

[1] On the ground that the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76) as a result of the passing of the emergency which occasioned its enactment, was no longer in force when the indictment was filed, it is contended in behalf of the plaintiff in error that no criminal offense was charged by either the third or the fourth count of the indictment. The following is the provision of that act which must be relied on to support the third and fourth counts of the indictment:

"Sec. 12. That the President of the United States, as Commander-in-Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the army as he may from time to time deem necessary or advisable: Provided, that no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or en-

listed men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section of the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000 or imprisonment for not more than twelve months, or both." 40 Stat. 82 (Comp. St. 1918, § 2019a).

Nothing in the terms of the act shows that the whole of it was intended to be effective only for the period of the war in which the country was engaged at the time the act was passed. Parts of the act are in terms made effective "for the period of the present emergency," or "during the present war." The above-quoted section contains no such limitation or restriction. The effectiveness of that provision is not made contingent upon the continuance of the emergency or state of war in existence at the time of its enactment. The authority of the President, as Commander-in-Chief of the Army, to make regulations governing the prohibition of alcoholic liquors in or near military camps, is conferred without limitation as to the time of its exercise. This being true, it is not necessary to determine whether the war in which the United States was engaged had or had not ended when the acts charged in the third and fourth counts were done, or when the indictment was filed and the trial under it occurred. The offenses charged in the third and fourth counts were capable of being committed after the end of the war. The conviction under those counts is not subject to be reversed on the ground that they did not charge the commission of criminal offenses.

[2] The conviction on the third and fourth counts being sufficient to sustain the sentence which was imposed, a failure of the first and second counts to charge the commission of a criminal offense would not justify a reversal of the judgment rendered. Frankfurt v. United States, 231 Fed. 903, 146 C. C. A. 99. It follows that it is unnecessary to consider the question of the sufficiency of the first and second counts.

counts.

The judgment is affirmed.

WHITE v. DANIEL.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1919.)

No. 3438.

1. WILLS \$= 758-ADVANCEMENTS; DIRECTIONS IN WILL ESSENTIAL.

Where a parent's will does not provide that land conveyed to a daughter and her husband shall be charged against her share in the estate, the doctrine of advancements has no application.

2. Trusts \$\infty 30\frac{1}{2}(2)\$—Creation; transfer by father to daughter and ther husband

Where a father made a voluntary conveyance of land to his daughter and her husband, who later became a bankrupt, held that, there being no circumstances having the effect, as between the husband and the father,

of preventing husband's acquisition of an interest in the land as a gift from the father, the interest vested in the husband was not, under Civ. Code Ga. 1910, § 3739, charged with a trust in favor of the daughter.

3. Trusts =17, 18(3)-Creation by oral declarations.

Under Civ. Code Ga. 1910, § 3733, a trust in favor of the wife of a bankrupt as to land conveyed to the bankrupt and his wife by the latter's father cannot arise from oral declarations of the bankrupt as to the ownership of the land.

4. ESTOPPEL \$\ightharpoonup 70(1)\topFailure to assert title to conveyance by wife's FATHER TO HIMSELF AND WIFE AS ADVANCEMENT TO HER.

Where a father, after conveying land to his daughter and her husband, died testate, leaving a will, which did not charge the interest of the daughter with the value of the land as an advancement, but the daughter, in settlement of the estate, voluntarily charged herself with the value of the land deeded to herself and husband, held, that no estoppel precluding the husband from claiming an interest in the land arose, and hence, on the bankruptcy of the husband, the daughter could not defeat the rights of the trustee to the husband's share in the land.

Appeal from the District Court of the United States for the South-

ern District of Georgia; Beverly D. Evans, Judge.

In the matter of R. K. White, bankrupt. Petition by J. Saxton Daniel, trustee in bankruptcy, on which Mrs. Theodosia E. White intervened, claiming the property claimed by the trustee. From a decree for the trustee, claimant appeals. Affirmed.

Francis M. Oliver, of Savannah, Ga. (Edgar J. Oliver, of Savannah, Ga., and A. S. Way, of Reidsville, Ga., on the brief), for appellant. Frederick T. Saussy, of Savannah, Ga. (Warnell & Newton, of Savannah, Ga., on the brief), for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. The appellant, the wife of the bankrupt, claimed the sole beneficial ownership of a tract of land, a voluntary conveyance of which to the appellant and the bankrupt was made by the former's father in the year 1893. The grantor died shortly after he made the deed, leaving a will, made the same day the deed was made, and which did not charge the land conveyed, or the value of it, against the appellant as an advancement. The conveyance mentioned stated that it was made in consideration of \$700 and for and in consideration of natural love and affection of the grantor for the grantees; but nothing was paid to the grantor.

The claim asserted is based on the following contentions: (1) That the land, though deeded to the grantor's daughter and her husband. was an advancement to the former; (2) that the beneficial ownership of the half interest conveyed to the bankrupt was in his wife as a result of an implied trust arising in her favor; (3) that parol declarations of the bankrupt and his wife to the effect that the land belonged to the latter created a trust in her favor as to the legal interest vested in the bankrupt by the deed; (4) that the bankrupt was precluded from claiming the beneficial ownership of the half interest conveyed to him as a result of his acquiescence in a settlement of the residue of the grantor's estate made several years after his death between the appellant and the other devisees of that residue, in which settlement, with the consent of the appellant, she was charged with the sum of \$700 as the value of the land deeded to herself and her husband, with the result that the amount she received as her share of the residue was less than it would have been if she had not consented to the \$700 being charged against her share. The claim asserted is not sustainable on any of the grounds mentioned.

- [1] 1. The grantor in the deed having died leaving a will which did not provide for the land or its value being charged against the share in his estate given to the appellant, the law as to advancements has no application. Brewton v. Brewton, 30 Ga. 416; Huggins v. Huggins, 71 Ga. 66.
- [2] 2. The conveyance of the land having been a voluntary one, the appellant parting with no consideration at or prior to the time the conveyance was made, and there being no circumstance having the effect, as between the bankrupt and the appellant, of preventing the acquisition by the former of an interest in the land as a gift from his father-in-law, the interest vested in the bankrupt by the deed was not charged with an implied or resulting trust in favor of his wife, the appellant. Hall v. Edwards, 140 Ga. 765, 79 S. E. 852; Code of Georgia 1910, § 3739.
- [3] 3. A trust in favor of the appellant could not arise from oral declarations of the bankrupt as to the ownership of the land, as in Georgia "all express trusts must be created or declared in writing." Code, of Georgia 1910, § 3733; Smith v. Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67.
- [4] 4. So far as appears, the act of the appellant in agreeing to be charged, in the settlement between herself and the other devisees of the residue of her deceased father's estate, with \$700 as the value of the land deeded to herself and her husband, was done with full knowledge of the facts, and was entirely voluntary, uninfluenced by any statement or conduct of her husband, who is not shown to have taken any part in the settlement, or to have done or said anything inconsistent with his interest in the land being the same after the settlement was made as it was before. There is no merit in the contention that the bankrupt estopped himself in favor of the appellant to claim the interest he acquired by the deed made by his father-in-law. Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 23 L. Ed. 927.

It was disclosed that the bankrupt acquired the beneficial ownership of a half interest in the land in question, and it was not disclosed that that interest has in any way passed into the appellant.

Affirmed.

UNITED STATES v. LOW HONG.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1919.)

No. 3308.

HABEAS CORPUS 5-13-IMMIGRATION LAW; DETENTION OF CITIZEN.

The provisions of Immigration Act, § 17 (Comp. St. 1918, § 4289¼i1), and other sections relating to excluding and deporting persons from the country, being expressly applicable only to aliens, one arrested and detained for hearing thereunder is prior to such hearing entitled to discharge on habeas corpus; the allegation of his petition that he is a citizen being admitted.

Appeal from the District Court of the United States for the Southern District of Georgia; Emery Speer, Judge.

Habeas corpus by Low Hong. From an order of discharge, the United States appeals. Affirmed.

E. M. Donalson, U. S. Atty., of Macon, Ga.

Hugh Howell, of Atlanta, Ga., and J. É. Hall and Warren Grice, both of Macon, Ga. (Brewster, Howell & Heyman, of Atlanta, Ga., on the brief), for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. This is an appeal by the government from an order discharging the appellee on a hearing in a habeas corpus proceeding instituted by the latter. The appellee's amended petition for the writ alleged that he is a citizen of the United States, that he was born in San Francisco 25 years ago, and that he was being held by virtue of a warrant issued by the Secretary of Labor commanding that appellee be taken into custody and granted a hearing to enable him to show why he should not be deported in conformity with law. A demurrer to the amended petition was filed, and a return was made to the writ, which averred that petitioner's arrest and detention were in pursuance of a warrant of the Secretary of Labor, duly and lawfully issued under the provisions of section 19 of the Act of Congress of February 5, 1917 (39 Stat. 889, c. 29 [Comp. St. 1918, § 42891/4j]).

The amended petition's averments of the appellee's nativity and citizenship were not in any way put in issue. The record discloses that in the course of the hearing the following colloquy occurred: the court asked: "Is the case dependent solely on the demurrer?" The assistant district attorney replied: "I think there is nothing but a question of law in the case." The court inquired as to the effect upon the issue if it should appear that the relator was born in the United States. To this inquiry the assistant district attorney replied:

"Our contention is that that question cannot be investigated by writ of habeas corpus at this stage of the proceeding; that the application for the writ is premature, and will not be entertained by the court until after the hearing is had as provided by the act of Congress, and appeal taken to the

Secretary of Labor, and his decision finally rendered. Then, and not until then, can a writ of habeas corpus be used to inquire into the fact of the petitioner's citizenship."

It fairly appears that the asserted right of the appellee to be discharged from custody was resisted on the ground that, though the truth of his averment of citizenship was admitted, he was subject to be held under the warrant issued by the Secretary of Labor until the summary administrative proceeding provided for by section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887 [Comp. St. 1918, § 4289¼ii]), had been finally concluded. The provisions of that section, and the other provisions of the act relating to excluding and deporting persons from the United States, in express terms are made applicable only to aliens. An admission that a person proceeded against under those provisions is a citizen amounts to an admission that he is not subject to be held under such a warrant as the one under which the

appellee was taken into custody.

A mere claim of citizenship, made in a petition for the writ of habeas corpus by one held under such process, cannot be given the effect of arresting the progress of the administrative proceeding provided for. United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. But an admission that such claim is well founded dispenses with any necessity or occasion for waiting for the Secretary of Labor to render a decision on a question that does not exist. An admission that one held under such process is not an alien is an admission that he is not subject to be detained under that process. What occurred on the hearing in the instant case amounted to an admission that the Secretary of Labor was without power or jurisdiction to have the appellee kept in custody under the warrant issued. The averments of the amended petition show that the appellee is a natural-born citizen of the United States. United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. The truth of those averments being admitted, the immigration officials were not entitled to retain the appellee in custody until the Secretary of Labor should in the summary proceedings pass on the question of deporting one who was admitted not to be subject to be detained or deported under the process under which he was held.

The record not showing that the court erred in ordering the appellee's discharge, the order is affirmed.

BUCHHOLZ V. GRANITE SAV. BANK & TRUST CO. (Circuit Court of Appeals, Fourth Circuit, February 16, 1911.)

No. 1004.

1. USURY \$\infty 83-STATUTE INAPPLICABLE TO CORPORATIONS. The effect of the New York statute providing that corporations may not plead usury is to render the usury statute inapplicable to contracts of corporations.

2. Jury 5-28(17)-Stipulation waiving jury; effect of change of issues. Where, after a stipulation waiving a jury, the pleadings are so amended as to change the issues, it is discretionary with the court to permit a party to withdraw from the stipulation.

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

Action at law by the Granite Savings Bank & Trust Company against George F. Buchholz. Judgment for plaintiff, and defendant brings error. Affirmed.

Certain proceedings in the court below are set forth as follows:

The Court: With regard to the point counsel have submitted this morning, unless there is a statute that is applicable, there is no such thing as usury. Parties have a right to make any bargain they choose, unless they are forbidden by statute. A statute which says you shall not pay more than such a per cent, is a binding statute on all parties, and any contract made has to conform thereto. But it may be provided that a certain class of persons are not to have the benefit of the statute, and if there is any such statute governing the amount of percentage to be charged, so far as that class of persons is concerned, the statute does not apply to that class. Therefore, when it says in New York state no corporation shall plead usury, it wipes out the usury statute so far as that particular class is concerned, so far as corporations are concerned. Does this come before me on demurrer?
Mr. Forbes: We demur to their plea.

The Court: Then I sustain the demurrer.

The next point brought before the court was whether or not a jury trial had been waived by counsel for defendant.

The Court: When the case was before me on a previous occasion, it came out in the testimony that Mr. Buchholz was an indorser who had not received formal notice of demand and protest for nonpayment by the indorser.

It is a rule of law and practice that when testimony is adduced, if it appears that the testimony does not support the declaration on which suit was brought, the court should allow an amendment of the declaration so as to conform to plaintiff's proof, if his proof has set up a legal claim. The proof adduced on that occasion tended to show that, although there had not been any formal demand or any formal protest for nonpayment by the indorser, yet there were circumstances which tended strongly, in my judgment, to show that Buchholz had waived those formalities, and therefore it was proper, as I thought, that the pleading should be amended, so as to set forth that although there was no formal demand and protest against him as indorser, he had by his conduct, or statements, I have forgotten now how it was exactly brought to the attention of the court, waived those formalities and of that waiver the plaintiffs were entitled to the benefit. Therefore I gave leave to amend the declaration.

It is true that, if circumstances are such that an amendment could be made at the trial table, the case would go on, and in this instance would have been heard by me under that agreement. It is, however, within the discretion of the court whether the case to be tried now is in any manner different from the case which was to have been tried before. It is different in this respect: That the testimony as to waiver is to be presented, and the defendant's testimony is to be presented, and the question of the weight of the testimony, if there is any conflict, is to be passed upon. As I have said before, while the matter is within my discretion, and while I might very well say that the former agreement held, and the case must be tried before the court, still, as has been suggested, it is a delicate matter for the court to say, where there has been a change in the issue to be tried, you must try the case before the court, although no jury was asked for in the first instance, and although in the beginning the parties might have claimed the right of trial by jury, yet, as I have said, it is rather a delicate position for the court to say you must try your case before the court, and therefore I shall avoid that embarrassment by allowing a jury trial.

Richard B. Tippett and William S. Bansemer, both of Baltimore, Md. (Bansemer & Solter, of Baltimore, Md., on the brief), for plaintiff in error.

George Forbes, of Baltimore, Md., and John M. Woolsey, of New York City (Convers & Kirlin, of New York City, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and McDOWELL and ROSE, District Judges.

PER CURIAM. We find no error. Affirmed.

BARLEY et al. v. G. E. WITT & CO., Inc.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1919.)

No. 3247.

1. Patents \$\infty 328-For oil-burning system not infringed.

The Witt patent, No. 986,791, claims 1 and 2, which are for an oil-burning system, having in combination a boiler, an oil pump, and a burner, held not infringed by defendants' device.

2. Patents \$\iff 243\$—Combination patent for oil-burning system not infringed.

A combination patent for an oil-burning system cannot be expanded beyond the fair meaning of the terms, and a device not operating in the same manner as the combination patent is not an infringement, where there is a substantial lack of identity between the combinations in respect to their functioning.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin,

Judge.

Suit by G. E. Witt & Co., Incorporated, against Harry Barley and Curt R. Reichel, copartners doing business under the firm name of Barley & Reichel. From an interlocutory decree for complainant, defendants appeal. Reversed, and cause remanded, with directions.

Carlos P. Griffin, of San Francisco, Cal., for appellants.

N. A. Acker, of San Francisco, Cal., for appellee.

Macleod, Calver, Copeland & Dike, of Boston, Mass. (Geo. P. Dike, of Boston, Mass., of counsel), for Mason Regulator Co., amicus curiæ.

Before GILBERT, MORROW, and HUNT. Circuit Judges.

HUNT, Circuit Judge. From an interlocutory decree holding that letters patent No. 986,791, granted March 14, 1911, for a liquid fuel governor, are valid, and that appellants, Barley & Reichel, have infringed, this appeal was taken. Barley & Reichel denied infringement and validity of letters patent, basing the denial as to the validity on certain public use defenses.

The claims, all of which are involved, are as follows:

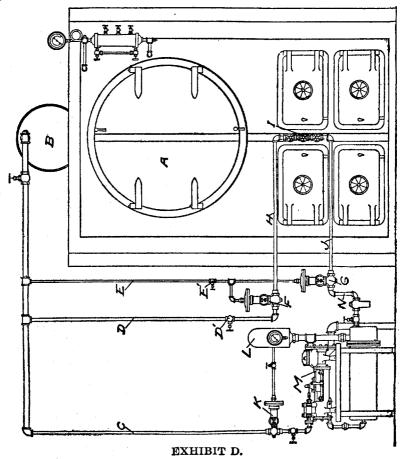
1. An oil-burning system having in combination a boiler, an oil pump, a burner having a steam pipe connected with the boiler and also having an oil pipe connected with the pump, governors in the oil and steam pipes controlled by the variations of steam pressure in the boiler, said governors regulating the steam and oil feeds independently by the boiler pressure, and means for operating the oil pump, a governor regulating the oil pump adapted to respond to a decrease of boiler pressure and to admit an increased feed of steam to the oil pump, for causing an accelerated boost to the oil pump to cause it to raise the oil pressure in the oil pipe.

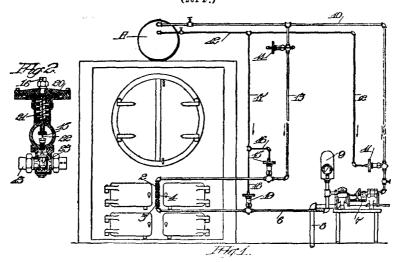
2. An oil-burning system, having in combination a boiler, an oil burner having oil and steam passages, an oil pump, connections between the oil pump and the oil passage of the burner, connections between the steam passage of the burner and the steam dome of the boiler, connections between the steam dome and the steam end of the pump, governors in the steam and oil passages of the burner connected with the steam dome and operable by the steam pressure therein, said governors automatically regulating the steam and oil

feeds independently by the boiler pressure, and a governor operable by the steam pressure in the dome for controlling the action of the pump.

3. An oil-burning system, having in combination a boiler, an oil burner, steam and oil pipes leading to the burner, the steam pipe connected with the dome of the boiler, an oil pump connected with said oil pipe, a pipe connecting the steam end of the pump with the steam dome, controlling valves in the steam pipe to the burner and in the steam pipe to the pump and in said oil pipe, and a diaphragm governor controlling the action of each of said valves, each of said diaphragm governors subject constantly to the absolute steam pressure in the dome whereby the said several valves are opened more or less in unison with the rise and fall of the steam pressure in the boiler, said governors automatically regulating the steam and oil feeds independently by the boiler pressure.

To illustrate the devices we append a copy of the drawing accompanying the patent, and two drawings introduced upon the trial, marked "Exhibit D" and "Exhibit E," respectively. D represents the appellee's constructed governor and E shows the governor of the appellants.

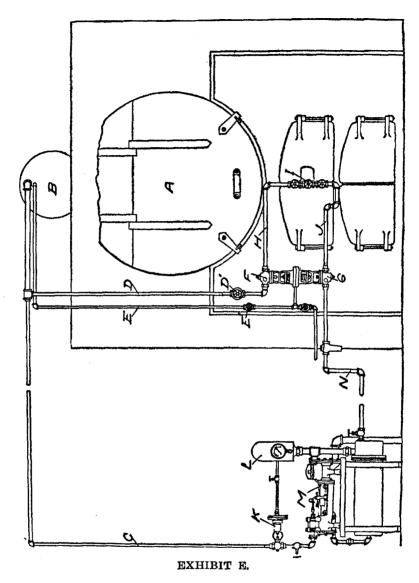




PATENT DRAWING.

Regulation of fire under boilers in response to changes in steam pressure in the boilers has been used for many years. Briefly, as shown by the patent to Witt, the oil is injected into the furnace by a steam-driven oil pump and is atomized by pressure of steam equal, approximately, to that of the oil. The steam required from the boiler will vary in amount from time to time. The changes in the demand for steam or in the load on the boiler produce corresponding fluctuations in pressure in the boiler, and they should be accompanied by inverse changes in the quantity of fire under the boiler. When there is a drop in pressure, the fire should be increased, and when there is a rise in pressure, the fire should be lessened. These automatic systems are operated by variations in pressure in the boiler. They respond directly to changes in the load upon the boiler, increasing or decreasing the fire as may be required.

In the Witt patent the oil is pumped from the nozzle by a pump driven by steam from the boiler, and three things require regulation simultaneously, namely, the flow of oil to the burners, the flow of steam to the burners, and the flow of steam to the oil pump. The regulator 19, shown upon the drawing of the patent in suit, governs the flow of oil to the burners, and the regulator 15 governs the flow of steam to the burners, and the regulator 11 controls the flow of steam to the oil pump. These several governors are of a movable diaphragm type, and each is subjected on one side to the pressure of steam from the boiler and on the other to the pressure exerted by a spring; the diaphragm moving a valve in the steam or oil pipe. Witt shows two pipes, each leading from the dome of the boiler to the respective governors, so that each governor is subjected to the full boiler pressure in the dome and is immediately and directly responsive to slight changes in the pressure in the boiler. There appears to be no function performed by the pipes which lead from the steam dome to the



governors, other than the transmission to the governors of boiler pressure. Witt in his specifications says:

"The use of the supplemental pipe 12 with its branches is important, for the reason that this pipe and its branches, having no outlets in them, will give absolute boiler pressure on the diaphragms of the several governors which they control. If these diaphragms were acted on by steam coming through pipes, which might have other connections through which steam would be drawn from time to time, the true and absolute gauge pressure would not be transmitted to the diaphragm, because there would be more or less variation, due to drawing steam from these pipes or connections,"

It is evident that Witt laid stress upon the feature of his invention that each of the three governors was subjected to absolute or direct pressure in the steam dome, so that each would respond directly and promptly to changes of pressure without being subject to variations not occurring in the steam dome of the boiler. When the pressure in the boiler drops, the three governors, 11, 15, and 19, open the valves operated by them respectively, and admit more steam to the burners, more oil to the burners, and more steam to the cylinder of the oil pump, and as a result the oil pump at once speeds up and maintains the pressure in the oil supply, although the valve operated by the governor 19 has opened and thereby allowed a freer flow to the burners. On the other hand, in case the boiler pressure arises, a similar action in reverse way would take place. Witt says in his specifications and claims:

"If the steam pressure in the boiler falls, then the governor 11 will open up and let more steam feed to the pump, so as to accelerate the action of the latter and boost the oil pressure even above the pressure under which it may be normally set at 65 pounds. This boosting of the oil pressure giving an enhanced oil feed to the burner synchronously with the additional steam feed thereto, due to the opening action of the governor 15. It is to be observed that not only are the oil and steam flow controlled direct by the boiler pressure by means of the governors 15 and 19, but the oil feed is further made more sensitive and more closely regulated to the desired boiler pressure by the desired boost given to the oil feed by the pump at the very instant when more oil is most desired."

Further on he says:

"One of the chief features of this invention is the boost given to the pump, so as temporarily to raise the oil pressure in the line θ , and so increase the fire when more fire is needed. The amount of this boost is controlled by the governor 11."

From the disclosures in the patent, these essential features of Witt's invention stand forth: The idea of three governors, controlling, respectively, the oil and steam feeds to the burners and the steam supply to the oil pump, each of the governors being subject to the direct steam pressure from the boiler, and the further idea of giving an accelerated boost to the oil pump to cause it to respond the very instant when more oil is desired.

The idea of giving an accelerated boost to the oil pump, to cause it to respond the instant more oil is desired, is the result of the idea of having the three governors controlling the oil and steam feeds, as stated, because the accelerated boost is the result of the direct connection of the oil pump governor with the dome of the boiler.

Turning to the file wrapper, we find that the Patent Office cited, as against the application of Witt, patent No. 886,466, May 5, 1908, granted to Atchison & Weymouth, for a system of regulation for oil-burning plants. The Atchison patent shows a system in which the throttle valve of the oil pump is controlled by a governor connected to the steam pipe, which also supplies the oil pump with steam, and also shows the governor controlling the steam supply to the burners; the governor being operated by pressure in the oil main. Witt argued to the Patent Office in favor of the allowance of the claims of his patent, in reference to the Atchison patent, as follows:

"The reason for this is that in applicant's system the boiler pressure acts instantly on the pump, as well as on the oil and steam feeds, so that the pump responds almost instantly to any demand put upon it."

He also pointed out that he regulates the steam and oil feeds independently "by the boiler pressure, and not by the variation in any oil pipe." He also said:

"Further, in the Atchison system the regulation of steam is indirect through the oil, and the oil is controlled by the governor on the pump. The pump has to act before the burner can act, and consequently the steam pressure can run way down or way up, beyond desired limit, before the burner will respond."

It appears that Witt was obliged to amend claim 1, and that he did amend it by inserting a phrase that he used a governor regulating the oil pump adapted to respond to a decrease of boiler pressure and to admit an increased feed of steam to the oil pump for causing an accelerated boost to the oil pump to cause it to raise the oil pressure in the oil pipe. It seems, therefore, that the file wrapper indicates that Witt laid emphasis on his system as one where the boiler pressure acts instantly on the pump, so that the pump responds instantly to any demand put upon it. Instant response of the oil pump to any variations in boiler pressure is the idea underlying the patent which Witt applied for, and it is the instant response that is due to the direct connection between the dome of the boiler and the governor controlling the oil pump throttle valve.

Having now gained an understanding of the patent involved, let us look at the system used by Witt, which is conceded to present a changed construction. The system has three regulators or governors, two of which control the steam in the burners and the oil in the burners, respectively, both regulators being supplied by steam from the steam done. The third regulator or governor controls the throttle valve of the oil pump, and is connected to the air chamber of the oil pump, and is therefore operated by oil pressure, and not by steam pressure. A comparison between the installed system of the appellants and the system installed in the Fuller plant in San Francisco shows that in both there is a pipe leading from the pump throttle governor to the pump air chamber, so that pressure in the oil main controls the speed of the pump. The fundamental difference between the system described in the patent in suit and the system of the appellants is that in the system described in the patent the oil pump governor responds instantly to every fluctuation in boiler pressure, and thereby may produce a sudden fluctuation in oil pressure, reflecting corresponding fluctuations in boiler pressure, while in the appellants' system the oil pump governor maintains a constant pressure in the oil main, because the speed of the pump is controlled by the pressure in the oil main. Changes in boiler pressure are thus not directly reflected, and there may be material variations in the speed of the pump, corresponding to the suddenness of the variations in boiler pressure.

Appellants use this illustration: If it is desired to maintain a pressure of 100 pounds on the boiler and 65 in the oil line at the burner, under the Witt patent the oil pump governor would be set at 100

pounds, and would move with every fluctuation of boiler pressure above or below this figure. In case the boiler pressure should run up to 105 pounds, the steam pump might be entirely stopped, while, if the pressure should drop suddenly, the steam pump would be started violently, and run at great speed. On the other hand, in appellants' system, the oil pump governor would be set at the oil pressure to be maintained, say 65 pounds, and would not be set at as high a figure as in the Witt system, described in the patent. The governor in the oil pressure line will be kept at the pressure of practically 65 pounds, and the pump will run steadily under a uniform pressure sufficient to maintain the boiler pressure at the desired point. The advantage of this is the reduction of the probability of violent changes in the speed of the oil pump, and as a result the operation of the oil pump will be steadier and smoother than in the Witt patent described; or it can be said that under the patent in suit Witt has an oil pump governor set at boiler pressure and produces violent changes in the speed of the pump in direct response to changes in boiler pressure, while the appellants' oil pump governor will be set at the oil line pressure, which ordinarily will be lower than that of the boiler pressure, and the pump will not respond directly to boiler pressure, but will endeavor to maintain an unvarying pressure in the oil line, and therefore will produce a more regular operation of the oil pump. The point appears to be well taken that in the patent in suit, when the burner becomes clogged, the oil pump will be speeded up as the boiler pressure drops, and the obstruction will finally be blown out, or the oil pump damaged, or the pipe will burst, because the continued drop in boiler pressure will tend to run the pump faster and faster. But in the appellants' system the clogging of the burner nozzle will produce an immediate increase in oil pressure, and thus will check the oil pump, inasmuch as the oil pump governor attempts to maintain a constant pressure in the oil line. Boiler pressure will drop, without any response from the oil pump, but there will be no damage to the system.

Again, Witt's system, as described in the patent, permits fluctuations in the oil pressure at the burners, preserving only uniformity of boiler pressure, while the appellants' system preserves substantially uniformity of oil pressure at the burners, yet permits some fluctuations of boiler pressure. Thus it appears that the Barley & Reichel construction does not employ the construction of the patent in suit, nor it is alike in its mode of operation.

[1] Our conclusions are that: Claim 1 is not infringed, for the reason that the Barley & Reichel oil pump governor is not operated by the boiler pressure, and the system they used does not operate to give an accelerated boost to the oil pump. There is no infringement of claim 2, for the reason that the oil pump governor of the burner of the Barley & Reichel system is operable by oil pressure in the oil main, and not by steam pressure in the dome. There is no infringement of claim 3, because in appellants' system each of the three diaphragm governors is not subject "constantly to absolute steam pressure in the dome."

Witt clearly has abandoned the system described in his patent for the construction shown in Exhibit D, and, as already pointed out, the Barley & Reichel system is materially different from that described in the patent.

It is argued by Witt that there is no distinction between the form of connection for carrying out his invention shown in the drawings and the installed device by reason of the changes made in the constructed means for producing the variable steam pressure relative to the governor controlling the pumping action of the oil supply pump, and that it is not material whether the controlling pressure is produced by means of pipe 12, as disclosed in the drawings of the letters patent, or whether the same is produced by means of an increase or decrease of pressure within the chamber L of the Witt installed construction. This is said to be so because the increase of pressure within the chamber L is said to be solely occasioned and produced by the increase or decrease of steam pressure through the direct valve-controlled pipe connection C extended from the dome B to the pump M; but as we study the different constructions there is an essential difference between the installed system and that of the patent in suit.

Witnesses testified that the Witt patent, the construction in the Fuller plant, the actual Witt construction, and the appellants' construction perform the same function; but they were obliged to admit that there is a difference in the mechanism between the construction of the appellants and the Witt patent claims and drawings. The conclusions that, notwithstanding such differences, the construction of the appellants is the same as in the patent, are not warranted. The case is one where the patent must be narrowed, considering the extensive state of the art shown in the records of the Patent Office and the system called the Without attempting to describe in detail the Fuller installation. Fuller system, it is sufficient to say that it is more nearly like the system of the appellee than it is like that of the patent in suit, and it is well established that it was in commercial use for a long time before Witt invented his device. In the Fuller installation there are burners having steam atomizers like those in the Witt patent; there is an oil pump supplying oil to the burners; there is a throttle valve controlling the supply of steam to the oil pump and controlling the speed of the oil pump; there is a diaphragm governor controlling the oil pump throttle valve and a regulator which regulates the steam and oil feeds by the boiler pressure. In all these respects the Fuller installation is the same as that shown in the patent in suit. It is true that the oil pump throttle valve governor of the Fuller system is controlled by the oil pressure, and not by the absolute steam pressure in the boiler, and that is also true of the system of Witt as installed. It may also be true that the oil and steam valves at the burners of the Fuller plant are not regulated independently. It would seem, however, that slight mechanical experience was only requisite to supply a separate regulator for each valve, if it should be desirable so to do.

[2] We are unable to expand the claims of the patent in question beyond the fair meaning of their terms, and we cannot find that identity of mechanical elements, as well as identity of function, necessary to sustain the charge of infringement. Notwithstanding the fact that there are the same mechanical elements present in the device of the patent in suit as in the construction of appellants, the manner of operation described in the patent claims determines whether there has been infringement; and, as we understand it, appellants do not use the manner of operation described by the patent claims.

Believing, therefore, that there is a lack of substantial identity between the combinations in respect to their capacity to do the same work in substantially the same way, appellants are not shown to infringe. Westinghouse Co. v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 C. C. A. 580; Westinghouse Air Brake Co. v. New York Air Brake Co., 119 Fed. 874, 56 C. C. A. 404; Imperial, etc., Co. v. Crown Cork & Seal Co., 139 Fed. 312, 71 C. C. A. 442; Thatcher v. Transit Co. (D. C.) 228 Fed. 905.

The decree is reversed, and the cause is remanded, with directions to dismiss the complaint, at the cost of the appellee herein, plaintiff below.

Reversed.

SMITH CANNERY MACHINES CO. v. SEATTLE-ASTORIA IRON WORKS et al. *

(Circuit Court of Appeals, Ninth Circuit. November 30, 1919.)
No. 3270.

- 1. Patents &=328—Infringement; fish-dressing machine.

 The Smith patent, No. 979,103, for a fish-dressing machine, claims 38, 39, 40, and 41, held valid and infringed.
- 2. Patents \$\ist\$245—Infringement; mechanical equivalents.

 Protection against the use of mechanical equivalents in a combination is governed by the same rules as in case of other patents; and where a combination patent marks a distinct advance in the art, the term "mechanical equivalent" should have a reasonably broad and generous interpretation.
- 3. Patents \$\iffine\$240—Infringement; improved device.

 That an infringing machine is superior, more useful, and more acceptable to the public than that of a patent does not avoid infringement, where the essential features of the patented machine are used, unless its superiority is due to a difference in function or mode of operation, or some essential change in character.
- 4. PATENTS & 243—Infringement; DOUBLE FUNCTION OF ELEMENT IN INFRINGING COMBINATION.

The joinder of two elements of a patented combination into one integral part, which accomplished the purpose of both, does not avoid infringement.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit in equity by the Smith Cannery Machines Company against the Seattle-Astoria Iron Works, Thomas A. Heckman, and N. C. Nicholsen. Decree for defendants, and complainant appeals. Reversed.

Grosscup & Morrow, of Tacoma, Wash., and Hiram E. Hadley, of Seattle, Wash., for appellant.

Farrell, Kane & Stratton, of Seattle, Wash., for appellee Seattle-

Astoria Iron Works.

C. H. Hanford, of Seattle, Wash., for appellees Heckman and Nicholsen.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1] The appellant brought a suit for infringement of two letters patent, which it owned as the assignee of the inventor, E. A. Smith. The patents are each for fish-dressing machine, the first of which is No. 796,538, issued on August 8, 1905, and the second is No. 979,103, issued on December 20, 1910. The court below found that there was no infringement and dismissed the bill.

The machines described in the patents are complicated, and the claims are many, for the reason that they include various operations in cleaning and preparing the fish, such as removing the heads, tails, and dorsal and ventral fins, as well as opening and cleansing the fish. The controversy centers about that portion of the combination which relates to cutting open the fish. Numerous prior patents had issued for fish-dressing machines, none of which had gone into successful use, for the reason that they all were deficient in automatic means for handling and opening fish of different sizes. The appellant's patents were the first to overcome that difficulty, and the appellant's machines went into universal use in the salmon packing industry on the Pacific Coast. At the time of the trial there were in use 283 machines under the appellant's patents. Said the court below:

"The devices of the patent in suit well-nigh took the entire field upon its introduction, and plaintiff is entitled to a liberal range of equivalents."

The feature that distinguished the appellant's machine from those which had preceded it is its flexibility, its capacity to receive and operate upon various sizes of fish as they come to the machine, and the essence of that portion of the combination which produces this result is that the cutting saw which rips open the belly of the fish is protected from cutting too deeply by a device which rests upon the body of the fish, and takes advantage of resistance upon the solid back of the fish; it being at the same time essential that in the operation the solid portion of the fish back of the visceral cavity shall not be cut.

In the appellant's machine, after the preparatory service of cutting off head, fins and tail, the fish is fastened on its back on a circular carrier and moved thereon tail end first. It approaches the splitter held by gripping devices and guides so adjusted that the fish is gradually and firmly centered, so that the splitter, which is a small circular saw, will cut along the medial line of the fish belly, beginning at the vent. The splitter is operated in a frame at the free end of a pivoted arm which has no lateral movement, but is permitted movement to and from the carrier. Attached to the frame is a shoe consisting of

two parallel plates between which the saw rotates. The plates are so formed and placed as to permit the saw to begin its splitting function, and, after the splitting has progressed a short distance, the lower edges of the plates press on the inside of the back of the fish, and so adjust the movement of the saw that it shall not mutilate the back of the fish. But, before the plates enter the cavity of the fish, the depth of the cut is regulated by pressure on the outside of the fish, accomplished by means of flared sides on the forward extension of the plates. The rear ends of the plates are so shaped that they turn the sides of the fish over outwardly after it has been split open, throwing the belly inside out, and so holding it open for the operation of the cleaning mechanism.

The appellees' machine is covered by a patent issued on February 27, 1917, to N. C. Nicholsen and T. A. Heckman, letters No. 1,217,809. The appellees' apparatus is mounted on a quadrilateral frame, lengthwise of which is a V shaped trough, in the bottom of which chains are carried by sprockets. On each link of the chain is set a sharpened pin so placed as to engage the fish near the back as it comes upon the trough, and carry it the length of the trough. A spring presser holds the fish against the chains, and aids in centering and fastening the fish back downward firmly against the chains. The fish-splitting mechanism is described as of the form of a plow of two moldboards, so formed as to turn furrows in opposite directions, the perpendicular sides of which moldboards are parallel and in close proximity, leaving between them a slot in which a circular saw is revolved. The plow, together with the saw, is attached to the free end of a shaft, the other end of which is pivotally attached to and supported on the main frame. The pivotal attachment permits the splitting device to move to and from the trough, and it has no lateral movement.

As the fish, with its head removed, approaches the saw, head end foremost, the toe of the plow enters the ventral cavity, and by gravity presses upon the back of the fish, and the saw which revolves in the same frame to which the plow is attached, automatically accommodates itself to the size of the fish; the varying depth of the fish body moving the saw up and down, and thus regulating the depth of the cut. As the fish is ripped open, the moldboards of the plow spread it open and turn the fish inside out, during which operation the base of the plow rests upon the solid back of the fish; the periphery of the saw being slightly above the base of the plow. In the rear of the plow and above, over the trough, there are forked arms pivotally supporting two metallic rods, which are not fastened to the moldboards of the plow, but come in such proximity to it to engage the inner surface of the fish belly as it is spread open outwardly, and then hold the fish so as to permit the action of the fish-cleansing devices. The toe of the plow is a necessary part of the automatic mechanism by which the depth of the splitting saw is regulated, and by which the defendant's machine is susceptible of operation on fish of different sizes.

The following are the claims of the appellant's patent, No. 979,103, which are principally involved:

"38. In a fish-dressing machine, a frame, a carrier supported thereon for movement, means on the carrier for holding a body, a splitter arranged in the path of said carrier, means swingingly connected with the frame for supporting said splitter, and shoes on opposite side of said splitter swingingly connected to said last means.

"39. In a fish-dressing machine, a main frame, a carrier supported thereon for movement, means on the carrier for holding a body, a frame swingingly supported on said main frame, a splitter supported by said last frame, a yieldingly pressed means connected with said last frame for independent movement toward and from the carrier, and shoes on said last means disposed to engage the fish body to regulate the depth of cut of said splitter."

Claims 40 and 41 add to the elements of the foregoing claims the members whose function it is to spread the cut-open body of the fish and expose the whole cavity to the body cleansing devices.

We think that the appellant's claims are readable upon the appellee's machine, notwithstanding the fact that in the operation of the appellant's machine the fish go tail end first, while the reverse is true of the appellee's machine. The claims of the appellant's patent contain no limitation to either mode of operation. Comparing the two machines we find that the plates between which appellant's splitting saw revolves extend slightly below the periphery of the saw and yieldingly press upon the inside of the back of the fish after the first cutting movement. This pressure regulates the movement of the plates to and from the fish, and the flaring tops of the plates engage the fish before it is sufficiently opened to permit the bottom of the plates to perform their function. This function in the appellee's machine is performed by the bottom of the plow which constitutes the means which by pressure on the body of the fish govern the movement of the appellee's frame to and from the fish, and thus regulate the depth of the cut. The appellees have thus, we think, availed themselves of the essential features of the appellant's combination.

[2, 3] Where a combination patent marks a distinct advance in the art to which it relates, as does the appellant's invention here, the term "mechanical equivalent" should have a reasonably broad and generous interpretation, and protection against the use of mechanical equivalents in a combination patent is governed by the same rules as patents for other inventions. Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945. The fact, if it be a fact, that the infringing machine is superior, more useful, and more acceptable to the public than that of the appellant, does not avoid infringement, so long as the essential features of the appellant's patented machine are used, unless its superiority is due to a difference in function or mode of operation or some essential change in character. Morley Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715; Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713; Lourie Implement Co. v. Lenhart, 130 Fed. 122, 64 C. C. A. 456; Diamond Match Co. v. Ruby Match Co. (C. C.) 127 Fed. 341; Whitely v. Fadner (C. C.) 73 Fed. 486.

The trial court, referring to the "yieldingly pressed means" in appellant's claim 39 connected with the saw frame "for independent movement toward and from the carrier," reached the conclusion that the "independent movement" of the shoe distinguishes the appellant's patents from that of the appellees', and observed that without such

"independent movement" there would be nothing to distinguish the appellant's cutting device from that of the prior Haigh patent, No. 673,255. To this we are unable to agree. The words "independent movement toward and from the carrier," as shown by the plans and specifications of the appellant's patents, is not a movement independent of the cutting frame; but the expression "independent movement" is used to indicate that the movement of the "yieldingly pressed means" is not subject to control by other means than by pressure on the fish, and not that it is independent of the movement of the saw frame to and from the carrier. The shoe in the Haigh patent, as indicated by the drawing thereof is a shoe which, it is true, has the same purpose as have the shoes in the patents here involved; that is, to regulate the depth of the cut of the saw. But it plainly appears from the drawing that Haigh's shoe rides on the surface of the trough in which the fish travels, and not on the body of the fish. In that distinction is found the advance which Smith made in the art, and which made his combination successful.

[4] The decision of the court below was influenced, also, by the consideration that the appellees' plow, in addition to the function of regulating the movement of the saw and spreading the side flaps of the split fish, performs the additional function of removing the viscera. But this does not avoid infringement. In Pedersen v. Dundon, 220 Fed. 309, 136 C. C. A. 143, this court said:

"Neither the joinder of two elements of a patented combination into one integral part, accomplishing the purpose of both, nor the separation of one integral part into two, which together accomplish substantially what was done by the single element, will avoid a charge of infringement"—citing Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524, 36 C. C. A. 375; Standard Caster & Wheel Co. v. Socket Co., 113 Fed. 162, 51 C. C. A. 109; H. F. Brammer Mfg. Co. v. Witte Hardware Co., 159 Fed. 726, 728, 86 C. C. A. 202.

It is our conclusion that the appellees have infringed claims 38, 39, 40, and 41 of the appellant's patent, No. 979,103.

The decree of the court below is reversed, and the cause is remanded, with instructions to enter a decree in accordance therewith.

WISCONSIN CHEMICAL CO. v. CHUTE.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)
No. 2629.

PATENTS \$= 328-Invention and infringement.

The Chute patent, No. 824,906, for an improvement in the process of making wood alcohol, claims 1, 5, 6, and 10, held valid, not anticipated, and infringed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit by Harry O. Chute against the Wisconsin Chemical Company. From a decree for complainant, defendant appeals. Affirmed. See, also, 185 Fed. 115.

Frank E. Liverance, of Grand Rapids, Mich., for appellant.
Louis Quarles, of Milwaukee, Wis., for appellee.

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Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Appellant attacks the decree entered against it, sustaining the Chute patent, No. 824,906, issued July 3, 1906, for an improvement in the process of making wood alcohol, relying on alleged invalidity and noninfringement of the patent. Ten claims appear in the patent, four of which are herewith set forth as more or less typical:

"1. The process of preparing wood alcohol from crude pyroligneous acid, which consists in distilling from said acid a concentrated distillate of between 10 and 25 per cent, alcoholic content and of acid nature, allowing said distillate to stand to permit separation of impurities, and decanting off the clear liquid."

"5. The process of preparing wood alcohol from crude pyroligneous acid, which consists in distilling from said acid a concentrated distillate of between 10 and 25 per cent. alcoholic content and of acid nature, allowing said distillate to stand to permit separation of impurities, decanting off the clear liquid, adding thereto an excess of alkali, decanting and refractionating the decanting liquid to produce perfectly miscible alcohol of above 80 per cent."

"6. The process of preparing wood alcohol from crude pyroligneous acid, which consists in distilling from said acid an acid product of an alcoholic strength wherein oily impurities are insoluble, allowing the same to stand to permit separation of such impurities, and decanting off the clear liquid."

"10. The process of preparing wood alcohol from crude pyroligneous acid, which consists in distilling from such acid an acid product of an alcoholic strength wherein oily impurities are insoluble, allowing the same to stand to permit separation of such impurities, decanting off the clear liquid, adding an excess of alkali, decanting away from the resinous deposit formed, and refractionating the decanted liquid to form a strong alcohol of above 80 per cent. and perfectly miscible with water."

Making alcohol from wood was old in 1906. The patent in suit, therefore, relates merely to an improvement in the process.

Generally speaking, wood alcohol is made from a pyroligneous acid (obtained by condensing the vapor or smoke from the burning wood to a liquid) by means with which we are not interested. Our indifference to the means whereby this pyroligneous acid is produced arises from the fact that the process by which wood alcohol is made, as described by Chute, as well as the processes commonly practiced before 1906, all require such a base.

This acid contains many ingredients, and it is by retaining some and eliminating others that manufacturers are enabled to produce a merchantable wood alcohol, an alcohol of at least 82 per cent. strength and miscible with water. Chute's problem was to reduce the cost of production. He claims to have accomplished the result by eliminating some of the steps previously taken.

By his first step he obtained a distillate with a greater alcoholic strength than was formerly sought. By his third step he used an "excess of lime" to (a) neutralize the acid and (b) remove the resinous ingredient. Chute describes this third step in his specification in the following language:

(261 F.)

"Therefore, after decanting the alcohol from the separated oily bodies, I add an excess of an alkali, as lime. Reaction soon sets in, as is shown, by the development of yellow color, the familiar color known and carefully avoided in working with pyroligneous acid as an evidence of overliming. It is here, however, advantageous and not detrimental. As the reaction progresses, alkali-resinous matters separate and form a precipitate. These resinous bodies formed by the action of the alkali on the aldehydic and ketonic impurities form a mass of novel and useful characteristics, it being substantialy a dye resin, being susceptible of use as a dyestuff, as it stains organic matters bright yellow when properly applied, and also of use as a resin. Being formed from a liquid from which the oily and tarry impurities have been removed by previous treatments, it is substantially pure. I do not claim this material herein specifically, but reserve the right to file a separate application therefor. The spirit decanted from this precipitate will be found much improved in quality, having been freed from these two classes of impurities, and I am therefore enabled to directly rectify in any rectifying continuous column producing by this one redistillation alcohol of standard 82 per cent. strength, but of such purity that it is miscible with water in all proportions and cannot be refractionated into portions 'milking' with water."

One of the older processes in common use was to first free-treat the pyroligneous acid of tar (the alcoholic content then being about 5 per cent.), so that it might be thereafter neutralized with lime to make a merchantable acetate. By this method the producer was able to market, not only wood alcohol (subsequently obtained), but a by-product of wood alcohol. But repeated distillations were required before wood alcohol, miscible with water, was thus produced; and the fact that appellee by his process lost a valuable by-product is quite immaterial. The patent must be judged as an improvement in the art of making wood alcohol; the advance being in the lessened cost of production. Validity does not depend upon the question of whether the wood alcohol plus the value of the by-product is greater than the value of wood alcohol alone, or the value of wood alcohol plus the value of other and different by-products. The value of each product may and in fact does vary. The war created extraordinary demands for many articles not ordinarily in great demand. Wood alcohol during the war period rose in value, due to the increased demand.

But validity of this patent is also attacked because of the prior art as disclosed in an article written by a French chemist, Vincent. It is pointed out that Vincent, in his first distillation, using a multiple still, stopped "at the point where the methyl alcohol has all been distilled over." He also says, "A rich alcoholic liquid which abridges later operations is obtained." It is claimed this step is equivalent to the first step in claim 1, "which consists in distilling from the said acid a concentrated distillate of between 10 and 25 per cent. alcohol content and of acid nature."

But an examination of the evidence clearly satisfies us that there is a difference between the Vincent and the Chute process. Not only did Vincent's description of his primary distillate fail to set forth the specific statement of the per cent. of alcohol in the distillate, but it completely failed to provide for the elimination of oils from the acid distillate, and also failed to describe a process whereby wood alcohol of 82 per cent. strength was obtainable by two distillations from a pyroligneous acid base. Even if the first step were fully disclosed by Vin-

cent, anticipation would not appear. For invention is recognized in this process not because of any one step alone, but because "a particular step" is taken in connection with other particular steps. The use of "an excess of lime" is important only as a step taken with and after the first step that resulted in "a distillation of between 10 and 25 per cent. alcoholic content and of acid nature." Of course it is elementary that validity of a process patent containing several steps cannot be assailed by showing any one of the steps to be old. Even where all steps are old, anticipation is not established, unless it further appears that the steps (old individually) were employed in relation to one another as disclosed in the patent the validity of which is attacked.

Further attack is made upon the patent because of the use of the words "excess of lime"; it being contended that the expression is too indefinite and vague to warrant the court in attempting to apply it. While there might be force in the argument, if the words were given their literal meaning and nothing more, it must be apparent that we are not justified in so construing the words as used in these claims. Patentee, while speaking to the public, was addressing himself primarily to those educated in the art under consideration. He was dealing with chemistry and to those familiar with the manufacture of wood alcohol. Such a class would, we think, have no misunderstanding from the use of this term and experience no difficulty in following the directions given by Chute. If doubt otherwise existed, an examination of the specifications removes it. The purpose of "over-liming," as well as its manifestations, clearly appears in the description. It is comparatively easy for one skilled in the art to follow the directions.

As to other attacks on this patent, we think no separate discussion is necessary. We have considered them all, and agree with the District Court that the invalidity of the patent has not been established.

Infringement.—Little need be said on this phase of the case. The District Court found from all the evidence (appellant's stipulation as to how it made wood alcohol and the oral testimony of several witnesses) that infringement appeared. We think the record supports this finding, and we are not justified in disturbing it. While there is testimony tending to show noninfringement, it is disputed by other testimony fully as persuasive. For example, appellant denies "over-liming" in its process. Certain witnesses support this denial. They base their conclusions upon certain paper tests, which are disputed by tests made by Mr. Chute. But what was doubtless a controlling bit of testimony with the District Judge, as it is with us, is the statements of the witnesses respecting the color of the product after over-liming. The "excess of lime" required by the Chute process resulted in the development of a "yellow color." Certainly Chute had a right to define the terms he used in his public letter and we are not at liberty to ignore his definitions. Witnesses for appellant admitted that the color of its distillate after liming "was a light orange color." Certain exhibits were also received to show the color of the distillate which in our opinion indicated an "over-liming," or "an excess of lime," as Chute used that expression in his third step.

The decree is affirmed.

In re LOOSCHEN PIANO CASE CO.

(District Court, D. New Jersey. October 18, 1919.)

1. BANKRUPTCY \$\infty 224\toprotections to Jurisdiction not waived.

Where a corporate trustee in bankruptcy petitioned to extend the trusteeship to an allied corporation, and such corporation, after objecting to the referee's jurisdiction, answered to the merits, *held*, in proceedings to review order of referee granting petition, which was the first order made, that the objection to jurisdiction was not waived.

2. Bankruptov &= 224, 288(1)—Jurisdiction of referee in proceedings by trustee.

Where a trustee in bankruptcy applies for an order requiring third persons to turn over property in their possession, and bases his application upon the ground that the property in question belongs to bankrupt and is held without color of right, the referee is bound to take jurisdiction of the matter, and under that power to summarily determine the question, for the bankruptcy court is clothed with power to cause estate of bankrupt to be collected and determine controversies in relation thereto, and, unless the claim of the trustee seems of doubtful validity, plenary suit will not be required.

3. Bankruptcy ≥24—Sufficiency of petition of trustee to compel delivery of property.

The petition of a trustee in bankruptcy of a corporation to extend the trusteeship to another corporation and to compel the delivery of property as property of the bankrupt *held* to require the referee to entertain the summary proceeding.

4. BANKRUPTCY \$\igsim 140(\frac{1}{2})\$—JURISDICTION OVER CORPORATIONS, PART OF ONE BUSINESS.

Where an individual engaged in manufacturing piano cases organized two corporations, transferring to one the business and to the other the real property and managed the two corporations, not as distinct and separate entities, but as a part of the manufacturing business, held that, on bankruptcy of the manufacturing corporation, the trustee in bankruptcy is entitled to a summary order extending the trusteeship to the assets of the other corporation.

In Bankruptcy. In the matter of the Looschen Piano Case Company, bankrupt. On petition to extend trusteeship to the Looschen Land & Building Company. Order of referee extending the trusteeship affirmed.

See, also, 259 Fed. 931.

Horton & Tilt, of Paterson, N. J., and George D. Hendrickson, of Jersey City, N. J., for trustee.

William B. Gourley, of Paterson, N. J., for respondents.

DAVIS, District Judge. For some time previous to 1901 Jared J. Looschen had been engaged in the manufacture of piano cases at Paterson, N. J. In June of that year he caused to be incorporated the Looschen Land & Building Company, and conveyed to it the real estate used in the manufacture of said cases, and at that time or later he conveyed other property to it. He took the stock issued by said company in payment for the said property, except qualifying shares held by other directors. On February 13, 1903, he caused to be incorporated the Looschen Piano Case Company and conveyed to it the machin-

ery, equipment, and "all the property he then owned, together with the good will of his business." He continued the business of manufacturing piano cases through these corporations until March 1, 1917. on which date an involuntary petition in bankruptcy was filed against the Looschen Piano Case Company. On the same day, upon its written consent, filed with the petition or shortly thereafter, the company was adjudicated a bankrupt, and on April 11, 1917, Thomas H. Milson was appointed trustee of the bankrupt estate. On petition of the trustee, filed May 1, 1917, an order was made by the referee on April 12. 1918, extending the trusteeship in bankruptcy to the Looschen Land & Building Company, and directing the said land company to turn over and deliver to the said Thomas H. Milson, trustee as aforesaid, "the entire assets and property belonging to the said Looschen Land & Building Company, together with all books of account, muniments of title, all capital stock and certificates thereof, and to execute any and all documents or instruments which may be necessary to vest the title to the property of said Looschen Land & Building Company in the said Thomas H. Milson, trustee as aforesaid." That order is before this court for review.

On the return day of the rule to show cause why the trusteeship of Thomas H. Milson should not be extended to the land company, the "land company and its stockholders appeared specially and objected to the power and jurisdiction of the referee to consider the matters raised on the motion," or on the petition and rule to show cause, and filed an application to dismiss the petition and order to show cause. Testimony was taken and the referee denied the application, but the land company took no action regarding the order of the referee, in which he held that he had jurisdiction and refused to dismiss. The land company, upon being granted further time for such purpose, filed its answer, in which it answered the petition on the merits of the case and renewed its objection to the jurisdiction of the court.

The petitioner maintains that the referee did not have jurisdiction to hear and determine the matter adjudicated in said order, because the property held by the land company belongs to it, and none of it was ever owned by the piano company or conveyed by it to the land company. Therefore it maintains that there should have been a plenary suit to determine the ownership of property belonging to the land company in accordance with the provisions of section 23 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 552 (Comp. St. § 9607).

[1] The trustee contends that, since the petitioner took no steps to have the order in the jurisdictional question reviewed within 10 days, in accordance with the rules of this court, it has become final and is conclusive against it. He further contends that the petitioner could not subsequently review its objection to the jurisdiction by joining it with the defense upon the merits of the case in the answer. In re Kornit Mfg. Co. (D. C.) 192 Fed. 392, 395. But the land company "having at the outset unequivocally objected to the referee's jurisdiction, and never having expressly waived it, and the order under review being the first made by the referee determining the ownership of said accounts, the jurisdictional question is still alive." When the answer

to the merits is not interposed until after the objection to the jurisdiction is overruled, pleading to the merits is not a waiver of the objections. In re Gottlieb & Co. (D. C.) 245 Fed. 139, 145, and the cases there cited. The case will therefore be considered on its merits.

[2, 3] In cases in which third parties hold property which the trustee believes belongs to the bankrupt and is a part of his estate in bankruptcy, great care should be exercised, for it is a serious matter to adjudge by summary process that the property claimed by one person belongs to the estate in bankruptcy of another, and therefore must be surrendered to his trustee. At the same time it should be borne in mind that the interest of creditors must not be sacrificed by long and useless litigation. The bankruptcy court is clothed with power "to cause the estate of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto." Power is also given to third parties, under certain conditions, to have their title to property litigated in a plenary suit; but the right to resort to such procedure does not preclude litigation of the rights of parties by summary proceedings in bankruptcy courts as distinguished from controversies by plenary suits, where the trustee applies for an order requiring third parties to turn over property in their possession, and bases his application upon the ground that the property in question belongs to the bankrupt and is held without color of right. If such application is made, the referee is bound to make the inquiry, and this inquiry requires a decision upon the merits. Mueller v. Nugent, 184 U.S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. If the referee decides that the application is made in good faith, and the applicant has color of title, though it may be of doubtful validity, there should be a plenary suit to try the question. If the referee decides that the claim to the property by third parties is not made in good faith and is without actual merit or legal foundation, the referee should regard the property as subject to the jurisdiction of the bankruptcy court, as property of the bankrupt, and should order it in summary proceedings to be surrendered to the court or trustee. In re Holbrook Shoe & Leather Co. (D. C.) 165 Fed. 973, 976.

In his petition to have the property of the land company turned over to him, the trustee alleged that, in addition to the assets of the bankrupt company of which he had taken possession, "there are certain other assets consisting of the assets and property owned by the Looschen Land & Building Company, which are in fact the assets of the bankrupt herein, and the possession whereof your petitioner is entitled to." The trustee alleged facts and presented affidavits which he claimed showed the above allegation, as to the real ownership of the property held by the land company, to be true, and that the land company held the same without color of right, and concluded by alleging:

"Wherefore your petitioner shows and charges the fact to be that all the property, assets, and effects of the Looschen Land & Bullding Company, and used by it in its business, is the property of the Looschen Piano Case Company, and that as trustee of said estate he is entitled to the possession thereof."

Under such allegations, it was the duty of the referee to make inquiry into the facts, and, if he found the allegations to be true, to make an order as prayed for. In re Holbrook Shoe & Leather Co., supra; Mueller v. Nugent, supra.

[4] The referee in his memorandum found, and the evidence seems to support his findings, that Jared J. Looschen was the owner of the majority of the stock and president of both corporations, "the other stockholders holding merely qualifying shares"; that the land company kept no books whatever; that the books of the piano company contained accounts of the land company; that whenever the piano company, which conducted the real business in which Jared J. Looschen was engaged, needed money, he would execute a note in the name of the piano company and indorse it in the name of the land company and negotiate it; that sometimes the notes of the piano company were indorsed by third parties, who were secured by a mortgage on the real estate of the land company, which Jared J. Looschen had previously turned over to it; that all the stockholders and directors of the companies are members of the Looschen family, and all of them live in one home; that the Looschen Piano Case Company used the assets of the Looschen Land & Building Company, in order to give it a double line of credit; that the Looschen Land & Building Company was subsidiary to, and the mere agent of, the case company, the corporation under which Jared J. Looschen conducted his active business, and that Jared J. Looschen organized these two corporations for such purpose, and is in fact the owner of all of the stock of both corporations. "I cannot give," said he, "any credit to his claim that other members of his family own stock in these two corporations. Such stock as they do hold was given by Jared J. Looschen to them, and such stock would be burdened with the same liability as the stock still standing in the name of Jared J. Looschen, and the handling of his business and the transferring of his stock is evidently a fraud upon many of the creditors of the Looschen Piano Company"; that the claim of title to the property in possession of the land company was not made in good faith.

The referee has found that these two corporations were not separate and distinct legal entities, but the land company was subsidiary to and the mere agent of the piano company. That the two corporations were not maintained and operated as separate and distinct legal entities the referee was justified in finding. The dominating personality back of these two corporations was Jared J. Looschen. Originally he owned all the property conveyed to them and managed it. Apparently he continued that management, without regard to the other directors. and with the same feeling of ownership that he had before the incorporation of the companies and the conveyance of the respective properties to them. These two corporations were the right and left hand, as it were, of Jared J. Looschen. The transactions of these companies with each other was the dealing of the left hand with the right of the same person. The operations of these two companies was nothing more than Jared J. Looschen, expressing or manifesting himself through this or that legal entity, and mostly through the piano company, for it was through this company that he conducted his active business, to which the business of the land company was subsidiary. In principle the business of these two companies was not unlike that mentioned in the case of In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609, 613, of which Judge Sater said:

"This is as unusual as it would be for a natural person, doing business in his correct name, to designate himself, or contract with himself, as his own agent regarding another branch of his business conducted by himself under a fetitious name, and to hold himself out to the public as two distinct persons. That he should so represent himself and keep for his two kinds of business separate books and separate bank accounts might give him a double line of credit, and might hinder and delay his creditors in reaching his assets in case of insolvency; but a court of equity, having knowledge of the fact, would have no difficulty in brushing aside the subterfuge, and subjecting the whole of his property to the payment of his debts."

The law will regard two corporations as separate and distinct entities, when they are so regarded and so treated in their operation by their directors or management. The referee has found that the two corporations in question were not so regarded and treated, and if he has correctly found the facts, his order extending the receivership to the land company was legally justified. The referee had the benefit of seeing the witnesses and hearing them testify. He was in position to weigh their testimony and pass upon their credibility. I accept the facts as he found them, and I am of the opinion that his conclusions were justified by the evidence.

His order will therefore be affirmed, and the petition dismissed.

BANK OF COMMERCE & TRUSTS et al. v. McARTHUR et al. (District Court, E. D. North Carolina. September 2, 1919.)

No. 369.

1. BILLS AND NOTES \$\ightharpoonup 379\to Accommodation indorsement; defense against bona fide purchaser.

One who allows the use of his name as payee of a note and becomes an indorser of the same is liable to subsequent bona fide holder for value, even though he was not the real payee.

2. Bills and notes €=306, 371—Accommodation note; liability to subsequent inderser without notice.

One who signed a note as only an accommodation maker is liable to a payee who indorsed the note without knowledge that the maker was only an accommodation party, and such payee and indorser, having paid the note or discharged judgment thereon, may recover the amount from the accommodation maker or have the judgment assigned to a third person and enforce it by way of exoneration.

3. Set-off and counterclaim \$==60-Failure to urge; effect.

Although a defendant may in an action against him set up a counterclaim, his failure to do so does not prevent him from resorting to a separate action.

4. Subrogation \$\iiint 7(7)\$—Right of surety; payment of judgment.

Though the payee and indorser of a note, who was sued with the maker, did not allege, in accordance with Revisal N. C. 1905, \\$ 2840 et seq.,

that he was surety, so that the jury might distinguish between the principal and surety, and judgment might be satisfied out of the property of the principal, the payee is still entitled to subrogation, and if he satisfies the judgment may have it assigned to a third party, to be enforced against the property of the principal.

SUBROGATION ⇐=31(2)—PARTIES TO NOTE; RIGHTS OF INDORSER.

Where an indorser of a note, who was sued with the maker, satisfied the judgment, he is entitled to demand as against the maker, who is the principal debtor, an assignment of the judgment for his benefit.

- 6. BILLS AND NOTES \$\iff 306\$—INDORSERS; RIGHTS TO POSSESSION ON PAYMENT.

 An indorser on a note may pay it and demand its delivery to him, so that he can enforce it against the maker for his own benefit.
- 7. Subrogation €=41(4)—Creditors of subrogee; enforcement of right.

 Where an indorser of a note, who was sued with the maker, did not set up the fact that he was only a surety, in accordance with Revisal N. C. 1905, § 2840 et seq., held, where judgment was recovered against both the indorser and the maker, creditors of the indorser may urge his right to subrogation, so that the judgment will be first enforced out of the property of the maker, or they may pay the judgment and take an assignment, for otherwise the rights of indorser's creditors might be lost.

In Equity. Suit by the Bank of Commerce and Trusts and others against Adam McArthur and others. On motion by complainants to have judgment satisfied out of the property of a defendant other than the one named. Motion granted.

J. Crawford Biggs, of Raleigh, N. C., for plaintiffs.

Manning & Kitchin, of Raleigh, N. C., for defendants McBride and another.

CONNOR, District Judge. The pleadings and exhibits disclose: That on or about January 2, 1913, J. Sprunt Newton was the owner of a mill plant, logging outfit, and a quantity of standing timber. Desiring to have the timber manufactured into logs, he proposed to defendants D. L. McBryde, W. N. Walker, R. H. Davis, and R. W. Herring that they form a corporation, to be known as the Garland Lumber Company. That he would sell to the corporation the mill plant and logging outfit, for which they should execute their two notes, for \$10,000 each, and enter into a contract with him to manufacture the standing timber. For some reason, which does not appear, the notes were made payable to J. Sprunt Newton and Adam McArthur. It does not appear that McArthur had any interest in the mill, logging outfit, or the timber. At the time of the execution of the two notes Newton executed and delivered to D. L. McBryde an agreement reciting the foregoing facts, and in consideration of \$10 promising—

"to indemnify and save harmless the said McBryde from any loss, damage, or harm which he may sustain by reason of becoming one of the incorporators of said company, and to indemnify him from any loss or damage which he may sustain by reason of any notes which he may sign or indorse by reason of becoming interested in said corporation." (Exhibit A, attached to Mr. Mc-Bryde's answer.)

It does not appear that Adam McArthur had any notice or knowledge of the execution of this contract of indemnity. The notes were executed and delivered to J. Sprunt Newton. He and Adam McArthur

indorsed one of them for value, before maturity, and without notice of the transaction between Newton and McBryde, to the American National Bank of Wilmington, N. C. Thereafter Newton informed McBryde and the other makers of the notes that he could not use them, whereupon one of the notes was destroyed. He told them that the other note would be produced, or had been destroyed. Thereafter the American National Bank recovered judgment on said note of \$10,000 against D. L. McBryde, Robert Davis, W. M. Walker, and R. W. Herring, which was docketed in Cumberland county on September 15, 1913. At the April term, 1914, of said court, the American National Bank recovered judgment on said note against Adam McArthur, which was docketed in Cumberland County April 27, 1914. A payment of about \$2,500 has been made upon the judgment, which was, since filing the bill herein, assigned to, and is now the property of the Citizens' National Bank of Durham.

At the time Newton stated to McBryde and the other makers of the two notes that he could not use them, they executed three notes for \$5,000 each payable to said Newton. These notes were negotiated to the Citizens' National Bank of Durham. At August term, 1913, of the Superior court of Durham county, said bank recovered judgments against the makers of, and indorsers on, said notes, which have been docketed in the counties of Durham, Harnett, and Cumberland, subsequent to the docketing of the judgment recovered by the American National Bank.

Plaintiff Bank of Commerce & Trusts, at the February term, 1914, of this court, recovered judgment against Adam McArthur for \$7,082.-32, with interest and cost, which was docketed March 1, 1914, and became a lien upon his real estate in Cumberland county. At May term of said court said bank recovered judgment against said McArthur for \$80,000, which was docketed in Cumberland county June 17, 1914. A payment of \$2,400 was made thereon March 26, 1915.

Plaintiff Citizens' Bank of Norfolk, at the May term, 1914, of this court, recovered judgment against said Adam McArthur for the sum of \$25,540.39, with interest and cost, which was duly docketed and became a lien on his real estate in Cumberland and Harnett counties June 17, 1914. No part of this judgment has been paid.

At the April term, 1914, of the superior court of Cumberland county, the Fourth National Bank of Fayetteville recovered judgment against defendant Adam McArthur for the sum of \$6,000, with interest and cost. Said judgment was docketed April 27, 1914, and constitutes a lien on the real estate of said McArthur, situate in Cumberland and Harnett counties.

It will be observed that the judgment of the American National Bank against D. L. McBryde, Davis, Walker, and Herring on the note for \$10,000 was docketed in Harnett and Cumberland counties September 17, 1913, and constitutes a lien as of that date on the lands of McBryde. It was docketed against defendant Adam McArthur April 27, 1914, cotemporaneously with the judgment for \$6,000 recovered against him by the Fourth National Bank.

It is admitted that Adam McArthur is insolvent and that the fore-

going and other judgments for amounts in excess of the value of his real estate are docketed and constitute liens on his real estate. It is also admitted that Walker, Davis, and Herring are insolvent.

Plaintiffs, on June 11, 1915, filed this bill against defendants, alleging the rendition of the several judgments against McBryde, McArthur, and others, with the dates of docketing same. They also set out several mortgages and deeds in trust executed by McArthur, with the dates of the liens on his real and personal property. They further allege that, by reason of the complicated condition created by the several liens attaching to the real estate of McArthur, a sale of it would result in a sacrifice of said property, as persons would be deterred from bidding, being unable to ascertain the amount and priority of the liens legally or equitably chargeable upon the several lots or points of said property.

Plaintiffs pray that the liens, priorities, and amounts thereof be ascertained and decreed, and that the property of McArthur be sold free from such liens, by commissioners appointed by and under the direction of the court. Among other prayers for specific relief, plaintiffs ask that defendant Citizens' National Bank of Durham be decreed to enforce the collection of the judgment for \$10,000 from the property of D. L. McBryde, or if, for any reason, this be inequitable, that the equities of plaintiffs in this regard be decreed and enforced. The Citizens' National Bank of Durham has been made party defendant in this suit and filed her answer.

None of the defendants, other than D. L. McBryde and the Citizens' National Bank of Durham, filed answers to the bill. Pursuant to interlocutory decrees, all of the lands of Adam McArthur have been sold by commissioners appointed by the court, and they have in hand the proceeds thereof in excess of the judgment recovered by the American National Bank, but less than the judgments recovered by plaintiffs subsequent thereto, subject to the orders of the court.

The only phase of the question to be dealt with at this time, and by the decree now prayed, relates to the contention of plaintiff that the Citizens' National Bank of Durham be required to collect the judgment held by it, by assignment of the American National Bank, out of the lands of defendant D. L. McBryde, for the purpose of exonerating the lands of defendant Adam McArthur. Defendant McBryde and Citizens' National Bank of Durham contest the alleged right of plaintiff to this relief.

It is admitted that defendant D. L. McBryde owns valuable real estate, of value in excess of the amount of said judgment, situate in Cumberland county, subject to liens, in the following order of priority: (1) Mortgages to the amount of approximately \$10,000. (2) Judgment recovered by American National Bank for \$10,000, with interest, subject to a credit of about \$2,500, assigned to the Citizens' National Bank of Durham. (3) Judgments recovered by Citizens' National Bank of Durham for \$15,000, with interest. Defendant McBryde insists that, as between J. Sprunt Newton and Adam McArthur and himself, while on the face of the note he appears to be a maker, in truth he was an accommodation maker.

This contention must be disposed of before proceeding to deal with the other phases of the controversy. Upon the face of the note, Mc-Bryde, together with Walker, Davis, and Herring, are makers, and therefore, as between McArthur and themselves, primarily liable for its payment. By their indorsement to the American National Bank, Newton and McArthur became liable as sureties. Did the transaction, out of which the indebtedness accrued, and the execution by Newton of the collateral contract change, or affect, the relation of the particle and highlifting as between each other?

ties, or their rights and liabilities as between each other?

[1, 2] McBryde was to share in any profits made by the corporation to be formed by virtue of the contract it made with Newton for cutting the timber in proportion to the stock which he held therein. He was to render such service as he was able toward making the corporation a success for which he was to be compensated. McArthur is not a party to, nor is it alleged that he had notice or knowledge of, the transaction. It appears from the transcript of the record in the action by the American National Bank on the note that McArthur denied having had any connection with or knowledge of its execution, or that he indorsed it. His denial did not avail him as judgment was rendered against him on his indorsement. In the absence of any explanation of this transaction, the court must deal with the rights and liabilities as they appear on the face of the note. By becoming a payee and thereafter an indorser, he became as to the bank liable for the debt and the judgment thereon is now a lien upon his property. McBryde is, as between McArthur and himself, one of the makers of the note and his property must respond to the demands upon it as such. If, upon the facts, as they appear upon the pleadings, McArthur had paid the note or discharged the judgment, he would have either an action at law against McBryde to recover the amount or a right to have the judgment assigned to a third party and enforced against McBryde's property by way of exoneration. Davison v. Gregory, 132 N. C. 389, 43 S. E. 916; Pittinger, Ex parte, 142 N. C. 85, 54 S. E. 845. Numerous cases are to be found in the reports sustaining and illustrating this principle.

[3, 4] McBryde's counsel say that whatever right McArthur may have had to call upon the court to subject McBryde's property primarily to the discharge of the debt was secured to him by compliance with section 2840 of the Revisal of 1905, which provides that, when sued, either of the defendants may allege that he is surety, and, if the allegation be proven, the jury in their verdict and the court in the judgment shall distinguish the principal and surety, and it shall be so indorsed on the execution issued for the collection of the judgment. By section 2841 the sheriff, when the execution comes into his hands, is directed to levy upon and sell the property of the principal before resorting to the property of the surety. It is insisted that the decisions of the Supreme Court of this state sustain the position that, unless the surety avail himself of the provisions of this statute before judgment is rendered, he is estopped from doing so in any subsequent stage of the action or by any other suit based upon the judgment; that his right to have the principal's property exhausted before he is called upon to

pay the debt is lost. In Stewart v. Ray, 26 N. C. 269, it is said that the statute was passed for the benefit of the surety, he may avail himself of its provisions or not as he thinks proper. If he does not, he loses the benefit intended for him, and it will be too late when an execution is about to be levied, or a sale of his property about to be made, to allege that he is not the principal, and demand of the sheriff to look to the property of him for whom he is bound. So in Banking Co. v. Duke, 121 N. C. 110, 28 S. E. 191, it was held that a judgment was not irregular and would not be set aside upon the application of the surety because it did not adjudge the relation of the parties to the note, when no such averment was made in the answer.

In these and the other cases cited by counsel it is settled that, if the surety would avail himself of the benefit of the statute, he must plead his suretyship and have the fact established by the verdict and judgment. No authority is cited to sustain the contention that by his failure to avail himself of the statutory right the surety may not, upon paying the judgment, sue the principal as for money had and received, to recover the amount, or have the judgment assigned to a third party for his benefit, or be subrogated to the securities held by the creditor. Although the statute was enacted as early as 1826, many decisions are found in our Reports sustaining the right of the surety to sue his principal at law, or to be subrogated in equity to the remedies and securities held by the creditor, in which the fact of suretyship was not pleaded nor adjudged. These remedies are independent of the statutory right to have the record show to the sheriff that by reason of suretyship of one of the defendants he is required to exhaust the property of the principal. The right secured by the statute is in no sense a defense to the action, nor does it limit or affect the right of the creditor to his judgment or the means of enforcing it. The sole office is to lay the basis for imposing upon the sheriff the duty in executing the writ of fieri facias, or venditioni exponas to sell the property of the principal before resorting to that of the surety. It is well settled that, although a defendant may, in an action against him, set up a counterclaim, his failure to do so does not prevent him from resorting to a separate action on it. Blackwell Mfg. Co. v. McElwee, 94 N. C. 425; Mauney v. Hamilton, 132 N. C. 306, 43 S. E. 903; Banking Co. v. Morehead, 126 N. C. 279, 35 S. E. 593; Robinson v. McDowell, 130 N. C. 247, 41 S. E. 287. While by section 563, Revisal, judgment may be given against one or more of several defendants and may determine the ultimate rights of the parties as between themselves, it is manifest that the defendants are not required to set up or call attention in their pleadings to rights existing between themselves; they may litigate the cause of action set up by plaintiff against them, reserving their rights as between each other.

"It has been held under this section that a judgment can be rendered in favor of a defendant against his codefendant upon matters connected with the same cause of action, and that while the rule is that a judgment against several defendants, nothing else appearing, determines none of their rights among themselves, but only the existence and legality of the plaintiff's demand, yet when the respective rights of the defendants, as between themselves, are put in issue by the pleadings, they may be adjudicated, and the judgment is binding and conclusive upon them." Gregg v. Wilmington, 155 N. C. 18, 29, 70 S. E. 1070, 1075.

It would not seem that, by failing to set up his suretyship in the action brought by the American National Bank on the note, McArthur lost any equitable rights against McBryde to which he was entitled as surety. It is true, as held in Gatewood v. Bruns, 99 N. C. 357, 6 S. E. 635, that the surety, who has failed to set up the fact and have it found as provided by the statute, cannot enjoin the plaintiff in the judgment from proceeding to sell his land for its satisfaction. Neither McArthur nor plaintiffs may enjoin the bank from enforcing its judgment against himself until it has exhausted McBryde's property. This is not the relief asked.

[5] It is well settled that, upon payment of the judgment by Mc-Arthur, he would be entitled to demand as against McBryde, an assignment of the judgment for his benefit. This doctrine is clearly stated and recognized by the Supreme Court of this state in Barringer v. Boyden, 52 N. C. 187:

"The right of a surety to keep alive a judgment, which he has paid, by having an assignment made to a stranger for his benefit, is unquestionable. When he advances the money, he has a clear equity (if he desire it) to be subrogated to the rights of the creditor, and to use the creditor's judgment for the purpose of coercing payment against the principal. Whether money advanced in such a way be an extinguishment or a purchase seems to be a question of intention. If it be paid, and nothing be said or done to show a contrary intendment, an extinguishment will be presumed; but if an assignment be made to one not a party, so as to show a purpose to keep it alive, it is sufficient. That a party defendant furnishes the money, and that the assignment is made on a day subsequent to the advancement of the money, can make no difference, provided it was intended, at the time it was advanced, as a purchase and not as a payment."

The doctrine of equity, upon which subsequent cases have been ruled, was announced in Deering v. Earl of Winchelsea (1787) White & Tudor's L. C. Eq. 784, and Pomeroy, Eq. (3d Ed.) 1419, in which it is said:

"By the fact of payment the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If, therefore, the creditor refuses to surrender up such securities, the surety may maintain an equitable suit to compel their assignment and surrender."

[6] So it is held that an indorser on a note may pay it and demand its delivery, and if the contract has been merged into a judgment, his right is to an assignment of the judgment and enforce it for his own benefit. Eno v. Crook, 10 N. Y. 66; Freeman on Judgments, 471; Lennox v. Prout, 3 Wheat. 521, 4 L. Ed. 449. The principle is clearly stated by Prof. Langdell:

"If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him and not to the debtor, though the latter has a clear legal right to receive it, the debt being paid and extinguished: 1. e., equity destroys the legal right of the debtor, and converts the creditor into a trustee for the surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is

therefore entitled to the pledge as an incident of the debt. This, however, is only a fiction—a fiction, moreover, which is contrary to law, for the payment by the surety and extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law."

If the bank had reduced the note against McBryde and the other makers to judgment, not suing McArthur, is it not clear that, when called upon to respond upon his indorsement, he would have, upon paying the note, the right to demand an assignment of the judgment; or if, after the execution and indorsement of the note, the bank had obtained collateral security, or a mortgage from the makers, the indorser could have demanded, upon tendering the amount, assignment of such security. How is such a case to be distinguished from the one disclosed by the pleadings? How does the fact that the bank has recovered judgment against the maker and indorser deprive the latter of the right to call for an assignment of the note, or the judgment into which it has been merged? Sheldon on Subrogation, 86; Nelson v. Williams, 22 N. C. 118. In Davidson v. Gregory, 132 N. C. 389, 43 S. E. 916, following the citation of many cases, it is said:

"In equity, however, when the surety, or, upon the same principle, a subsequent incumbrancer or any other person having an interest in the property affected by the liens, pays off the debt of his principal, or of the common debtor, as the case may be, for the protection of the property liable for the debt, he is subrogated to the rights of the creditor whose debt he has paid and to all securities held by him, without a formal assignment."

While the Supreme Court of this state held in many cases, prior to 1868, that the payment of a judgment by the surety extinguished it, and left him to his action at law against the principal, other courts held that equity, notwithstanding the effect of the payment at law, would, for the purpose of preserving and enforcing the equities, treat the judgment as existing, or, as was said, for the purpose of effectuating the intention of the parties, treat the judgment as alive. It may be that, under the Code system, introduced in 1868, abolishing the distinction between legal and equitable remedies, the North Carolina Courts would follow the ruling of other courts in respect to the rights of sureties for which they were bound with their principles. This view is strongly stated by Mr. Justice Walker in his dissenting opinion in Liverman v. Cahoon, 156 N. C. 189, 72 S. E. 327, 1 White & Tudor's L. C. Eq. (3d Ed.) 151.

However this may be, McArthur is entitled, upon tendering the full amount of the judgment, with interest and cost, to demand an assignment, and that is what plaintiffs ask the court to decree.

[7] Counsel for McBryde and the Citizens' National Bank of Durham say that whatever rights McArthur may have had to be subrogated to the rights of the bank were personal, and do not vest in, nor can it be invoked by, his creditors. This contention leads to the conclusion that McArthur, against whom plaintiffs hold judgment liens junior to the judgment held by the bank against McBryde and himself, by refusing or failing to assert his right to be subrogated as against his principal, McBryde, may permit his property to be sold, and thereby

defeat the lien of plaintiffs' judgment, and that they may not protect themselves by invoking the right which he fails to assert for their protection. The correctness of this contention may be tested by assuming that subsequent to the indorsement by McArthur of the note, McBryde had executed to the American National Bank a mortgage on his land as security for the note; that the bank had thereafter recovered judgment against McBryde and McArthur on the note, and thereafter plaintiffs had recovered judgment against McArthur. Is if not clear that, for the purpose of protecting their liens, plaintiffs would be entitled to either compel the banks to foreclose the mortgage or to demand an assignment of it to themselves?

The equity to which, in the case put, the owner of the judgments against McArthur, junior to the judgment held by the bank against McBryde and McArthur, called marshaling securities, is defined by Chan-

cellor Kent in Cheesborough v. Millard, 1 Johnson's Ch. 409:

"If a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of these parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled, either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him and to receive all the aid it can afford him."

"The party liable to be affected by this election is usually protected by means of substitution. Thus, for instance, if a creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he was a purchaser against the principal debtor or the cosureties." Aldrich v. Cooper, 8 Ves. 382, 2 White & Tudor's L. C. Eq. (3d Ed.) 219; 4 Pomeroy, Eq. 1414; Hawkins v. Blake, 108 U. S. 422, 435, 2 Sup. Ct. 804, 27 L. Ed. 775; Williams v. Washington, 16 N. C. 137; Roberts v. Oldham, 63 N. C. 297; Bunting v. Ricks, 22 N. C. 130, 32 Am. Dec. 699; York v. Landis, 65 N. C. 535; Holden v. Strickland, 116 N. C. 186, 21 S. E. 684; Carter v. Jones, 40 N. C. 196, 49 Am. Dec. 425.

That the bank has secured a judgment lien against McArthur and McBryde, senior to the lien of plaintiffs' judgment, does not in principle distinguish the case from one in which it had secured a mortgage on McBryde's land. The case comes to this: McBryde is primarily, and McArthur secondarily, liable for the debt upon which the American National Bank has recovered judgment against both. McArthur is entitled to tender to the bank the amount of the judgment against McBryde and himself and demand an assignment. If the bank refuse to assign, he is entitled, in a court of equity, to have the judgment assigned, or a decree declaring the bank to hold it as his trustee, upon paying the amount. Being insolvent, and either unable or unwilling to avail himself of this right, plaintiffs, holding junior judgment liens on his property, are entitled to be substituted to his right and call on the Citizens' National Bank of Durham to either exhaust the property of McBryde or to assign its judgment to them upon payment of the amount due thereon. By pursuing this course no possible harm can come to the Citizens' National Bank of Durham, and McBryde's property will be subjected to the payment of the debt for which he is primarily liable; McArthur's property will be exonerated from this judgment and subjected to the payment of the judgment held against him by plaintiffs. The Citizens' National Bank of Durham took an assignment of the judgment held by the American National Bank against McBryde and McArthur after the institution of this suit. It holds the judgments against McBryde junior in date of lien to the judgment in controversy. If it be permitted to collect this judgment out of the property of McArthur, the surety, it will thereby relieve the lands of the principal of the lien of the judgment and cast the burden upon the lands of the surety.

Plaintiffs' equity against McBryde and the American National Bank accrued, and attached to the judgment, before the Citizens' National Bank of Durham purchased, and it therefore took the assignment subject to such equity. The lands of McArthur have been sold by receivers appointed by the court in this case. The proceeds are held by the receivers subject to the judgment liens, according to the order of their priorities. The relief to which plaintiffs are entitled, as between McBryde, the Citizens' National Bank of Durham, and themselves, may be accomplished by a decree directing the receivers to pay from the funds in their hands to the Citizens' National Bank of Durham the amount due on the judgment against McArthur and McBryde, and take an assignment to themselves or such other person as they may designate. The same result will be reached by a decree directing the payment by the receivers of the amount of the judgment into the court upon which the Citizens' National Bank of Durham will be adjudged to hold the judgment as trustee for the receivers, subject to such further orders as may be necessary to secure relief to the parties.

A decree may be drawn ascertaining the amount due on the judgment held by the Citizens' National Bank of Durham against McBryde and McArthur, and directing the receivers to tender the amount, together with the cost, to said bank, upon the execution of an assignment of said judgments to them. The cause is retained for such other and further orders and decrees as may be in accordance with the rights of the parties and the course and practice of the court.

UNITED STATES v. AMO.

(District Court, W. D. Wisconsin. September 18, 1919.)

ORIMINAL LAW \$\iff 37\$—Entrapment as defense; sale of liquor to Indians. A conviction for selling liquor to Indians held not invalidated because a government agent, having reports of illegal sales by defendant, employed and sent two full-blood Indian men to defendant's saloon, where on merely asking for whisky they were sold several drinks.

Criminal prosecution by the United States against Albert Amo. On motion by defendant for arrest of judgment. Denied.

Albert C. Wolfe, U. S. Dist. Atty., of La Crosse, Wis. Frank B. Lamoreux, of Ashland, Wis., for defendant.

SANBORN, District Judge. Several cases have been tried at this term which involve the question of the right of government agents to

make use of Indians to obtain intoxicating liquor at saloons, and show substantially the same facts. There have been several convictions in cases involving the question of the use of these decoys, in which proper motions have been made so as to save the question.

It appears that two full-blood Indians, strong, stalwart specimens of the race, living on the Lac du Flambeau reservation, were hired by the agent to go to Saxon, some distance from Flambeau, and visit a certain saloon for the purpose of buying liquor. The two Indians, and the agent, went together to Saxon, and the Indians went to the saloon and bought, and in the space of two hours consumed, each 12 drinks, and purchased a half pint bottle of whisky. The agent did not go with them into the saloon, or visit it at any time. There was no persuasion or deception whatever. The Indians simply went up to the bar and said "Whisky?" which was continuously furnished them until each had had 12 whisky glasses filled to the top (in Indian fashion). All the whisky was paid for with money furnished by the agent of the government, who also paid all the railroad fare to and from Saxon, and wages to each of the Indians at \$3 a day.

On these facts defendant's attorney moves to direct a verdict for defendant at the close of all the evidence, which was overruled, with the direction that, in case of a verdict of guilty, the objection might be raised in any proper way. A motion is now made in arrest of judgment. It is urged on the part of the defendant that, while decoys are permissible to entrap criminals, they are not to create them—to present opportunity to those having intent or willing to commit a statutory crime, but not to ensnare the law-abiding into unconscious offending, substantially quoting from United States v. Healy (D. C.) 202 Fed. 349. In the Healy Case defendant was charged with selling liquor to an Indian, but supposed him to be a white man, so that the case may be said to have included the element of deceit. The court says:

"The case at bar is not of those where the actor knows his act violates the law."

Most of the decisions where defendant has been discharged are those in which he was enticed or expressly persuaded to make the unlawful sale or do the unlawful act, and not where the government merely furnished the opportunity to a person willing to offend. Such is the case of Voves v. United States, 249 Fed. 191, 161 C. C. A. 227, in this circuit, where the defendant supposed the Indian was a Mexican, and this was known to the government detectives, by whom the Indian was induced to buy the liquor, but who did nothing to correct the impression of defendant in respect to the buyer's race. The element of deceit was also present in Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604, Sam Yick v. United States, 240 Fed. 60, 153 C. C. A. 96, and Peterson v. United States, 255 Fed. 433, 166 C. C. A. 509. The question is settled for this circuit by Goldstein v. United States, 256 Fed. 813, — C. C. A. —.

In the present case Indians visit a saloon and buy liquor from a person who is entirely ready and willing to sell to them, without any de-

ceit or persuasion whatever. They simply approach the bar and say "Whisky?" which may be the only English word they know (and, as one of the Indians said, that is enough to know). They merely gave defendant the opportunity to violate the law, without any persuasion to or deception of a willing law-breaker, who knowingly and promptly furnishes the liquor, well knowing that whisky is the cause of most of the evils which beset the Indian, most of the crimes on Indian reservations, and that the government has sought in every possible way to keep the poison away from them. It is to be hoped that the reign of this monster is nearly over.

Another aspect of the case is presented by the charge of Judge Geiger in a recent trial at Milwaukee in the case of United States v. Lagers. It appears that three Indian women from the Menominee reservation had been at Milwaukee as witnesses before a grand jury, and on their way home they were taken to a saloon by a special agent for the suppression of the liquor traffic among the Indians. There they bought liquor and became intoxicated. Judge Geiger instructed the jury to find for the defendant, on the ground that it is against public policy for the United States, as a guardian for the Indians, to get its Indian ward drunk for the purpose of suppression of the traffic. Judge Geiger said:

"I am willing to grant that the government should resort to vigorous and aggressive means for the enforcement of this law, for the investigation of alleged violation, and for the apprehension of those who are believed to be guilty of violation; but I cannot and will not bring myself to believe that another department of the government can, as was done in his case, take one of its own wards and have her participate in what, according to the testimony of these three women, was a debauch in liquor during an hour or an hour and a half, with the government agent standing by, making not a word of protest, and then put it up to a court of justice, with the idea that the testimony shall be brought into court from the mouths of these witnesses, that a jury should be asked to convict upon that testimony, and that the court should read that verdict into a solemn pronouncement of guilt, entailing the penalty of this law. * * It cannot be that the rule permitting decoy evidence is wholly without limit, and that the court must at all times ignore the fact and extent of its use, to say nothing of its manifest abuse. At any rate, I shall not feel bound to recognize its use to an extent which involves ignoring on the part of the government for the time being the other plain obligations which it, as guardian, owes to these Indians as wards. Neither is it incumbent upon me to define the exact limits within which it may be used; and I feel that it is my plain duty, a duty owing to the court as an instrumentality for the enforcement of the law, to assume the burden of stopping the case right here, myself, and your verdict will be that you find the defendant not guilty."

I do not think that the rule applied by Judge Geiger should be adopted here. The means for the suppression of the liquor traffic is a matter governed almost entirely by political or administrative considerations, with which the courts have no concern except in the case of grave abuse. It is one thing for an Indian agent to connive or procure the debauchery of Indian women, who are peculiarly susceptible to the alcoholic influence, and a different one for him to hire a stalwart male of the tribe to buy liquor, in order to stop the business in that particular locality. It is well known that a small amount of liquor robs an Indian woman of all sense of chastity or decency—destroys all her

moral resistance. The facts in the Milwaukee case showed a flagrant abuse of the agent's duty. It appears that the saloon where the woman obtained the liquor was 45 miles from the reservation, while Saxon is 55 miles away. It does not appear that there had been any reports to the agent of sales of liquor to Indians in that vicinity. In this case, agents have such reports. I think that in this particular case the government was justified in resorting to this means for arresting the sale of liquor at Saxon. Clearly the political department should not be restrained by the judicial except in a clear case.

The motion in arrest of judgment is denied.

In re W. & A. BACON CO.

(District Court, D. Massachusetts. October 15, 1919.)

No. 25341.

1. BANKRUPTCY \$\insigm 154\ldot Set-off against trustee.

Claimants, who delivered parcels for bankrupt's store, for some of which they collected the price, which they customarily paid over every few days, rendering bills for their services once or twice each month, held entitled to apply the proceeds of such collections in their hands at the time of bankruptcy on the amount due them for services.

2. Trusts &=301/2 (1)—Relation of parties; collection of money for another

The fact that one person has collected money for another and has it in his possession does not, without more, establish a trust relation between them.

In Bankruptcy. In the matter of W. & A. Bacon Company, bankrupt. On review of orders of referee. Affirmed.

Morris, Campbell & Abbott and Charles H. Morris, all of Boston, Mass., for creditor.

Dunbar, Nutter & McClennen and George R. Nutter, all of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. The question certified relates to the allowance by the referee of certain set-offs to the claimants, of whom there are several.

The precise facts differ somewhat with the different claims; but the basic facts are similar in all, and the differences are not sufficient to change the results. The matter can best be considered as a single case, as was done by the learned referee. Certain of his inferences or statements of fact are objected to by the alleged bankrupt, it being a case of composition before adjudication; but the facts themselves are clear, and appear not to have been seriously in controversy.

[1] The claimants were in the business of delivering parcels for Boston stores. They collected parcels from the stores and carried them to the purchasers, and for this service they charged the store a certain rate per parcel. Some of these parcels were C. O. D.; i. e., were not to be delivered, except upon receipt of the purchase price. On them the

claimants collected the price and returned it to the store, making in some cases an additional charge for the collection.

Bills for delivery charges were rendered by the claimants to the bankrupt monthly or semimonthly; but the amounts collected on C. O. D. parcels were paid over to the bankrupt within a few days after collection and did not figure in the monthly bill. One of the claimants deducted from its remittances its return charge on the money, and the others undoubtedly might have done so, if they had desired; but in fact they returned the collections without deduction and included their charges on C. O. D. parcels in their general bills. There was no written agreement, and no exact and explicit oral agreement, between the bankrupt and the delivery companies. It was understood between the bankrupt and the companies that the latter were responsible for all parcels for which they receipted, and must either return the parcel or pay for it. When C. O. D. parcels were lost, or the price was not remitted, a credit was claimed by the store on the delivery company's monthly bill.

The money received by the claimants on C. O. D. parcels was, except by one or two of them, deposited in their general bank accounts, and was remitted by check. There was no understanding that it was to be kept separate. Under the course of business as stated there would be in a delivery company's hands, at any given time, two or three days' collections and undelivered parcels on which collections were to be made. The amounts due a delivery company would frequently exceed the amount of collections and parcels in its hands, and did so at the

time of this failure.

On the bankruptcy of the Bacon Company the several claimants applied on their current bills against it for delivery charges the moneys then in their hands from C. O. D. collections, and proved for the balance due them. The present question is whether they had the right to make this set-off, or whether they must return the C. O. D. money to

the bankrupt.

The bankrupt contends that the collections constituted trust funds, which the claimants were bound to return to the Bacon Company, regardless of the state of its general account, and with no right of set-off. That depends on whether, quoad the collections, the claimants occupied a trust relation to the bankrupt. It does not seem to me that they did. The relation, as I view it, was a purely commercial one, and there was nothing of a fiduciary nature in it. The bankrupt employed the claimants to transact certain business for it, instead of doing the business itself. As part of it the claimants were to make collections when required, for which they were accountable to the bankrupt; the bankrupt being indebted to them in turn for services rendered. There was nothing which expressly or impliedly bound the claimants to return the collections in specie, whatever the effect of that might have been, and their liability for parcels stolen or lost was part of the general understanding. In respect to this, as in other matters, each party seems to have relied on the general financial responsibility of the other.

The course of business was such that there were mutual accounts between the bankrupt and the claimants; no distinctions were made,

so far as appears, as to the character of the claimant's liability (whether at law or in equity), in regard to any items entering into the account, except that the moneys collected by them were paid over within two or three days after collection, instead of monthly or semimonthly when the bills were rendered. That of itself does not show, I think, that the money so paid over was regarded, or should be treated, as trust funds. It was money which belonged to the bankrupt, and which a proper dispatch of the business intrusted to the claimants by the

bankrupt required should be promptly paid over.

[2] But the fact that one person has collected money for, and has in his possession money belonging to, another, does not, without more, establish the relation of trustee and cestui que trust between them. Although an agent is bound to act with all fidelity in regard to matters intrusted to him by his principal or by a bailee, he is not a trustee, nor accountable as such. For any violation of his duties and obligations towards his principal he is liable to an action at law in which he can avail himself of the defense of set-off or recoupment, as the case may be. If one of the parties be acting for an undisclosed principal, a setoff might result in the application of money belonging to one person to the payment of a debt due from another; but that is not the present case. The money which the claimants seek to set off belongs to the bankrupt, and will be applied by the set-off to the payment of the bankrupt's own debts. The doctrine of set-off is in itself eminently just, and is increasingly favored in courts of bankruptcy, because of its essential fairness. See Clifford, Trustee, v. Oak Valley Mills Co. (D. C.) 229 Fed. 851, 853, and cases cited.

No decision has been called to my attention requiring a denial of the right on the facts here shown. In the Western Tie & Timber Co. Case, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, relied on by the bankrupt, the laborers were indebted to the bankrupt, and the tie company to the laborers. By agreement between the laborers, the bankrupt, and the company the last-named made deductions from the wages and paid the deductions to the bankrupt on account of the laborers and in settlement of their bills with him. That case seems to me quite dis-

tinguishable from the present one.

Order of referee affirmed.

In re SEAT.

(District Court. E. D. New York, November 17, 1919.)

BANKRUPTCY \$\infty\$ 11. 51. 143(9)—EQUITY POWERS OF COURT; FAILURE TO SCHED-ULE INTEREST OF BENEFICIARY UNDER WILL OF PERSON STILL LIVING.

Where the bankrupt's aged mother executed a will September 14, 1917. leaving him practically her entire estate, and he filed a petition in bankruptcy before her death October 7, 1919, his contingent interest under the will was not an asset of his estate, for the mother might at any time have changed her will; and hence, while a bankruptcy court possesses equity powers to prevent the perpetration of fraud, his adjudication will not be set aside because the bankrupt did not schedule as an asset his contingent interest in his mother's estate.

In Bankruptcy. In the matter of Harry E. Seal, bankrupt. On application for order vacating order of adjudication, and for a stay of proceedings. Application denied.

Adolph Ruger, of Brooklyn, N. Y., for Emily R. Pierce. Louis J. Somerville, of New York City, for bankrupt.

GARVIN, District Judge. This is an application for an order vacating the order of adjudication herein and for a stay of proceedings. including the payment of moneys by a third party belonging to the bankrupt. The application is based upon alleged fraud practiced by the bankrupt in obtaining the adjudication.

It is claimed that he borrowed various sums of money upon the representation that he was the sole heir and next of kin of his mother. who was advanced in years, and upon whose death he would repay the sums so obtained. On September 14, 1917, the bankrupt's mother made a will, in which, it is claimed, she left him practically her entire estate. On October 7, 1919, she died, and it is alleged that the bankrupt came into considerable property under her will. The bankrupt denies having made statements at any time that he would be his mother's sole heir, and there a sharp issue of fact is raised.

The applicant, a creditor of the bankrupt, seeks to invoke the equity powers which a court of bankruptcy undoubtedly possesses to prevent a perpetration of fraud. That this court, sitting in bankruptcy, possesses equity powers to prevent the perpetration of fraud is well recognized; but these powers are by no means without limit. The bankrupt had a right to file the petition in bankruptcy. He did not schedule under his assets any interest in his mother's estate. The applicant claims that, because he had been designated as sole (or practically sole) devisee or legatee, this interest should have been scheduled as an asset.

With this contention I am unable to agree. He had no vested right. His mother could at any time have changed her will, and I am unable to reach any other conclusion than that the property belonging to her estate comes within that class which is acquired by a bankrupt after his adjudication, and over which the court has no jurisdiction.

It follows that the motion be denied. Order signed.

HOUGHTON et al. v. ENSLEN et al.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1919.)
No. 3339.

1. Banks and banking \$\infty\$=63\frac{1}{2}\$—State superintendent of banks; assignment of right of action against directors.

Under Acts Ala. 1911, p. 50, creating banking department of the state and authorizing the superintendent of banks to take possession and liquidate unsound banks, whether corporate or private, by collecting all debts due and claims belonging to the bank, or by selling pursuant to order of court all of the property of the bank, the superintendent of banks may under order of court dispose of, with the other property, the bank's right of action against directors for mismanagement.

2. Banks and banking \$\sim 63\\\2\cdots\$ Sales by state banking superintendent of assets of insolvent bank.

A sale by the Alabama superintendent of banks of the assets of an unsound bank, made pursuant to the powers given by Acts Ala. 1911, p. 50, and under order of court, held, in view of the order of the court and resolution of stockholders, to carry with it any right of action in favor of the unsound bank against directors for their mismanagement.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Bill by Albert F. Houghton and others against Eugene F. Enslen and others. From a decree dismissing the bill, complainants appeal. Affirmed.

Robert N. Bell and James A. Mitchell, both of Birmingham, Alafor appellants.

Forney Johnston and W. R. C. Cocke, both of Birmingham, Ala., for appellees.

Before WALKER, Circuit Judge, and FOSTER and EVANS, District Judges.

WALKER, Circuit Judge. This was a stockholders' bill filed by the appellants, three stockholders of the Jefferson County Savings Bank, an Alabama corporation (which will be referred to as the bank), against that bank and the directors thereof. The bill sought a decree charging the directors individually with liability for alleged losses sustained by the bank in consequence of alleged wrongful conduct of the directors in making, for and in the name of the bank, sundry loans of the bank's funds to insolvent borrowers without security, or on grossly inadequate security, and in investing other funds of the bank in property worth greatly less than the aggregate of the amount of incumbrances thereon and the amounts of the bank's funds invested therein. Among the matters set up in the answer to the bill as defenses thereto were the following:

(1) That the causes of action sued on were barred by the Alabama statute of limitations of one year; (2) that the claims sued on were assigned to the Jefferson County Bank, another corporation, by the Alabama superintendent of banks pursuant to a decree of the chancery

court of Jefferson county, Ala., rendered in a cause to which the superintendent of banks and the Jefferson County Savings Bank were parties, which decree was rendered after the making of such assignment had been agreed to by the stockholders of the bank, as evidenced by a resolution adopted at a meeting of such stockholders, a copy of which was exhibited to the court ordering the sale.

The court ordered that the above-mentioned two matters set up in defense to the bill be separately heard and disposed of before the trial of the case as a whole. The result of that hearing was a decree dis-

missing the bill. The appeal is from that decree.

The decree under review is not subject to be reversed if either of the above-mentioned matters constituted a defense to the bill.

[1] The superintendent of banks is a state officer provided for by an act of the Legislature of Alabama entitled:

"An act to create a banking department of the state of Alabama and through this department to regulate, examine and supervise banks and banking, and to punish certain prohibited acts relating thereto." General Acts Alabama 1911, p. 50.

That act provides that, on the happening of specified delinquencies or on a finding, after examination, that a corporation or individual banker is in an unsound or unsafe condition to transact the business for which it was organized, or that it is unsafe for it to continue in business, the superintendent of banks may take possession of the property and business of such corporation or individual banker, and retain such possession until such corporation or individual banker shall resume business or its affairs be finally liquidated as provided in the act. While so in possession the superintendent is authorized to collect all debts due and claims belonging to the bank. Provision is made by the act for the superintendent completing the liquidation of the affairs of a bank, and for his selling, pursuant to an order of court, and on such terms as the order prescribes, all real or personal property of the bank, the property and business of which has been taken possession of.

The provision for the authorization of a sale by the superintendent of banks of "all real and personal property" of a bank is to be interpreted in the light of the fact that the making of such sale is a step towards effecting a complete liquidation of the bank's affairs. The provisions of the act make it evident that it was contemplated that the affairs of a delinquent or unsound bank which is not put in condition to resume its business with safety to those having dealings with it may be finally liquidated by the superintendent, and that that official may proceed towards that end by realizing on everything on which the bank itself could have realized, if it had remained in control of its own affairs, and that he may do so either by sale or by enforcing payment or collection of everything belonging to the bank which may be made available for the payment of debts and distribution of any surplus among the bank's stockholders. It is not to be doubted that the official liquidator would be empowered to enforce such a liability to the bank as that of the directors which is alleged and sought to be enforced in this case. It being open to him to realize by sale on what belongs to

the bank, it may be inferred that it was intended to make it permissible for him to sell anything belonging to the bank on which he, as liquidator, could have realized money if he had not sold it.

In view of the fact that a complete liquidation of the affairs of a bank was provided for, and that the official liquidator could be authorized to sell what belonged to the bank, instead of realizing on it otherwise, we think the conclusion is warranted that he could, when duly authorized to do so, make a sale which would confer on the purchaser the right to enforce such a liability to the bank of its directors as the averments of the bill in this case show was incurred. Considering the object in view in providing for an authorization of a sale by the superintendent of all property of a bank, it is not to be supposed that the Legislature intended to authorize the enforcement by the superintendent of the tort liability of the bank's directors, and at the same time intended to withold from that official the power of assigning or transferring to the purchaser of the bank's assets the right to enforce that liability. So far as a bank's resources are concerned, it seems that a buyer can be put in the superintendent's shoes, leaving no moneyed liability to the bank to be enforced by that official. We are of opinion that under the provisions of the act the superintendent could be authorized to sell anything belonging to the bank which was a resource on which it could have realized money, if it had remained in control of its own affairs.

[2] The further question is: Was the right to enforce the asserted liability of its directors to the bank sold and transferred by the superintendent of banks? Pursuant to a decree rendered by a court having jurisdiction in a cause to which the bank and the superintendent of banks were parties, the latter sold, transferred, set over, and assigned to the Jefferson County Bank, its successors and assigns—

"all and singular the real, personal, and mixed property, choses in action, causes of action, rights, equities, and assets, of every nature whatsoever, of said Jefferson County Savings Bank, and all such property and assets in or to which the said Jefferson County Savings Bank, or the said A. E. Walker, as superintendent of banks, in charge of the business and assets of said bank, or the stockholders or creditors of said bank, have any right, title, interest, equity, or estate, including (but without limiting the scope of this conveyance to) all moneys, funds, and securities in the custody or possession of said superintendent of banks in the premises; all real, personal and mixed property, of every nature whatsoever, whether located in Jefferson county, Alabama, or elsewhere, as well as rights, equities, and causes of action, choses in action, remedies, and recoveries, in or to which the said Jefferson County Savings Bank had any right, title, interest, or equity on January 28, 1915; all promissory notes, together with all collateral or other security or agreements thereto attached, now in the possession of the superintendent of banks as aforesaid, or in the possession of the agents or attorneys of said superintendent of banks, or of said Jefferson County Savings Bank, including, likewise, all judgments, decrees, suits, actions, and causes of action pending in the courts of Alabama or of any other jurisdiction in which the said savings bank had or has any beneficial or other interest, together with all rights, powers, equities, trusts, powers of appointment, agencies, and things or relations of value heretofore vesting in or inuring to the benefit of said bank, of every nature whatsoever."

It is plain that any liability to the bank which was capable of being assigned was embraced by the above-quoted assignment. A question

was raised as to the regularity of the adoption, at an adjourned meeting of the bank's stockholders, of the resolution in conformity with the terms of which the court authorized the sale made by the superintendent. No question is raised as to the regularity of the adoption, at a previous meeting of the bank's stockholders, of a resolution which contained the following:

"Resolved, that the superintendent of banks is hereby authorized and requested to dispose of all of the assets of the Jefferson County Savings Bank to any individual, corporation, or association, in consideration of the assumption by the purchaser of the debts and liabilities of the Jefferson County Savings Bank, as shown by the books of the bank and filed or allowed, together with the costs of administration, under such terms and provisions as may be stipulated by him.

"Resolved, further, that the superintendent of banks and his agents be, and they are hereby, authorized and directed to execute all such transfers and assignments for and in the name of this bank as may be deemed necessary by the purchaser of said assets to effect such transfer."

It is quite apparent that the managing officers of the bank, in consenting to the sale authorized by the terms of the court's order, did not go beyond what the bank's stockholders had expressly authorized and requested to be done.

From the above-stated conclusions it follows that the court did not err in dismissing the bill. The decree to that effect is affirmed.

Petition of CHATTANOOGA SAVINGS BANK.

In re. HITT LUMBER & BOX CO.

(Circuit Court of Appeals, Sixth Circuit, November 5, 1919.)

No. 3310.

CHATTEL MORTGAGES S-PLEDGE OR MORTGAGE.

Where auto trucks were delivered by the debtor into possession of an agent of the creditor as security for a loan, the giving in addition of a bill of sale of the trucks to the agent *held* not to convert the transaction from a pledge into a mortgage, requiring registration under the law of Tennessee.

Petition to Revise an Order of the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In the matter of the Hitt Lumber & Box Company, bankrupt. On petition of the Chattanooga Savings Bank to revise an order of District Court. Reversed.

Robert H. Williams, of Chattanooga, Tenn., for petitioner.

James M. Trimble, D. L. Grayson, and Frank Spurlock, all of Chattanooga, Tenn., for respondent.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. Before bankruptcy proceedings were commenced the bank loaned the bankrupt a sum of money, to be se-

cured by certain automobile trucks. Thereupon the bankrupt delivered the trucks to one Lewis for the benefit of the bank, together with a bill of sale of the trucks to Lewis, with covenant of warranty for the like benefit. The security was thus that of the bank. Wharton v. Lavender, 14 Lea (Tenn.) 178, 188. The bill of sale was not registered. The possession of the trucks was maintained by Lewis until after bankruptcy intervened. If the transaction constituted a pledge of the trucks it was valid as against creditors of the bankrupt; for a pledge requires no registration, even though in writing. Crisp v. Miller, 5 Heisk. (Tenn.) 697, 700; Biles v. Elliotte, 215 Fed. 340, 344, 131 C. C. A. 482 (C. C. A. 6). The District Judge held that notwithstanding the delivery of possession the transaction amounted to a mortgage or deed of trust, void for lack of registration under section 3664 of Shannon's Tennessee Code (1917). The trustee in bankruptcy had already paid the bank the amount of its loan, and the latter was ordered to pay it back. The correctness of this action is the only question presented. The reasoning of the court's conclusion is that a pledge differs from a mortgage in that under the former the legal title remains in the pledgor, while under the latter it passes to the mortgagee, and thus that, while the delivery of the trucks would have made a valid pledge in the absence of bill of sale, yet the delivery of the latter, although in connection with the possession of the trucks, as a matter of law under the Tennessee rule converted the transaction into a mort-

This result impresses us as wrong, unless compelled by the law of Tennessee, which, of course, would control. It need not be said that the intention of the parties, as evidenced by the entire transaction, must determine its character. See Biles v. Elliotte, supra. 215 Fed. at page 344, 131 C. C. A. 482. The more natural inference from the transaction, without further explanation and in the absence of fixed rule of law to the contrary, would be that the parties intended a pledge. and not a mere mortgage, and that the former was thus its dominant character. The bill of sale was presumably given simultaneously with the delivery of possession of the trucks. Although it would have been competent to show by parol that the transaction was intended as a mortgage (and, if so, it would be within the registration laws), it does not appear that a mortgage rather than a pledge was intended, unless in the mere fact that an absolute bill of sale accompanied the delivery of possession of the trucks. On principle there is no greater difficulty in attributing the dominant character of pledge to a bill of sale, with simultaneous delivery of possession to secure a debt, than in treating a bill of sale absolute in form as a mortgage. There is well-considered authority that the taking of bill of sale absolute in terms, but intended as collateral security, amounts only to a pledge. Walker v. Staples, 5 Allen (Mass.) 34; Thompson v. Dolliver, 132 Mass. 103.

¹ The District Judge states in his opinion that Lewis "subsequently allowed the bankrupt to use the automobile trucks in daytime without charge, but required them to be returned to his possession every night." As both court and counsel treat Lewis' possession as complete, we shall do the same. And see Biles v. Elliotte, 215 Fed. 340, 344, 131 C. C. A. 482 (C. C. A. 6); Hickok v. Cowperthwait, 210 N. Y. 137, 142, 143, 103 N. E. 1111, Ann. Cas. 1915B, 1002.

104; Ex parte Fitz, 2 Lowell, 519, Fed. Cas. No. 4, 837, where the Massachusetts rule is stated as in the foregoing citations. This rule has also been applied to absolute transfers of incorporeal property incapable of manual delivery, such as corporate stock, warehouse receipts, etc. Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; White River Bank v. Capital Bank, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754; Rice v. Gilbert, 173 Ill. 348, 50 N. E. 1087; Conrad v. Fisher, 37 Mo. App. 352, 358, 8 L. R. A. 147. In the latter case a bill of sale accompanied the warehouse receipts. We see no controlling reason for a distinction in this respect between corporeal and incorporeal property. Indeed, in Wilson v. Little, supra, 2 N. Y. at page 447, 51 Am. Dec. 307, it was said:

"In such case [transfer of corporate stock], the transfer of the legal title being necessary to the change of possession, it is entirely consistent with a pledge of the goods. Indeed, it is in no case inconsistent with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale."

In the instant case the bill of sale and delivery of possession was made only to secure the borrowed money. The test is, not what the effect of the bill of sale standing alone would be, but the character of the transaction as a whole. To our minds, the infirmity of the decision below lies in assuming that the making of a bill of sale conclusively proves an intent to pass the title; whereas it is, in our opinion, merely evidence in that direction, to be considered with other evidence in determining the actual intent. The inference of pledge rather than mortgage receives support from the presumption that the parties intended a valid and effective security, the actual omission of a defeasance clause, the delivery of possession of the trucks, the failure to register, and the fact that the instrument, if intended as a mortgage, would normally have been acknowledged or proved by subscribing witnesses, as necessary to registration (Shannon's Code, sec. 3712); and the record does not contain such acknowledgement or proof. If a pledge, although for the bank's benefit, it was not a conveyance within the recording statute. Wharton v. Lavender, supra.

No substantial advantage could be gained by the bank in taking a mortgage rather than a pledge. Its rights, remedies, and obligations would be substantially the same, whichever form was taken. In legal effect the principal difference would be that in the one case the debtor would retain the legal, in the other the equitable, title; the creditor receiving in the one case a special, in the other the general, property. So far as the merits are concerned the distinction is technical and artificial. Under such circumstances, doubts of the intent of the transaction would naturally and equitably be solved in favor of a pledge rather than a mortgage. Under modern registration laws generally actual possession by the security holder, even by mortgage, usually dispenses with the necessity of recording. While the Tennessee statute does not in terms declare that registration of a mortgage is unnecessary where accompanied by actual delivery of possession of the mortgaged property, yet the only object of registration is to give construc-

tive notice, and delivery and possession gives effective notice. In Bank v. Haselton, 15 Lea (Tenn.) 216, 249, it was said that "possession by the pledgee * * * is a substitute for registration," and, unless the Tennessee law requires it, a denial of the bank's lien as a pledge would subordinate substance to form.

In our opinion the Tennessee law does not so require. The learned District Judge rightly stated the essential difference between a pledge and a mortgage under the law of Tennessee. Barfield v. Cole, 4 Sneed (Tenn.), 465, 467; Johnson v. Smith, 11 Humph. (Tenn.) 396, 400; Smith v. Atkinson, 4 Heisk. (Tenn.) 625, 628; Hurst v. Jones, 10 Lea (Tenn.) 8, 14; McCready v. Haslock, 3 Tenn. Ch. 13, 16; Trust Co. v. Bank, 123 Tenn. 617, 626, 134 S. W. 311. But the Tennessee decisions have not, in our opinion, established a settled rule that, under circumstances such as exist here, the delivery of a bill of sale, in connection with that of possession, as mere matter of law necessarily converts an otherwise valid pledge into a mortgage subject to the recording laws.

Barfield v. Cole, supra, cited by the District Judge, does not in our opinion support the decision below. It does not appear by the reported decision of that case that the subject of the alleged pledge was ever in fact delivered to the pledgee. The bill of sale merely announces such delivery. The decision relates only to the legal effect of the instrument of conveyance. An intention and agreement of the parties that possession would be given under it cannot take the place of actual delivery and possession. Indeed, the question whether the transaction amounted to a pledge, rather than an invalid mortgage, was not raised by any issues in the case. So far as concerned the plaintiff (a creditor suing an attaching creditor), it was immaterial which character was given.

In Johnson v. Smith, supra, the only proposition of present interest decided is that the assignment by the pledgee of the debt secured by the pledge, unaccompanied by delivery of the subject of the pledge, either actual or constructive, will not carry with it and vest in the assignee the lien upon the property created by the original pledge.

In Smith v. Atkinson, supra, the point decided was that a sale of goods with delivery of possession, and without reservation of title to the seller, with an understanding that a third person (who was to receive part of the purchase money) should have joint possession with the actual vendee until paid, but without any title conveyed to or actual possession of goods given to such third person, or control reserved to him, was invalid against creditors as a pledge or lien to secure the debt due such third person.

In McCready v. Haslock, supra, where the transaction in question was held to be a pledge and not a mortgage requiring registration, it was said that if the instruments under which the relation was created were mortgages or trust conveyances they would be void for lack of registration; but that is as far as the holding went in any respect material here.

In Hurst v. Jones, supra, a firm turned over to a creditor a stock of goods which the latter was to sell to pay his debt, and to pay the bal-

ance, if any, to other creditors. There was also a bill of sale, but the transferee denied that he had accepted it as the contract or received the goods thereunder. Although both parties called it a sale, it was held not such because no price was fixed, and not a mortgage for lack of conveyance of the title in writing, but that it "more nearly resembles a pledge, in that it transferred the possession of the goods to secure the debt of [the transferee], and authorized him to sell them to pay the debt." The lien was sustained.

Trust Co. v. Bank, supra, is not particularly in point as to the ul-

timate question here.

No Tennessee decision has been cited (and we have found none) holding that a transaction intended as a pledge would be rendered void by the mere fact that the pledgor accompanied the delivery of the thing pledged by a bill of sale; and the leading Tennessee decisions impress us as leaning towards sustaining a pledge, when equitable to do so, rather than defeating it. See, for example, Hurst v. Jones, supra, at page 15. We think the Tennessee decisions, taken as a whole, tend to support rather than to reject the rule that the dominant character of the transaction will be determined from a consideration of all the pertinent facts.

It results from these views that the order of the District Court

should be reversed.

AMERICAN FUEL CO. v. INTERSTATE FUEL AGENCY.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3352.

1. CONTRACTS \$\insigma 155\$—Construction against Party using words.

A provision inserted in a contract with a view to protect one of the parties thereto is to be construed against him, if ambiguous.

2. SALES \$\infty\$ 8I'(6)—Amount of monthly deliveries under contract to deliver coal.

A provision of a contract by a mining company to deliver 15,000 tons of coal within one year as ordered, that the company should use diligence to fill orders, but should "not be obligated to ship during any month in excess of 2,500 tons," and that the contract should terminate whenever 15,000 tons had been furnished, held to entitle the purchaser to demand delivery of 2,500 tons a month until the contract was filled.

3. Sales \$\infty\$176(1)—Delay in delivery not waived by permission to catch up back shipments.

Under a contract to deliver 15,000 tons of coal at the rate of at least 2,500 a month, where seller had failed to so deliver during certain months, a letter of the buyer giving seller permission to "catch up" all back shipments by shipping mine run coal was not a waiver of damages theretofore sustained from seller's failure to deliver coal on time; the permission to "catch up" merely extending a privilege without consideration, and revocable at the buyer's pleasure.

4. Trial \$\iff 260(9)\$—Instructions; refusal of requests covered.

In an action for breach by a mining company of a contract to deliver coal, refusal of instructions requested by defendant held not error, in view of the instructions given.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by the Interstate Fuel Agency against the American Fuel Company. Judgment for plaintiff, and defendant brings error. Af-

firmed.

The Interstate Fuel Agency recovered a verdict and judgment against the American Fuel Company. The fuel company sued out a writ of error. The action was for breach of a contract by plaintiff below, the Interstate Fuel Agency, a Washington corporation, against the American Fuel Company, a Utah corporation, doing business in the state of Washington. The contract was made April 25, 1917, between the American Fuel Company, called the shippers, and the Interstate Fuel Agency, called the jobbers. The agreement, after reciting that the shippers are engaged in mining and selling coal, and that the jobbers are desirous of purchasing from the shippers 15,000 tons of coal for resale, provides as follows: "(1) The shippers hereby agree to sell and deliver f. o. b. cars, at Neslen, Utah, to the jobbers, and the jobbers hereby agree to buy, accept, and pay for 15,000 tons of coal from shippers' mine, within one year from April 25, 1917, consisting of lump, egg lump, and stove coal, upon the following terms and conditions." The sole right to sell coal in certain parts of Idaho, all of Washington, and a portion of Oregon, subject to existing rights of six certain named corporations and partnerships under contract, was in the jobbers. It was also agreed that the jobbers would either procure the cancellation of said contracts, or "out of said 15,000 tons would supply the demands" of the firms and corporations named, and that the shippers were to have credit on the 15,000 tons for any coal shipped by them to the firms and corporations under contracts referred to. Paragraph C provides that for any sales of coal by the shippers during the existence of the contract in the territory named the jobbers should be credited by the shippers with the difference between the contract price, as specified in the agreement, and the price for which the coal was sold, the tonnage of coal so sold and delivered to be charged against the 15,000 tons to be sold the The prices to be paid are specified. It was also agreed that the jobbers should from time to time on and after April 25, 1917, give the shippers orders for the shipment of said coal; that the shippers would use diligence to fill the orders, but should not be obligated to ship during any month in excess of 2,500 tons; that the contract should terminate whenever 15,000 tons had been furnished to the jobbers, including all coal thereafter furnished by the shippers under said contract with any or all of the six firms or corporations previously named in the agreement, and including also any coal sold and delivered by the shippers in the territory described in the agreement. The shippers were not to be responsible in case of shortage of cars for shipment, and in furnishing coal the jobbers should have the right only to their just and equitable proportion of cars available for filling all of shippers' orders. The shippers were to be relieved from immediate performance of the contract and liability thereunder, if by reason of war or government control, labor troubles, strikes, acts of God, or other causes beyond their control, they were prevented from operating their coal mines or disposing of the product thereof. Each shipment was to be paid for by sight draft drawn by the shippers on the jobbers at Spokane, Wash., with railroad bill of lading attached. If any of the drafts remained unpaid for more than 10 days after arrival of coal shipment at final destination, then at the option of the shippers the agreement could be terminated.

Ratification of the contract by the shippers is pleaded. It is alleged that after the agreement was made the Interstate Fuel Agency placed an order with the fuel company for shipment at the rate of 2,500 tons per month, alleged to be the maximum which plaintiff was entitled to demand under the contract, and the minimum which the defendant could ship without violating the agreement, but that only 3,318 tons were shipped up to the time of the commencement of this action, and that since October 16, 1917, the fuel company had failed to ship any coal under the contract; that the jobbers procured the can-

cellation of all the six outside contracts mentioned in the agreement, except the contract with the International Fuel Company at Spokane, and had notified the defendant of the cancellation of such contracts, and that under its order of 2,500 tons per month the tonnage to which the jobbers were entitled under the agreement should have been wholly shipped and received not later than October 31, 1917, but that there was a failure to perform. It is alleged that the jobbers did all the things required to be performed by them, and that under the agreement there remained due to the jobbers 11,613 tons; that at the time of the breach the market value of the coal was \$2.55 per ton higher than the contract price, and that damages were suffered on that basis in the amount of 11,613 tons, or \$29,614.52.

The shippers admitted the contract, denied shipment of only 3,318 tons, denied ratification and damage, and set up that under the contract for furnishing coal to the International Fuel Company at Spokane, one of the six outside companies named in the agreement, from the 16th day of March, 1917, to the 1st day of May, 1918, the shippers obligated themselves to furnish coal during the life of the contract to 5,000 tons; that between April 25. 1917, and April 25, 1918, it furnished 4,906 tons to the International Fuel Company, and prior to April 25, 1917, the shippers had not furnished any coal under said contract; that, after the contract was made between the American Fuel Company and the Interstate Fuel Agency, the American Fuel Company was under contract so to furnish coal to the International Fuel Company, and the amount to be furnished to the International Fuel Company was a first charge or claim against the entire total of 15,000 tons mentioned in the contract between the fuel agency and the fuel company. It is also alleged that under a contract between the fuel company and the Madison Fuel Company, another outside company, referred to in the agreement between the parties to this litigation, the fuel company subsequent to April 25, 1917, and prior to April 25, 1918, furnished 49 tons to the Madison Fuel Company, which should be credited upon the contract with the jobbers; that fuel was also furnished to others mentioned in the contract between the parties hereto to the amount of 15,000 tons and over. The shipping company also says that prior to April 25, 1918, it furnished 10,188 tons under the contract, all of which was accepted, except 2,711 tons furnished after March 18, 1918.

For a further defense it was pleaded that, war between the United States and Germany having been declared on April 6, 1917, railroad traffic became congested, and cars could not be obtained, except in limited numbers, and that by reason of the situation the fuel company could not furnish 2,500 tons of coal per month prior to February, 1918, or any more rapidly than it did furnish coal. "by giving plaintiff a just and equitable proportion of cars available for filling all of the shippers' orders which defendant had for filling"; that its mines were situated in Utah, and that prior to October, 1917, the United States government took charge of the fuel distribution, and defendant was ordered to cease shipping coal to any of the districts embraced in the contract between plaintiff and defendant, and that the shipping company could not furnish under the contract with the jobbers at the rate of 2,500 tons a month having regard for the rights of others. It is set up by way of counterclaim that the shipping company, between March 8, 1918, and March 22, 1918, shipped 52 cars, amounting to 2,711 tons, as provided by the contract, and drew drafts for shipments, but that the fuel agency refused to pay the drafts or to accept the coal, and that demurrage accrued, and the shipping company was obliged to sell 50 cars of coal at a loss, and also lost by reason of expenses. A counterclaim for \$1,276 damages was made.

To this answer the jobbers filed a replication, and, after denying the material averments in the answer, set up that prior to the beginning of this action the shippers under the contract furnished, within a period of 37 weeks after the execution of the contract, 89 cars of coal, and that when the coal was in great demand the shippers failed to ship any coal whatever, and that in February, 1918, the shippers shipped one carload and requested the jobbers to receive it; that they agreed to receive it without prejudice to the action then pending, and that the shippers continued to ship under like agreement, and against objections of the jobbers shipped 139 cars, to the loss and damage of the jobbers; that the jobbers disposed of 84 cars at best obtainable prices,

but could not dispose of all that was sent prior to March 22, 1918. jobbing company again set up that under its contract it was entitled to the full amount of 15,000 tons, and that if its order, which was placed about May 1, 1917, had been complied with, the tonnage would have been completed long prior to the beginning of this action.

The jury found generally for the jobbers in the sum of \$9,272.

Dey, Hoppaugh & Fabian, of Salt Lake City, Utah, and James A. Williams and Danson, Williams & Danson, all of Spokane, Wash., for plaintiff in error.

A. O. Colburn and Del Cary Smith, both of Spokane, Wash., for

defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The principal assignments of error are based upon the refusal of the court to give instructions adopting a construction of the contract in accord with the contentions of the shippers. The more important points are involved in the following discussion:

[1, 2] It is argued by the shipping company that the provision in the contract concerning the 2,500 tons per month to be delivered is for the purpose of protecting the shippers against being "swamped" with orders from the jobbers, and was not for the purpose of giving to the jobbers the right to any specific amount of coal. The pertinent clause

is:

"The shippers will use diligence to fill said orders, but shall not be obligated to ship during any month in excess of 2,500 tons; that this contract shall end and terminate whenever 15,000 tons have been furnished."

Our understanding of this language is that, if the jobbers should order more than 2,500 tons per month, the shippers would use diligence to fill such order, but that there would be no obligation upon the shippers to ship more than 2,500 tons. The shippers were obligated to ship as much as 2,500 tons per month, if that amount were ordered by the iobbers. "Obligated" means bound to do; and the jobbing company proved to the satisfaction of the jury that 2,500 tons per month never were, but could have been, shipped. On principle, too, if the argument of the shippers is sound, and the provision concerning the 2,500 tons was inserted in the contract with a view to protect the shippers, then a construction should be adopted which would be against the shipper, if the contract is ambiguous in its terms. Page on Contracts, § 1122; Byron v. First Nat. Bank, 75 Or. 296, 146 Pac. 516; Metropolitan Building Co. v. Seattle, 92 Wash. 660, 159 Pac. 793.

[3] It is argued that the court erred in refusing to permit the shipping company during the trial to amend its answer, so as to allege specifically a waiver by the jobbing company of any alleged breach. The argument is that before the conclusion of the evidence certain letters written by the jobbing company to the shipping company were introduced, which tended to show that, if there had been any breach of the contract up to the time of the trial of the present suit, the jobbing company had waived the same. Stress is laid upon a letter by the jobbers, dated August 25, 1917, in which the jobbers stated that they understood the difficulties which the shipping company had encountered in meeting the requirements of the railroad for coal, and that the shipping company had the full permission of the jobbing company to "catch up" all back shipments by shipping mine run coal. The letter also states:

"How about sending a few cars right now to help catch up?"

The error of the shipping company lies, we think, in construing the contents of this letter as going to show a waiver of any damages which had theretofore been sustained by the jobbing company on account of the failure of the shipping company to deliver coal on time. Permission to "catch up" all back shipments by shipping mine run coal merely extended a privilege without consideration; the privilege being revocable at the pleasure of the jobbing company. In Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341, the Supreme Court said:

"If the builder has done a large and valuable part of the work, but yet has failed to complete the whole, or any specific part, of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. * * But if the other party says to him, 'I prefer you should finish your work,' or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed. For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damage thus sustained in reduction of the sum due by contract price for the completed work."

See Jessup & Moore Paper Co. v. Piper (C. C.) 133 Fed. 108.

The question of allowing the amendment was discretionary, and we find no error in denying the request, especially considering that the shipping company based its defense on the ground that the contract had been performed in compliance with its terms and denied any breach

[4] Error is assigned to the refusal of the court to give a requested instruction to the effect that the shipper was entitled to an allowance by way of credit for coal which it was obligated to deliver—not for that which it had delivered. The provision of the contract referring to coal shipped to outside firms was that the shippers should have credit "on said 15,000 tons for any coal shipped by them to said firms or corporations under said contracts." The language, "shipped" by them, makes a distinction between coal actually shipped and that which the shipping company was obligated to ship. This distinction was recognized by the learned District Judge when, in charging the jury, he stated that, if they were satisfied that the existing outside contract between the parties was one for 5,000 tons, then the shipping company would be entitled to a credit for the full amount delivered. The jury found, however, that the contract was not for 5,000 tons, as contended by the shipping company; wherefore any instructions based upon the

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theory that the contract was for 5,000 tons became immaterial, and under no circumstances could they have operated to the prejudice of the shipping company.

It is next argued that the court erred in refusing certain requests for instructions with respect to the measure of damages. The argument is that in one of the affirmative defenses interposed by the shipping company it set up that after the beginning of the action, and before the expiration of the year within which the coal was to be furnished, the shipping company furnished certain coal under the contract to the jobbing company, which coal was received by the latter. We think that the coal transactions had between the shipping company and the jobbers in February and March of 1918 should not be considered as directly relating to the determination of the controversy, because it was expressly stated in a communication by the jobbers to the shippers that shipments made in February and March should be "accepted without prejudice to this action." While it is true that the jobbing company stated to the shipping company that they would only consent to the shipping company being credited in the suit "for any coal so shipped with any profit" made by the jobbing company thereon, it does not appear that the shipping company agreed to ship under such terms. Therefore there was no acceptance of the offer of the jobbing company. Nor did the shipping company plead what the profit was on the February and March shipments by way of lessening damages. It is to be reiterated that the shipping company tried its case on the theory that it had performed its contract in full, and that there were no damages accruing to the jobbing company, and never agreed to ship under the offer and terms of the jobbers in February and March, 1918. We therefore affirm the ruling of the District Court that whatever rights the jobbing company had under the contract accrued within six months from delivery of the order for the shipment of coal early in May, because no order for a later shipment was given, and the shipper could claim no damages by reason of attempts to deliver coal in February and March of the succeeding year, because such attempt was made without an order of the jobbing company concerning such shipments or authorizing the same.

It is also said that the court erred in refusing certain requests embodying instructions to the effect that, if the shipping company was prevented by acts of God, labor trouble, or other causes beyond their control, from fulfilling the contract or operating its mines, such facts should be taken into consideration in determining whether there was a breach of the contract, and, if it was found that there was a breach for any such cause, allowance should be made for any time shippers were prevented from operating their mine or for the curtailment of the output of the mine. Stress is laid upon the point that the evidence showed that there was a washout on one of the railroads, and that shipments to the jobbers were prevented thereby, and that a shortage of cars resulted. The court, however, charged that, if it was found that due diligence was used by the shippers to fill the order, and the failure to deliver coal was caused by a shortage of cars, and that the shipping company made a just and equitable apportionment of cars

available, then the immediate performance of the contract was excused as a matter of law. We think this sufficiently covered the point.

The next assignments of error are based upon the refusal of the court to instruct the jury that, owing to war conditions, it was the duty of the shippers to comply with the orders of the President of the United States, and that, if by reason of any order of the President the ability of the shipping company to perform its contract with the jobbers was curtailed, allowance should be made for such conditions in determining whether the shipping company was liable to the jobbing company, and the extent of the liability. The court charged that there was no evidence that any orders were made by the National Fuel Administration which prevented the defendant from performing its contract during the life of the order given by the jobbing company, which expired early in November, 1917, and that therefore the jury need not deliberate upon such a defense. The order of the Fuel Administrator, dated August 23, 1917, however, expressly provided that—

"Contracts relating to bituminous coal made before the proclamation of the President on August 21st are not affected by these proclamations, provided the contracts are bona fide in character and are enforceable at law."

Under such evidence it was the duty of the court to instruct as it did concerning the failure to prove that there were any orders made by the agents of the government which would prevent the fulfillment of the contract.

The shippers requested certain instructions concerning the responsibility in case of a shortage of cars and interference with the performance of the contract because of such shortage. The shippers argue that the clause in the contract which provides that in furnishing coal the jobbers shall have the right only to their just and equitable proportion of cars available for filling all of shippers' orders, the jobbers were only entitled to receive on any orders placed by them a just and equitable proportion of all cars available for all orders which the shippers had for the furnishing of coal, whether such orders were given by the jobbers or by other customers. The District Court instructed that, in case of inability to obtain cars for the shipment of the product of its mine, the shipping company, after exercising due diligence on its part, might apportion the cars available pro rata among the different jobbers who held contracts or orders for the delivery and shipment of coal, provided the contracts outstanding and the orders taken did not exceed the amount of coal available for shipment and delivery at the time. We believe that to be a plain and comprehensive statement of the true meaning of the portion of contract relating to distribution of cars and adequately covered the point involved. Jessup & Moore Paper Co. v. Piper, supra; Garfield & Proctor Coal Co. v. Penn. Coal Co., 199 Mass. 22, 84 N. E. 1020.

The shippers urge that the court erred in refusing certain requests for instructions that under the contract the jobbing company was entitled to a full year from April 25, 1917, within which to receive and pay for the coal, and that the shipping company was entitled to a full year from said date within which to ship the coal. The contention of the shipping company is that under the contract the jobbing company had

no right to insist upon 2,500 tons being shipped for any number of consecutive months, and that there was no obligation on the shipping company to ship the coal within a period of less than one year. But under the contract there was the obligation to ship 2,500 tons when the order of the jobbers for that amount was entered by the shipping company; hence it follows that the construction adopted by the District Court was correct, and therefore that the requested instructions were properly refused.

It is contended that the court, in stating the issues and the contracts with an outside company (the International Fuel Company), erred in charging the jury that the jobbers contended there was a contract for the sale of 3,000 tons of coal, expiring on May 1, 1917, while the shippers contended that the contract was superseded by another contract and canceled, and that there was a modification to provide for the sale and delivery of 5,000 tons of coal, and in advising the jury that it was for them to say from the evidence which of the contracts was in effect at the time of the execution of the contract in suit. The shippers say there was no evidence to authorize the submission of this matter to the jury. The record does not sustain the contention of the shippers, inasmuch as the president of the jobbers testified to a conversation which he had had with the president of the shipping company before the 15,000-ton contract was executed, wherein the 3,000-ton contract with the International Company was referred to and understood to be effective. Whatever issue arose in respect to the existence of any such contract became one of fact, and for the consideration of the jury.

We have given careful consideration to all of the assignments elaborated in the brief of the counsel for the shippers, and find no ground for a reversal of the judgment. While it does not appear exactly how the jury arrived at their verdict of \$9,272 damages in favor of the jobbers, every reasonable presumption is that they fairly considered the evidence in behalf of the defenses interposed, and applied the law as given by the court. The record, including statements showing the amount of coal shipped and sold on the open market, sustains the contention that the shipping company could have shipped the requisite amount of coal to the jobbers, but failed to do so because the profit per ton was greater upon sales in the open market than it would have been had they complied with their contract.

The judgment is affirmed.

STATE OF LOUISIANA, BY SCHOOL BOARD OF PARISH OF TANGI-PAHOA v. WILLIAM T. JOYCE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 6, 1919. Rehearing Denied, December 6, 1919.)

No. 3361.

PUBLIC LANDS 6-54(1)-DISPOSAL OF LOUISIANA SCHOOL LANDS.

Under Act April 21, 1806, and Act March 3, 1811, reserving section 16 in each township of land in the territory of Louisiana, when surveyed for the future state, when created in compliance with the treaty of cession, to be used for support of schools, title to such sections vested in the state on its admission, to the exclusion of the United States, as also the right to dispose of the same in such manner as it deemed best to carry out the purpose of the dedication, and a sale and conveyance of any of such lands by the state is not invalid, because not made as prescribed by Act Feb. 15, 1843.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the State of Louisiana, by the School Board of the Parish of Tangipahoa, against the William T. Joyce Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

William Winans Wall, of New Orleans, La., and Boliver E. Kemp, of Amite, La., for plaintiff in error.

Robert R. Reid, of Amite, La., and Henry Fitts, of Chicago, Ill., for defendants in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This was an action by the state of Louisiana, acting through the parish school board of Tangipahoa parish, for the recovery of two sections of land in that parish, namely, section 16, township 8 south, of range 8 east, and section 16, township 8 south, of range 9 east. There was a judgment in favor of the defendants on a verdict rendered in pursuance of an instruction given by the court to the jury, and the plaintiff by writ of error presents that judgment for review. The parties will be referred to as they were designated in the trial court.

The defendants deraign title through sales made pursuant to the provisions of an act of the Legislature of Louisiana—Act No. 168 of 1894—entitled:

"An act to provide for the sale of sixteenth section lands, where the township in which such lands is situated is not habitable by reason of the land therein being swamp or sea marsh."

It was admitted that the townships of which the lands sued for are parts are swamp and subject to tidal and storm overflow. The theory advanced in the argument of the counsel for the plaintiff to support the claim asserted seems to be that the title to the land sued for still is in the United States, not having been divested by the sales relied on by the defendants, because such sales were made without the con-

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sent of the inhabitants of the townships of which the lands are parts, as required by an act of Congress of February 15, 1843 (5 Stat. 600, c. 33), which authorized sales by the state only when prescribed conditions were complied with, and that, by virtue of an agency created by that act, the state is entitled to sue for and recover such sixteenth section lands as have not been disposed of by the state in the manner prescribed by that act. The following is the act of Congress just referred to:

"An act to authorize the Legislatures of the states of Illinois, Arkansas, Louisiana, and Tennessee to sell lands heretofore appropriated for the use of schools in these states.

"Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Legislatures of Illinois, Arkansas, Louisiana, and Tennessee be, and they are hereby, authorized to provide by law for the sale and conveyance in fee simple, of all or any part of the lands heretofore reserved and appropriated by Congress for the use of schools within said states, and to invest the money arising from the sales thereof in some productive fund, the proceeds of which shall be forever applied, under the direction of said Legislatures, to the use and support of schools within the several townships and districts of country, for which they were originally reserved and set apart, and for no other purpose whatever: Provided, said land, or any part thereof, shall in no wise be sold without the consent of the inhabitants of such township or district, to be obtained in such manner as the Legislatures of said states shall by law direct; and in the apportionment of the proceeds of said fund, each township and district shall be entitled to such part thereof, and no more, as shall have accrued from the sum or sums of money arising from the sale of the school lands belonging to such township or district.

"Sec. 2. And be it further enacted, that the Legislatures of said states be, and they are hereby, authorized to make such laws and needful regulations as may be deemed expedient to secure and protect from injury or waste, the sections reserved by the laws of Congress, for the use of schools, to each township and to provide by law, if not deemed expedient to sell, for leasing the same for any term not exceeding four years, in such manner as to render them productive, and most conducive to the object for which they were designed.

"Sec. 3. And be it further enacted, that if the proceeds accruing to any township or district from said fund, shall be insufficient for the support of the schools therein, it shall be lawful for said Legislatures to invest the same in the most secure and productive manner, until the whole proceeds of the fund belonging to such township or district shall be adequate to the permanent maintenance and support of schools within the same: Provided, that the Legislatures aforesaid shall, in no case, invest the proceeds of the sale of the lands in any township in manner aforesaid, without the consent of the inhabitants of said township or district, to be obtained as aforesaid.

"Sec. 4. And be it further enacted, that any sales of such lands, reserved as aforesaid, as have been made in pursuance of any of the laws enacted by the Legislatures of said states, and not inconsistent with the principles of this act, are hereby ratified and confirmed, so far as the assent of the United States to the same may be necessary to the confirmation thereof."

That the theory advanced in argument by the plaintiff's counsel is not the one which influenced the bringing of the suit is shown by the averments and prayer of the plaintiff's petition. The petition contained the following averments:

"That said sixteenth sections were reserved by the United States government to the state of Louisiana under acts of Congress of April 21, 1806, and 3d of March, 1811, for the support of public schools within the townships in which said sixteenth sections are situated. * * * That the state of Louisi-

ana has never parted with the title to said sixteenth sections and they are still held by the state of Louisiana in trust for public school purposes for the benefit of the inhabitants of the respective townships in which said sixteenth sections are situated in accordance with the act of Congress granting sixteenth sections to the state for school purposes. * * That notwithstanding petitioner's said ownership of said lands," etc.

The petition prayed for:

"Judgment in favor of your petitioner and against said defendants, decreeing and recognizing the state of Louisiana, your petitioner, as the owner of said" above-described lands "for school purposes, in accordance with the acts of Congress granting the land to the state of Louisiana," etc.

The averments and prayer of the petition indicate that the suit was intended to assert a right in the state to recover sixteenth section lands sold by it without complying with conditions prescribed by the above-quoted act of Congress, though the title to such lands had been granted by the United States to the state of Louisiana before that act was passed. In the argument in this court it was not contended that the plaintiff is entitled to recover if the title to the lands sued for was in the state of Louisiana prior to the passage of the above-quoted act of Congress; but, as above stated, it was contended that title to the lands sued for still is in the United States.

The lands in question are part of the territory which was ceded to the United States by France by the treaty of April 30, 1803 (8 Stat. 200). The following is article 3 of that treaty:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

The following legislation was enacted before the state of Louisiana came into existence:

As to lands which had been surveyed in the Western district of Orleans, an act of Congress of April 21, 1806, provided that:

"All such land shall, with the exception of the section 'number sixteen,' which shall be reserved in each township for the support of schools within the same, * * * be offered to the highest bidder," etc. 2 Stat. 391, c. 39, § 11.

An act of Congress of March 3, 1811 (2 Stat. 662, c. 46), entitled "An act providing for final adjustment of claims to lands and for sale of public lands in the territories of Orleans and Louisiana, and repeal of act passed for the same purpose, and approved February 16, 1811," contained the following provision:

"That the President of the United States be and he is hereby authorized, whenever he shall think proper, to direct that so much of the public land lying within the territory of Louisiana, as shall have been surveyed in conformity with the eighth section of this act, be offered for sale. All such lands shall, with the exception of section 'number sixteen,' which shall be reserved in each township, for the support of the schools within the same, * * * shall be offered for sale to the highest bidder," etc. Section 10.

Before the passage of the two last-mentioned acts of Congress, it already had been definitely and irrevocably settled that the territory

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they dealt with was to be in a state which was to be admitted into the Union, "as soon as possible." It is obvious that the sixteenth sections were not withheld from sale with a view to a future sale or other disposition of them by the United States, and that it was not contemplated that the United States would use or administer those lands for the purposes of education. The quoted provisions amounted to an assurance to purchasers of other lands in the several townships that the future state in which the purchased lands would be "as soon as possible" would have the sixteenth sections for the support of schools within such townships. The beneficiaries of the appropriation or dedication of the sixteenth sections for the support of schools were, not the United States, but the future state in which the townships would be, and the inhabitants of such townships.

Language used in the act of February 15, 1843, shows that it was recognized that prior to that enactment the sixteenth sections had been "appropriated by Congress for the use of schools within said states." The above-quoted provisions of the acts of Congress of 1806 and 1811 effected as unequivocal a dedication of sixteenth sections for the support of schools in the townships, the remainder of which was authorized to be sold, as was effected by legislation which preceded the admission into the Union of states formed out of the territory northwest of the Ohio river which was ceded to the United States and out of the territory subsequently ceded by the state of Georgia. It is settled that the title to sixteenth sections in such states, when identified by appropriate surveys and not covered by prior grants or dispositions, vests in such states upon their admission into the Union, as a consequence of the action of Congress in setting them aside for the maintenance of schools, and that patents or formal grants thereof are not required to divest the title of the United States. Cooper v. Roberts, 18 How, 173. 15 L. Ed. 338; Beecher v. Weatherby, 95 U. S. 524, 24 L. Ed. 440; Gaines v. Nicholson, 9 How. 356, 13 L. Ed. 172; Jones v. Madison County, 72 Miss, 777, 18 South, 87. A relinquishment of all rights of the United States in land may be effected by an act of Congress which shows an intention to segregate that land from the mass of the public domain and to set it apart for the use of a designated beneficiary, either presently and unconditionally, without anything else being required to be done to accomplish a change of ownership, or upon compliance with a prescribed condition other than the issue of a patent. Republican River Bridge Co. v. Kansas Pacific R. Co., 92 U. S. 315, 23 L. Ed. 515; Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050.

The circumstances of the unconditional setting apart of the sixteenth sections in question were such that it is to be inferred that Congress intended that the state in which they would be, which was to be admitted into the Union "as soon as possible," was to be the donee; that state having been destined, from the time the territory included in it was acquired by the United States, to have exclusive and plenary power over the schools for the support of which those sections were set apart (Alabama v. Schmidt, 232 U. S. 173, 34 Sup. Ct. 301, 58 L. Ed. 555), and that the gift was to be consummated upon that state

being admitted into the Union and the donated lands being identified by surveys. Those lands were unequivocally and unconditionally appropriated to a purpose for the carrying out of which the future state alone was looked to. An ordinance of the convention of the representatives of the people of the territory of Orleans assembled pursuant to the act of Congress approved in December, 1811 (Act Feb. 20, 1811, c. 21, 2 Stat. 642), providing for the people of that territory forming a—

"Constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states," etc.: Provided, in compliance with a provision of that act, "that the people inhabiting the said territory do agree and declare that they do forever disclaim all rights or title to waste or unappropriated lands, lying within the said territory, and the same shall be and remain at the sole and entire disposition of the United States."

The requirement and acceptance by Congress of a disclaimer so expressed indicate an absence of an understanding that the United States then owned or had the disposition of lands previously unconditionally appropriated for a public purpose of the state then coming into existence. The disclaimer did not affect the state's right or title to lands

so previously appropriated.

Decisions of the Supreme Court of Louisiana have given to the action of Congress with reference to sixteenth sections which became parts of that state the effect of a grant thereof to the state. Garland v. Jackson, 7 La. Ann. 68; State ex rel. McEnevy v. Nicholls, 42 La. Ann. 209, 7 South. 738; State v. F. B. Williams Cypress Co., 131 La. 67, 58 South. 1033. We think rulings to that effect were proper, on the ground that the action of Congress and what was done under it amounted to a compact with the inhabitants and purchasers of the lands in the future state which was consummated by the state's admission into the Union and the identification of the donated sections by appropriate surveys. The action of Congress with reference to sixteenth sections in the territory which afterwards became the state of Louisiana is to be considered in the light of the fact that long before that action was taken the United States had adopted and adhered to the policy of providing for new states formed out of the public domain having for the support of education the sixteenth section of each township, or another section of the public land in lieu thereof, if that section was otherwise disposed of. Cooper v. Roberts, supra; Beecher v. Weatherby, supra; United States v. Morrison, 240 U. S. 192, 202, 36 Sup. Ct. 326, 60 L. Ed. 599. When so considered, the abovestated conclusion is a result.

Furthermore, the above-quoted provisions of the acts of Congress of 1806 and 1811 fairly may be regarded as the initial steps of a compliance with the obligation created by the provision of the treaty with the French republic securing to the inhabitants of the ceded territory the right to be—

"incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

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Under an already settled policy one of the advantages accruing to public land states coming into the Union was that they had the sixteenth section in each township, or other equivalent public land, if that section was otherwise disposed of, for the support of schools in that township.

The terms of the act of February 15, 1843, indicate that in enacting it Congress assumed that previously there had been consummated appropriations of the sixteenth sections for the use of schools within the states mentioned, and that, notwithstanding such prior disposition of these sections, it remained in the power of Congress to determine the method to be pursued by those states in disposing of their school The former assumption is inconsistent with the latter one. The consummated gifts of the school lands to the states being absolute, though such states were in honor bound to apply them to the purpose for which they were given, the validity of sales of them by the states is not dependent upon a compliance with a qualified permission to sell given by Congress after the lands had ceased to belong to the United States. Cooper v. Roberts, supra; Alabama v. Schmidt, 232 U. S. 169, 34 Sup. Ct. 301, 58 L. Ed. 555; Long & Long v. Brown, 4 Ala. 622. The sales by the state of the land sued for being questioned only on the ground that such sales were not made in the manner prescribed by the act of February 15, 1843, the attack on the validity of those sales cannot be sustained. The state had the power to sell those lands without the consent of Congress. Nothing in the mode adopted in exercising that power indicates that there was a disregard of the honorary obligation to use the lands for the support of schools. It is not intended to be intimated that the state could recover the lands it sold, if it had been guilty of a breach of faith in selling them for a purpose foreign to the one for which they were given to it.

The court did not err in directing a verdict in favor of the defend-

ants. The judgment is affirmed

BATTS, Circuit Judge, did not take part in the decision of this case.

HUTCHINSON v. SPERRY et al.

(Circuit Court of Appeals, Third Circuit. July 8, 1919. Rehearing Denied December 12, 1919.)

No. 2416.

1. Corporations \$==116-Consideration for sale of stock.

A contract by which a minority stockholder sold stock having a par value of \$497,000 for \$250 cash and \$121,500.15 to be paid from dividends upon stock, in hope that buyer could induce his brother who was majority stockholder, to declare larger dividends, etc., *held* valid, unless effected by fraud.

2. Corporations \$==116-Sale of stock-Fraud.

Contract for sale of stock to majority stockholder's brother was not void for fraud, because corporation declared large dividends soon after payment was completed, where such dividends were earned subsequent

to contract's execution, nor because of alleged wrongful handling of certain assets by majority stockholder, where there was no evidence that buyer knew of such acts.

3. Corporations \$\infty\$116—Sale of stock—Fraud—Duty to investigate,

A sale of corporate stock cannot be set aside because of fraudulent misrepresentations regarding corporation's business, where seller's experiences should have put him upon inquiry as to true state of corporation's affairs, and he was in a position to have ascertained true facts.

Appeal from the District Court of the United States for the Dis-

trict of New Jersey; Thomas G. Haight, Judge.
Bill by Shelley B. Hutchinson against William M. Sperry, Kate M. Sperry, the Farmers' Loan & Trust Company of New York, executor and trustee of the estate of Thomas A. Sperry, deceased, and the Sperry & Hutchinson Company. From a decree dismissing the bill, complainant appeals. Affirmed.

William Mayo Atkinson, of Elizabeth, N. J. (Herbert A. Trebing,

of New York City, of counsel), for appellant.

Crisp, Randall & Crisp, of New York City, and Edward S. Atwater. Jr., of Elizabeth, N. J. (W. Benton Crisp, of New York City, and Robert H. McCarter, of Newark, N. J., of counsel), for appellee William M. Sperry.

Frederick Geller, of New York City, and William H. Osborne, of Newark, N. J. (George S. Mittendorf, of New York City, of counsel).

for appellees Goodrich and another.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and RELLSTAB, District Judge.

WOOLLEY, Circuit Judge. This action is in equity. It was brought on original and supplemental bills—dismissed by the decree wherein the complainant averred three causes of action, which, though distinct in themselves, were, nevertheless, related in the relief sought from the several defendants.

The first cause of action which we find in the pleadings is against the defendant William M. Sperry personally to set aside a contract for the sale of stock of Sperry & Hutchinson Company, made between the complainant and that defendant on July 24, 1901, and to require William M. Sperry to account for all dividends and other payments made to him on account of the said stock after the date of the contract, on the allegation that the said contract is void because affected by fraud.

The second cause of action is asserted by the complainant as stockholder of Sperry & Hutchinson Company on behalf of himself and all others similarly situated, and is brought against Kate M. Sperry and the Farmers' Loan & Trust Company, executors and trustees of the estate of Thomas A. Sperry, deceased, to compel them to restore to the corporation certain sums of money which it is alleged Thomas A. Sperry unlawfully withdrew from the prior partnership of Thomas A. Sperry and the complainant, trading as Sperry & Hutchinson. The prayer for this relief is based on the assumption by the complainant that his prayer for the annulment of the contract of July 24, 1901, and for his restoration to the status of stockholder, will be granted, and that, in consequence, he still is the lawful owner of that stock with a stockholder's right to maintain this action.

The third cause of action is based on a like assumption that the complainant still is a stockholder of the Sperry & Hutchinson Company and is brought on behalf of himself and all others similarly situated against William M. Sperry and the Executors of the Estate of Thomas A. Sperry, for an accounting of all dividends or other payments made to them out of the assets of the corporation on account of the stock standing in the name of William M. Sperry and Thomas A. Sperry after the sale by the complainant of his stock on July 24, 1901.

These several causes of action, with their respective prayers for appropriate relief, involve charges of fraud and misconduct on which the complainant seeks to hold William M. Sperry and the executors and trustees of the estate of Thomas A. Sperry as trustees ex maleficio. The evidence on these issues may be logically divided into two periods, namely: Evidence of facts and transactions which occurred prior to July 24, 1901, the date of the contract for the sale of the complainant's stocks; and evidence of facts and transactions which occurred thereafter.

Because of the feeling displayed by the parties and the vigor with which they prosecuted and defended this action, the evidence reached this court in a somewhat confused state. As a proper decision in this case rests essentially on a correct understanding of the facts, it is of first importance that the controversy be reduced to simple terms. We shall avail ourselves of the clear statement made by Judge Haight in delivering the opinion of the court below as presenting the facts on which, in the main, the decision of the District Court was grounded, and on which we shall base our decision on appeal:

"It seems necessary that the facts, as I find them, should be recited with considerable detail. In the early part of 1896 the plaintiff engaged in the trading stamp business in the city of Jackson, Michigan. He claims that he was the originator of that business in this country, although this is disputed. But whether he was or not seems immaterial. In January, 1897, he entered into partnership with Thomas A. Sperry and one Jackson to conduct the business in a broader field. This partnership continued for about a month, when Jackson retired. Thereafter, and until October of 1900, the business was conducted by Thomas A. Sperry and the plaintiff, as partners, under the firm name of Sperry & Hutchinson. It steadily grew, and, at the time last mentioned, was quite extensive. In the meantime, William M. Sperry, a brother of Thomas A., and one Alexander had also engaged in the same business, under the name or Sperry & Alexander. They operated, however, in a different field than Sperry & Hutchinson. One Wiedenbach, a brother-in-law of Thomas A. Sperry, had likewise engaged in the business in the same way. Sperry & Hutchinson had a financial interest in and shared in the profits of both of the latter concerns. In November, 1897, a corporation known as the International Trading Stamp Company was formed, which took over the business theretofore conducted by Sperry & Alexander, Wiedenbach and some of the business of Sperry & Hutchinson. This corporation did business until the latter part of March, 1899, when, being in financial difficulties, it sold all of its assets to Sperry & Hutchinson, they, in turn, agreeing to pay off and discharge its debts and obligations. That arrangement was actually consummated in September of 1899. Thomas A. Sperry was the financial man and dominating genius of the firm. From the time that the partnership was formed until the latter part of

1899, the plaintiff was engaged in developing the business in various parts of this country and Australia. In the latter part of 1897 he went to San Francisco and from thence, later, to Australia, and did not return, except for one short visit, to the main office of the company in New York, until some time in 1899. In October of 1900, at the suggestion of Thomas A. Sperry, a corporation known as The Sperry & Hutchinson Company, one of the defendants in this suit, was organized under the laws of the State of New Jersey, to carry on the business which had theretofore been conducted by the partnership of Sperry & Hutchinson. Thereupon, to carry out the purposes for which the corporation was formed, the partnership transferred to it practically all its assets and good will. The authorized capital stock of the corporation was \$1,000,000, divided into shares of \$100 each, of which 4,985 shares were issued to each of the partners, and 10 shares each to three employes of the firm, a Miss Hirst, a bookkeeper, a Mr. Bailey and William M. Sperry, one of the defendants. The plaintiff and Thomas A. Sperry, under the partnership, which was one at will, had equal shares and were entitled to an equal division of the profits. Within a few months after the corporation was formed, the plaintiff, at the suggestion of Thomas A. Sperry and upon the latter's promise to do likewise, disposed of fifteen of his shares to a third party. Subsequently these shares were acquired by Thomas A. Sperry. It is suggested that this was done by Thomas A. Sperry surreptitiously, to vest the absolute control of the corporation in himself, and to eliminate the plaintiff from any connection with it. It seems unlikely, however, that he should have resorted to such a course to accomplish that purpose, because the three persons to whom shares had originally been issued, outside of the partners, and who thus with Thomas A. Sperry had the controlling interest in the corporation, were unquestionably under his control and subject to his will, two of them being relatives. Prior to the formation of the corporation, the plaintiff had a drawing account, as well as a division of the profits, and had actually received by way of profits from \$40,000 to \$50,000. Directly after the corporation was organized, the salary of Thomas A. Sperry, as president of the company, was fixed at \$8,000 a year, but the plaintiff, who was vice-president, was given no salary, and the drawing account which he had theretofore been in receipt of was discontinued. At about this time, and possibly on account of the matters just referred to, the relations between the former partners became strained and unpleasant. The plaintiff endeavored to secure a salary, but could not do so. He was called upon to do very little work, and, to a large extent, was eliminated from the conduct of the business. In January of 1901, however, a dividend on the stock of the corporation was declared and paid, plaintiff's share being \$9,940. On July 24, 1901, the plaintiff, after having unsuccessfully tried to dispose of his stock in the corporation to other persons, one of whom was Thomas A. Sperry, entered into an agreement with the defendant, William M. Sperry, to sell the stock to him at the rate of \$24.50 per share, or in all, the sum of \$121,765. Under the agreement, the stock was to be paid for in the following manner: \$250 upon the execution of the agreement, and the balance by the dividends which might be 'earned, declared and paid by the corporation on the stock.' In arriving at the purchase price, interest on the deferred payments was taken into account and fixed, for that purpose, at \$10,-000. The circumstances surrounding the execution of this agreement will be referred to in more detail later. The agreement was consummated, the last payment on the purchase price having been made on September 17, 1904, and the stock certificates were delivered on October 1st of the same year. The plaintiff took no part in the management of the company after the agreement was signed, but immediately left New York, where he had been residing, and returned to his former home in Ypsilanti, Michigan, where he engaged in other businesses. In 1912 he brought suit against Thomas A. Sperry, in the Supreme Court of New York, for an accounting of the partnership dealings and transactions, particularly with reference to a sale of the business which the partnership had carried on in the State of Michigan and at Atlanta, Georgia. In this action he was defeated. Thomas A. Sperry died on September 2, 1913, and letters testamentary were granted to his widow, Kate M. Sperry, and the Farmers' Loan and Trust Company, two of the defendants in this suit. On

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September 11, 1915, the original bill in this case was filed against William M. Sperry, the purpose of which was to secure an annulment of the before mentioned contract of July 24, 1901, the retransfer of the shares of stock which the plaintiff had sold to William M. Sperry, pursuant thereto, and to recover from the latter all the dividends which he had received on the stock. Subsequently, on February 3, 1916, a supplemental bill was filed, by leave of this Court, against William M. Sperry, The Sperry & Hutchinson Company and the executors of the estate of Thomas A. Sperry, in which the same relief was sought against William M. Sperry as in the original bill, and, in addition, that he and the executors of the estate of Thomas A. Sperry repay to the Sperry & Hutchinson Company certain alleged unlawful withdrawals of money by them from the company, and that the company pay to the plaintiff such part of such withdrawals as ought properly to have been declared as dividends upon the stock which the plaintiff had sold to William M. Sperry. The bills allege, and the plaintiff offered evidence to prove, that between the time the plaintiff had left New York for the Pacific Coast in the latter part of 1897 and his return in 1899, Thomas A. Sperry had withdrawn from the funds of the partnership and those of the International Trading Stamp Company moneys amounting in the aggregate to about \$40,000 over and above the amount which he was lawfully entitled to draw-although the evidence does not show the exact amount drawn from either concern, or, for that matter, from boththat he had concealed the withdrawals by fraudulent entries in the books of account; that subsequent to the time of these withdrawals, but before the contract in question was entered into, William M. Sperry was advised of them by the bookkeeper, and that the first knowledge that the plaintiff had of the withdrawals was shortly before the original bill was filed. The supplemental bill alleges, and the evidence establishes that in June, 1905, there was distributed between William M. Sperry and Thomas A. Sperry approximately \$500,000 in cash and property, which represented the accumulated surplus of the corporation that had been carried by Thomas A. Sperry in a so-called 'trustee account.' These are the alleged illegal withdrawals which the supplemental bill seeks to have returned to the corporation. It is further claimed that the Detroit business of the partnership was not transferred to the corporation in the original bill of sale, but that, a short time thereafter, it was taken over and operated by the corporation for some time, without the knowledge of the plaintiff. The defendant William M. Sperry denies any knowledge whatsoever of any illegal withdrawals by his brother, Thomas A. Sperry, from the funds of the partnership, and the other defendants, so far as they were able, without the testimony of the person accused of the withdrawals. have endeavored to prove that no such withdrawals were, in fact, made. The case presents several questions which I will discuss in their logical sequence."

The pivotal matter in this controversy is the transaction by which the complainant sold his stock in Sperry & Hutchinson Company to William M. Sperry. The contract by which this sale was effected, standing alone and viewed without regard to the circumstances surrounding it, appears to be such an unusual one that doubt of its validity is naturally suggested because of an inadequacy of consideration seemingly so gross as to give the impression that it could not have been brought about except by deceit or imposition. Phillips v. Pullen, 45 N. J. Eq. 831, 18 Atl. 849. By its bald terms it appears that William M. Sperry obtained the complainant's stock of the par value of \$497.000 for \$250; or stated differently, that he paid but \$250 for stock, which, though worth less than its par at the time it was sold, later, had a value in excess of par. But \$250 was not the full contract price, though it was all the money which William M. Sperry paid from his own resources. The balance of the contract price (\$121,515) was paid as and when dividends on the stock so sold were declared and paid. This also looks suspicious when viewed alone, for it would seem that Hutchinson's stock was paid for with his own money.

[1] The circumstances affecting the validity of this contract with its apparently inadequate consideration, as we regard them, are these: The complainant found himself a minority stockholder in a corporation in which Thomas A. Sperry was the majority stockholder. The business of the corporation had been tolerably profitable and dividends had been declared on the stock, of which the complainant got his share. But there came a time in the affairs of the corporation, which materially darkened its prospects. The peculiar business of the corporation had grown unpopular in trade circles and statutes had been enacted in many states forbidding its transaction. Thomas A. Sperry drew a salary not disproportionate to the volume of the corporation's business, while the complainant was allowed no salary. Aside from receiving no salary, and from being a minority stockholder with its consequent disadvantages—though it does not appear that Thomas A. Sperry used his stock control unlawfully—the complainant found the prospects of the business, because of legislative antagonism, speculative, if not doubtful. He endeavored to sell his stock, first to Thomas A. Sperry, and later to persons outside the corporation. Failing in this, and evidently as a last resort, he proposed the sale of his stock to William M. Sperry, who, though a brother of Thomas A. Sperry, the president of the corporation, held a position in the corporation no higher than that of clerk. This proposition did not appeal to William M. Sperry for several reasons, the principal one being that he had no money with which to make the purchase. The complainant, however, persisted in his endeavor to persuade William M. Sperry to buy his stock, and, in fact, made the purchase by William M. Sperry possible by arriving in the negotiations at the very unusual terms of the contract, whereby nearly all the consideration for the purchase should come from dividends paid on the very stock that was sold. In other words, the complainant financed William M. Sperry as a purchaser, a transaction not unusual in difficult business situations, believing, doubtless, that William M. Sperry as a minority stockholder could induce his brother, Thomas A. Sperry, the majority stockholder, to declare dividends more quickly and in larger amounts than he could, if he continued to hold the stock. With this arrangement, easy of performance by William M. Sperry as it would be in any event, and immensely profitable to him as it afterward turned out to be, the complainant was satisfied, not only in its inception, but throughout its performance and in its ultimate completion by the payments made on the purchase price from dividends declared in the succeeding years. When the last payment was made on account of the consideration in 1904,—this very fact showing the remarkable prosperity of the corporation,—the complainant turned over the stock to William M. Sperry without objection, except as to a matter of interest which is not relevant to this issue. The contract was unusual; so was the situation. But as the contract was entered into, manifestly on the initiative of the complainant in full possession of his faculties and with an intelligent regard to his own interests, it must be held valid, if not af(261 F.)

fected by fraud preceding its execution. The complainant, however, maintains that he was induced to enter into the contract for the sale of his stock for a consideration grossly disproportionate to its true value, because of fraud of William M. Sperry, afterward disclosed.

[2,3] This allegation of fraud is based on the following circumstances: After the complainant had contracted for the sale of his stock, many of the state statutes which had been enacted in opposition to business of the character of this corporation were declared unconstitutional, and as a result the business of the corporation grew by leaps and bounds to prodigious proportions. The business transacted by the corporation in 1901, the year of the contract, was about \$650,000; in 1902, it increased to \$1,100,000; in 1903, to \$2,800,000; and in 1904, the year the contract was completed and the stock turned over, to \$4,437,000. The dividends from the business during the three years in which the contract ran, declared on the stock purchased, were sufficient to enable William M. Sperry to pay the full contract price for the stock, amounting (with the \$250 cash) to \$121,765.

Aside from these dividends, there had accumulated a surplus which was divided among the stockholders eight months after the contract had been completed by the transfer of the stock, in which division William M. Sperry received \$223,000 as his share. The complainant contends that this large distribution was made possible only because the money had been secreted and knowledge of it had been kept from him, and that, in consequence, when he contracted to sell his stock he was fraudulently kept in ignorance of its value by William M. Sperry. But we find no evidence which shows that any part of this surplus, thus distributed after the contract had been performed, existed at the time the contract was entered into on July 24, 1901. In fact, the evidence seems to lead to the conclusion that, if not all of it, certainly a greater part of it was accumulated during the prosperous year of 1904. If the contract was valid when it was made, it continued to be valid during the accumulation and distribution of this substantial surplus. There is certainly nothing to indicate that this sum was accumulated for the purpose of defrauding the complainant, or that William M. Sperry had any knowledge that it had been accumulated until shortly before its distribution in June, 1905. Finding no fraud occurring after the execution of the contract, let us inquire what transpired before its execution.

The complainant maintains that fraud existed before the contract was entered into and specifies, first, illegal withdrawals and concealment by Thomas A. Sperry of funds from the partnership and the International Trading Stamp Company; and second, the alleged transfer before the date of the contract of the Detroit business of the partnership to the corporation without the complainant's knowledge. In considering these allegations of fraud, several questions arise.

The complainant maintains that when he was a member of the firm of Sperry & Hutchinson and before he agreed with his partner Sperry to turn over the firm assets to the corporation in consideration of the corporation's stock to be delivered to each in equal shares, Thomas A. Sperry had withdrawn from the partnership and converted to his own

use from \$25,000 to \$40,000 more of the partnership funds than he was entitled to. Although this alleged conduct occurred nearly twenty years ago, the complainant avers that knowledge of it reached him only recently. He maintains, therefore, that there should be a redistribution of the stock based on the actual interests of the partners in the partnership funds, as determined by the abstractions of a part thereof by Thomas A. Sperry, whereby the complainant, under such distribution and on having his stock restored to him on decree of this court annuling his contract of sale with William M. Sperry, would be placed in stock control of the corporation.

There is substance in this contention if he has established two facts: First, that Thomas A. Sperry actually made illegal withdrawals of partnership funds; and second, that William M. Sperry had knowledge of that fact. On the first matter, we are not satisfied from the evidence that Thomas A. Sperry did make illegal withdrawals from partnership funds; and on the second, we are quite satisfied from the evidence, that if he did, William M. Sperry had no knowledge of it, and was not, therefore, bound to reveal something he did not know. Knowledge of such fact had by William M. Sperry and his silence with respect to it on entering into the contract for the purchase of the stock, constitute the suppressio veri on which the complainant mainly relies in proof of fraud to avoid the contract. In this we think he has failed. But aside from William M. Sperry's knowledge as to the alleged misconduct of his brother and from his duty to reyeal it to the complainant when about to purchase his stock, we are convinced from the complainant's own story, that his difficulties with Thomas A. Sperry were such as to have put any reasonable man upon inquiry as to the true state of the corporation's affairs and of the partnership affairs preceding the corporation, and that he was in possession of the means and had at hand the opportunity to pursue an inquiry to a point where the precise facts would come into his possession. Wood v. Carpenter, 101 U. S. 135, 141, 25 L. Ed. 807.

We do not find it necessary to discuss the transaction by which the corporation acquired the Detroit business. It is sufficient to say that this transaction had no effect on the contract for the sale of stock to William M. Sperry, because the business was not an asset of the corporation, and, therefore, did not affect the value of the complainant's stock.

In disposing of this case, to which we have given serious and deliberate consideration, we find it difficult to add anything to the opinion of the learned trial judge. We not only concur with all his conclusions, but find ourselves in entire accord with the reasoning by which he reached them. The complainant has failed in this litigation, not because his counsel did not properly or sufficiently present the law—indeed, his counsel's briefs are an encyclopedic exposition of the law, showing great labor conscientiously performed. He failed because the facts on which he built his case do not show that he has been wronged in the sale of his stock. For his misfortune in disposing of his stock on the eve of its great enhancement in value, the law affords no relief.

The decree below is affirmed.

ENFIELD V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1919.)
No. 5244.

1. Army and navy \$\iff 40\$—Espionage Act; forcible interference with draft.

Forcible interference with the operation of the draft under the Selective Service Act constitutes the offense of "willfully obstructing the recruiting or enlistment service," within Espionage Act, tit. 1, § 3 (Comp. St. 1918, § 10212c).

2. Conspiracy \$\infty\$27-Overt act; forcible interference with draft.

Espionage Act, tit. 1, § 4 (Comp. St. 1918, § 10212d), prescribing punishment for conspiracy to violate section 2 or 3 (Comp. St. 1918, § 10212b, 10212c) of the act, where an overt act is committed, supersedes Criminal Code, § 37 (Comp. St. § 10201), as to such offenses, but does not supersede Criminal Code, § 6 (Comp. St. § 10170), making it an offense to conspire to oppose the authority of the United States by force, and a conspiracy to oppose enforcement of the Draft Act by force may be prosecuted thereunder, although no overt act is charged.

3. CRIMINAL LAW \$\ightharpoonup 338(4,5)\$—EVIDENCE OF CONSPIRACY TO OPPOSE DRAFT.

On trial of defendant for conspiracy to oppose enforcement of the draft by force, admission of evidence of a highly seditious and disloyal speech by a third person, with whom defendant was not shown to have any connection, held reversible error.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Criminal prosecution by the United States against Orville E. Enfield. Judgment of conviction, and defendant brings error. Reversed and remanded.

H. L. Adkins, of Higgins, Tex. (R. E. Echols, of Elk City, Okl., on the brief), for plaintiff in error.

Redmond S. Cole, Asst. U. S. Atty., of Pawnee, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. Writ of error from conviction for conspirary to oppose by force the enforcement of the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76), and the presidential proclamations made in pursuance thereof. The assignments of error may be classified as follows: (1) Insufficiency of the indictment; (2) refusal to require election between the two counts; (3) insufficiency of the evidence; (4) improper admission of evidence; and (5) refusal to charge that certain witnesses were accomplices, whose testimony must be corroborated.

The indictment was against Enfield and one Pickens, who was acquitted by the jury. The first count charged that Enfield, Pickens, and other named persons have continuously and at all times, between June 5, 1917, and August 6, 1917, conspired to hinder, delay, and prevent

certain named persons, and others who had registered and were subject to draft service, from being inducted into that service, by arming themselves and offering armed resistance to induction into the army. The second count was to the same effect, with the addition of overt acts, in that on or about July 29, 1917, defendants went to the residence of J. S. Beers and advised, induced, instructed, and procured J. S. Beers and Mark Beers to obtain guns and ammunition and to go, on that date, to named persons, and others unknown, to request and demand that said persons also procure guns and ammunition, and thus armed, to meet with defendants J. S. Beers and Mark Beers at or near the Luthi schoolhouse for the purpose of discussing plans for and organizing to obstruct the recruiting and enlistment service, and that a portion of such persons (not including defendants) did, on or about July 30, 1917, meet about a half mile from such schoolhouse, armed and for the above purposes. The insufficiency of the indictment is claimed on the ground that no statement of material facts, necessary to bring the case within the statute, has been substantially set forth. Each count charges conspiracy, between certain dates, to procure arms and ammunition, and to offer armed resistance to the induction into the army of men qualified therefor and registered under the Selective Service Act. This is sufficient so far as particularity of statement is concerned.

It is also urged that section 4 of the Espionage Act (Act June 15, 1917, c. 30, tit. 1, 40 Stat. 219 [Comp. St. 1918, § 10212d]) is applicable to this case, and, being special legislation, excludes the application of sections 6 and 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1089, 1096 [Comp. St. §§ 10170, 10201]). If this be true, the results must be that the first count of this indictment is bad, because no overt act is alleged therein, and that the penalty is determined by sections of the Espionage Act. Sections 6 and 37 of the Penal Code were enacted before the war. Section 6 deals with seditious conspiracies to forcibly resist the authority of the government. Section 37 refers generally to conspiracies to violate national laws. Under section 6 no overt act was necessary, while under section 37 the overt act was required.

[1] Section 4 of the Espionage Act covers conspiracies to violate sections 2 and 3 of that act (Comp. St. 1918, §§ 10212b, 10212c). It provides that "except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine," thus showing that this section was expressly intended to replace section 37 in those cases to which it is applicable; that is, where the purpose of the conspiracy is to violate or secure the violation of sections 2 and 3 of the Espionage Act. Section 3 of that act makes it a crime to "willfully obstruct the recruiting or enlistment service of the United States." The purpose of the conspiracy charged in this indictment was to forcibly interfere with the operation of the draft, under the Selective Service Act and presidential proclamations in pursuance thereof. The draft is comprehended within the expression "recruiting or enlistment

service," as used in section 3 of the Espionage Act. Therefore the conspiracy here charged falls within section 4 of the Espionage Act.

[2] But the fact that section 37 is expressly supplanted does not mean that section 6 is impliedly replaced. Both sections 6 and 37 have been law for years, and it has never been thought that they were inconsistent, although the broad language of section 37 might well cover all manner of conspiracies against the United States, whether or not such contemplated the employment of force. Section 6 has been regarded as reaching the very serious situation of incipient rebellion, and designed to halt such in its first stages. See Charge to Grand Jury, Fed. Cas. No. 18,274, 2 Spr. 292. If in peace times such a statute was regarded as essential, it should require something more than implication to strike it down in war times and as applied to the war activities themselves. On the other hand, it must be said that section 4 of the Espionage Act undoubtedly is applicable to all manner of conspiracies to violate sections 2 and 3 of that act, whether or not force is contemplated in the conspiracy. The fact that the Espionage Act requires an overt act to complete the crime, which is made punishable up to 20 years' imprisonment, is not inconsistent with the declaration of the Penal Code that the bare conspiracy to use force, with no overt act, is also a crime, and punishable up to 6 years' imprisonment. The result is that section 6 is fully applicable to bare conspiracies to forcibly oppose the enforcement of the Selective Service Act, and that, where an overt act has followed, section 4 of the Espionage Act is also applicable. The motion for election was properly overruled. It may be added that since the second count, covering the conspiracy with overt act, was certainly applicable, since the sentence thereunder was greater than under the first count, and since the sentences run concurrently, the defendant in error was not prejudiced by the ruling.

It is earnestly urged that the evidence is insufficient to sustain the conviction. The entire evidence has been carefully studied, and presents a clear-cut issue of fact for the determination of a jury. It is true that the vital testimony for the government came from two self-confessed co-conspirators, who were exceedingly active in connection with the overt acts alleged, and who understood that they were saving themselves by turning state's evidence. The court, however, very properly and carefully cautioned the jury as to evidence from such sources.

[3] The final contention is that evidence of the desertion of a brother of Enfield, and evidence of a highly vicious and inflammatory speech by one Hicks, were improperly admitted. These assignments are well taken. We cannot doubt the highly prejudicial effect of this testimony. Enfield was in no way shown to be connected with, or responsible for, the desertion. Hicks was, according to the evidence, an ex-convict, fraudulently claiming to represent organizations which did not know of him, or which had no real existence. He was making inflammatory, anarchistic speeches, intended and calculated to incite lawlessness in connection with the prosecution of the war. He was under indictment at the time of this trial for some of these very utterances. When the government began introducing testimony as to Hicks and his utterances, objection was made that such evidence was irrelevant. The

assurance was then given that Hicks would be connected with Enfield

in the conspiracy charged. This assurance was not fulfilled.

The particular speech by Hicks which was introduced was delivered in the afternoon, at Arnett, Okl. That day a large all-day public meeting of the people of that neighborhood was held at Arnett. It had been advertised that both Hicks and Enfield would speak. Enfield, who lived some miles away on a farm, without telephone, testified that he had seen none of the advertisements, and did not know until he reached Arnett that Hicks was to speak; that he then refused to speak, until a number of friends urged him to do so, because they had come to hear him; that he announced at the beginning of his speech that there was no connection between Hicks and himself. He spoke in the morning, in the courthouse. Hicks spoke in the afternoon, in front of the courthouse, and again that night. Enfield heard at least part, if not all, of Hicks' speech. The only evidence of approval by Enfield was by one witness, of clearly limited capacity, who answered "Yes, sir," to the following very suggestive question: "Did you see him applaud Hicks when he made a point against the war—against the draft?" Several witnesses, who had heard portions of both speeches, testified that they were similar. A portion of Hicks' extended speech had been taken by a stenographer. Upon the above slender basis this portion was introduced against Enfield. It was a vicious, scurrilous, seditious outburst against the government, which would naturally inflame the righteous anger of every patriotic man upon the jury. Enfield was not shown to be in any way responsible for this speech, nor was it properly shown that he in any wise approved the highly intemperate passages introduced.

For the error in admitting this testimony of Hicks' speech, and concerning the desertion of Enfield's brother, the judgment is reversed,

and the case remanded for new trial.

UNITED STATES v. LENA et al.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1919.)

No. 5311.

INDIANS \$== 13-EFFECT OF ERROR IN ENROLLMENT.

That the Dawes Commission, in listing as a Creek citizen a woman whose name appeared on the Creek rolls of 1895, confused her with another and erroneously gave her the name of her supposed husband, in which name her allotments were made, *held* not to invalidate the patents therefor.

Appeal from the District Court of the United States for the East-

ern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States against Hettie Lena, alias Emma Coker, and others. Decree for defendants, and complainant appeals. Affirmed.

D. H. Linebaugh, Sp. Asst. Atty. Gen., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., Alvin F. Molony, Sp. Asst. U. S. Atty., and

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James C. Davis, Creek National Atty., all of Muskogee, Okl., on the brief), for the United States.

N. A. Gibson, of Muskogee, Okl. (J. L. Hull and T. L. Gibson, both of Muskogee, Okl., and Harry H. Rogers, of Tulsa, Okl., on

the brief), for appellee Harwell.

Joseph C. Stone, of Muskogee, Okl. (George C. Greer, of Dallas, Tex., B. B. Blakeney and J. H. Maxey, both of Tulsa, Okl., George S. Ramsey and Malcolm E. Rosser, both of Muskogee, Okl., Villard Martin, C. R. Thurwell, and A. A. Hatch, all of Tulsa, Okl., Joseph M. Hill, of Pryor, Okl., and Charles A. Moon and Francis Stewart, both of Muskogee, Okl., on the brief), for appellees Lena and others.

Before SANBORN, Circuit Judge, and MUNGER and YOU-MANS, District Judges.

YOUMANS, District Judge. On June 5, 1915, the United States brought this suit in the District Court of the United States for the Eastern District of Oklahoma, in behalf of the Creek Nation of Indians, to set aside two patents, one for a homestead and the other for an allotment, to Emma Coker, a citizen of the Creek Tribe of Indians. The theory of the original bill was that Hettie Lena and Emma Coker were identical, and that the issuance of patents to the latter constituted a duplicate issue.

During the trial an amended bill was filed to meet what the United States conceived to be the effect of the proof. The amended bill charged:

"That the Dawes Commission, after having enrolled on January 26, 1900, Hettie Lena as a citizen of the Creek Nation under her correct name, did, on the 23d and 24th of May, 1901, open an enrolling division and office at Okmulgee, Indian Territory, for the purpose of closing up the Creek Roll; that said Commission to the Five Civilized Tribes at that time, in view of section 28 of the Original Creek Agreement (31 Stat. 861), prohibiting it, or probably prohibiting it, from enrolling, or listing the name of any Creek for enrollment, as a citizen, or adding to said rolls, any name after May 25, 1901, opened an office at Okmulgee, Indian Territory, the capital of the Creek Nation, just a few days before May 25, 1901, and made an effort to list for enrollment before the ratification of said Original Creek Agreement the names of all Creeks not theretofore listed or enrolled, and in said work at Okmulgee said Commission acted hurriedly, and without the opportunity for full investigation, and, acting without evidence in this case, took the name 'Emma' from the 1895 Creek Tribal Roll and placed it on a card for further consideration, and on subsequent consideration rejected that name and the person it represented, and thereupon enrolled a person by the name of Emma Coker, 30 years of age, whose mother was Loskey, and which person complainant alleges was in fact either the same person represented by the name Hettie Lena already enrolled, or represented no person in being on April 1, 1809, or subsequent to that date, and therefore placed the name 'Emma Coker' on the rolls by mistake, although said Hettie Lena had been enrolled prior thereto by the Commission to the Five Civilized Tribes on January 26, 1900: alleges that the said Commission placed upon the rolls the name Emma Coker, under the mistake and belief that the name 'Emma Coker' represented a person in being, to wit, the same person theretofore enrolled by the Commission under the correct name of Hettie Lena, and on account of said confusion in the identity of the names, Hettie Lena and Emma Coker, the name Emma Coker was enrolled by the Commission and approved by the Secretary of the Interior, and on account of the above this complainant did not discover, until a short while before the institution of this suit, that there was in fact and in reality no such person as Emma Coker."

The testimony shows that the name "Emma," together with other names, appears on the Creek Tribal Roll of 1895 under the name of Loskey. The name Loskey indicated the head of the family or ancestor. Under that name as descendants were eight other names, Sophia, Hettie, Jacob, Lucinda, William, Sallie, Noah and Emma. Mr. Edward Merrick, an employé of the Commission, described the method pursued as follows:

"In March, 1901, the Commission transferred its Creek enrollment work from its office in Muskogee to the town of Okmulgee, the then capital of the Creek Tribe of Indians. I went to Okmulgee in May, 1901, in this work. The object of the Commission in transferring this work to Okmulgee was to secure the enrollment, or the listing for enrollment, of members of the Creek Tribe whose applications the Commission had not received. During the month of May, the Creek National Council was in session at Okmulgee, considering whether the Original Creek Agreement should be ratified. There was a portion of the agreement providing that no person should be added to the rolls of Creek Indians after the ratification of the agreement, and it was thought necessary, in order to preserve or save the rights of Indians, that they should be listed on a card, in some manner to indicate that application had been made for and on their behalf. There were 1,500 or 2,000 names on the 1890 and 1895 rolls for whom no application had been made for enrollment. On May 19th or 20th the Commission was advised that the Creek Council was about ready to act upon the ratification of the agreement, and, in order to get listed upon cards before the council took action, all of the names which were upon the 1890 and 1895 rolls, for whom no application had been made, we took blank census cards, which we had numbered and brought from the Muskogee office, and took these tribal rolls, and made a census card for each name appearing thereon, about whom we had not received information, by placing the name on the census card as it appeared on the tribal roll, and also noting on the card the tribal enrollment, and the band or town in which the name belonged, as it appeared on the tribal roll. I would say there were several hundred names on the tribal rolls about whom the Commission had received no information when we began, the last few days before the action of the Council in ratifying the agreement, writing on the census card the name and tribal enrollment as it appeared on the tribal roll. I think Mr. Hastain and myself wrote most of these cards.

"No arbitrary allotments were made until after the roll had first been approved by the Secretary of the Interior. When the Commission believed an applicant was entitled to enrollment, such applicant was permitted to apply for an allotment immediately after his application for enrollment was received. Thereupon a certificate of allotment was issued, which has the field number of the allottee's census card. When the enrollment was approved by the Secretary of the Interior, patents would be issued to such allottee, which patents had placed on them the number opposite which such allottee's name appeared on the approved roll. * *

"The name 'Emma' appeared on the 1895 Little River Tulsa 279, unaccounted for, up to May 23, 1901, and she was one among those that we listed on cards to have their names on a card prior to the ratification of the Agreement, in order to preserve any rights she might have. At the time this card was prepared we had absolutely no information with reference to Emma. We did not know whether a person represented by this name was entitled to enrollment, or was living. All we knew was the name appeared on the Little River Tulsa town tribal roll. The expression 'Little River Tulsa town' refers to a clan or band of Creek Indians. The Creek tribe was divided into 47 bands or towns; each was separate from the other, and had separate rolls of its members. I am familiar with the method employed by the Commission in making its recommendations to the Secretary of the Interior for the enrollment of Creeks. We had to secure evidence that the person represented by this name was living on April 1, 1899, before the name would be recommended for enrollment. We also sought information concerning each person, so the enrollment records would

be descriptive of the person enrolled. In this case such information was secured after I entered the name on this card. The notation 'Rewritten' on this card means that the name on this card was placed on another card, together with the information desired by the Commission. The notation 'enrolled as Emma Coker' indicates that the word 'Emma' was placed on another card and given the name Emma Coker. The notation 'Don't find on 1890 roll" indicates the name 'Emma' does not appear on the 1890 Creek tribal roll. The notations appearing on this and other census cards indicate some fact which the Commission ascertained during the progress of its investigations concerning persons represented by the names appearing on the card. * *

"The instrument identified as Government's Exhibit No. 7 is in the hand-writing of Mr. Wm. T. Martin, and is the 'rewritten' card referred to by the notation on Exhibit No. 5. This card is filled out as other census cards were. The notation with reference to residence indicates that the first post-office address of this person was given as Keokuk Falls, and later it was ascertained that her post office was changed to Salem, and was at Salem on April 13, 1912. The number 2974 was placed on this card at the time we prepared the roll. The field number 3274 is the number of the field card. Comparing Exhibits 5 and 7, all information upon No. 7, not appearing on No. 5, was obtained by the Commission, or some employé for the Commission, other than myself, after I had prepared No. 5 at Okmulgee. * *

"On Exhibit No. 5 I observe in column under the words 'Dawes Roll No.' the word 'Coker' in parenthesis. I do not know who wrote this. It was written after the card was prepared by me. The figures '30' in the column 'age' indicate that the Commission found that the person represented by this name was 30 years old in 1901. Similar information was secured and stated on census cards of all other enrolled Creeks. The 'F' appearing in the column headed 'sex' indicates the Commission found this person to be a female. The word 'full' appearing in column headed 'blood' indicates the Commission ascertained that the quantum of Indian blood of this person was 100 per cent. The tribal enrollment following is identical with what I placed on Government's Exhibit No. 5. The word 'unknown', appearing in column under the word 'father' and the word 'Seminole' following, indicates that some one informed the Commission that the father of this person was unknown, but he was a Seminole Indian. The word 'Loskey' appearing in the column under 'mother' indicates that some one advised the Commission that the mother of this person was named Loskey. The figures '1895' appearing in the column under 'year' indicates that the name of this parent may be found on the 1895 roll, and that she was living on April 1, 1899. If the parent or parents of an enrolled person was found by the Commission to be not living on April 1, 1899, the word 'Dead' would be written opposite the name of the enrolled person, in this column. The letters and word 'L. R. Tulsa,' in the column under the word 'town' refers to the Indian band to which the parent belonged, which was Little River Tulsa."

W. H. Angell testified as follows:

"During part of the year 1901 I was an employe of the Commission to the Five Civilized Tribes, engaged in Creek enrollment work. During that year I was in charge of a field party, sent out into the interior of the Creek tribal domain, making investigations for the Commission concerning unaccounted for names appearing on the Creek tribal rolls. Mr. W. T. Martin was a member of my field party. Government's Exhibit No. 7 was prepared by Mr. Martin, and the information appearing thereon was obtained by the field party of which I had charge. The information we obtained was concerning the woman who was the wife of Charlie Coker, who appeared on card No. 3839. We did not obtain any information or evidence concerning any other person."

Cross-Examination.

"I have some personal recollection as to how this information was obtained, and I do remember how the memorandum happened to be written on the cara. I do not remember the persons who appeared before me. Their testimony is

what appears upon the card. Outside of the card, I have no recollection of what evidence I heard. I assisted in investigating between 300 and 400 cases. The facts concerning this particular case have not entirely passed from my memory. I have a distinct recollection of receiving information from a person, and making a memorandum at the time, that 'Emma' was the wife of Charlie Coker. This memorandum which I made was on a memorandum card we had in the field, not on the card which is Government's Exhibit No. 7. That card we did not have in the field. We had thin cards, similar to that, which we took into the field and made our memorandum upon, which thin cards were destroyed when we returned to the office and made the completed card, such as Government's Exhibit No. 7. The members of our party worked together, except in a very few cases, when we had to drive from our camp into the country. I do not remember whether it was a man or a woman that gave testimony that Emma was the wife of Charlie Coker. It was while we were stationed at Wetumka this evidence was received. I could not swear positively to all the places where evidence concerning the enrollment of 'Emma' was heard. I do not think any evidence was heard at Muskogee.

"It is true that Indians from various parts of the Creek Nation, town kings, warriors, and head members of the tribe, and other people who knew about the Creeks, were coming into the office at Muskogee from time to time and corresponding with the Commission with reference to these enrollment matters even in the absence of the field parties. The Commission may possibly have heard evidence at Muskogee while my party was in the field. My recollection is that we made this investigation in July, 1901. We submitted the information we secured to the Commission. I do not know whether there was before the Commission, when they finally enrolled this party, any other evidence than this data we secured and which appears on Government's Exhibit No. 7. We made copies in some cases on thin cards. In some instances we would take the names off the tribal rolls that we were to investigate. In this particular instance, I do not remember whether we had a card, but we did have something to remind us that we were to investigate the name 'Emma,' which appeared opposite No. 279 on the Little River Tulsa Creek roll, and our inquiry was concerning that name. I do not know who wrote the word 'Coker' in lead pencil on Government's Exhibit No. 5."

Redirect Examination.

"Our party took into the field thin cards and not heavy ones, like the original of Government's Exhibit No. 7. Upon these thin cards we wrote the information we received from the evidence we took. Thereafter it was transferred from the thin cards to the heavy cards, such as the original of Government's Exhibit No. 7, and thereupon the thin card was destroyed."

Recross-Examination.

"The information I got from some person, either town king or Indian that knew, was that 'Emma' was the wife of Charlie Coker.

"The Court: What Emma was it that you were inquiring about out there? A. We went out to look for Emma; that is the only name.

"The Court: Where did you get that name? A. That we got off of the 1895 pay roll.

"The Court: What was the number on the roll? A. 279, Little River, Tulsa Town.

"The Court: That Emma, 279 Little River Tulsa Town, on the 1895 roll, the person represented by that name, was the person with reference to whom you were making the investigation? A. Yes, sir.

"The Court: And in the course of that investigation you secured evidence to the effect that whom you were investigating was the wife of a man by the name of Coker? A. Charlie Coker; yes, sir. It was after May 23, 1901, that we made our investigation. I do not know when Government's Exhibit No. 7 was prepared. I am satisfied in my own mind when it was prepared, but do not know positively."

The testimony does not sustain the allegation in the amended bill that the Commission rejected the name and person represented by the name Emma on the 1895 Creek tribal roll. The word "Rewritten," as it appears on the card prepared by or under the direction of Mr. Merrick, does not warrant the conclusion that the investigation with regard to Emma had terminated, and that she was rejected as one having no claim as a Creek citizen. It is clear that in the course of the investigation she was erroneously identified by Mr. Angell, or his party, as the wife of Charles Coker. It developed that Hettie Lena was the wife of Charles Coker, and to that extent there was confusion regarding the two persons, Hettie Lena and Emma; but that confusion did not destroy the identity of Emma as established by the tribal roll of 1895. She was the Emma under investigation by the Dawes Commission, and the patents that were issued were intended for her. The erroneous conclusion of a change of status did not destroy her identity.

The attorney for the United States offered to prove that a child called Emma was at one time in the family of Loskey, and that she was the daughter of Sophia, or granddaughter of Loskey, and that she was born about 1894 and died before she was 2 years old, and that no person named Emma in the family of Loskey was living on April 1, 1899.

Objection was made to that portion of the offer that no person named Emma in the family of Loskey was living April 1, 1899. This objection was sustained by the court and the action of the court is assigned as error. In the case of United States v. Wildcat, 244 U. S. 111, 118, 124, 37 Sup. Ct. 561, 564, 566 (61 L. Ed. 1024), with reference to the action of the Commission, the Supreme Court said:

"A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it made mistakes which are now impossible of correction. This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe, and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commission had to pass with the best information which it could obtain. * *

"It is true that the methods followed by the Commission may not have been the most satisfactory possible of determining who were entitled to enrollment as living persons on April 1, 1899; but it must be remembered that there were many persons whose right to enrollment was being considered, and the Commission in good faith made an honest endeavor to keep the names of persons off the rolls who were not entitled to appear as members of the tribe upon the date fixed by Congress."

In the case of Folk v. United States, 233 Fed. 177, 189, 147 C. C. A. 183, 195, Judge Sanborn, speaking for this court, said:

"As the Commission was required by the acts of Congress to give full force and effect to the authenticated tribal rolls, the usages and customs of each tribe, and was by those acts given access to all their rolls and records, the Creek Rolls of 1890 and 1895, on each of which Minnie Atkins and Thomas Atkins as her son were enrolled as citizens of the tribe by blood, constituted not only prima facie, but, in the absence of strong and persuasive countervailing proof, conclusive evidence before the Commission of the right of Thomas Atkins to enrollment as a citizen of the Creek tribe. In the face of this record counsel for the plaintiffs no longer contend in this court, as they pleaded in

the court below, that 'no evidence of any character was produced before, or had or obtained by said Commission with respect to the right of the alleged Thomas Atkins under said act of Congress to be so enrolled'; but they now argue that, although all the evidence and information disclosed above was before the Commission, there was no evidence before them that Thomas Alkins was living on April 1, 1899. The answer is, first, that the testimony of Merrick and Lyons tends to show that Merrick who made the census card had information that he was living before making that card, and made it in reliance upon such information; and, second, that the authenticated Creek roll of 1895 was conclusive evidence that he was living in that year, and, in the absence of any direct evidence before the Commission that he had died, or that he had been in such a dangerous situation that men of reasonable prudence would infer that he had died, prior to April 1, 1899, the conclusive legal presumption was that he continued to live for at least seven years after the making of the Creek roll in 1895, and hence that he was living on April 1, 1899. In the absence of proof of earlier death, or of evidence of unusual danger of such earlier death, the legal presumption is that a live person continues to live for at least 7 years."

The mistake made by the Commission in tracing the identity of Emma in the family of Loskey did not relate to the essential point to be determined, which was whether she was alive on April 1, 1899. The appearance of her name on the 1895 roll was conclusive evidence that she was living in that year, and in the absence of any direct evidence before the Commission that she had died prior to April 1, 1899, the conclusive legal presumption to be drawn by the Commission was that she was alive on that date.

We have considered all of the errors assigned which are regarded as essential to the determination of this case. We do not regard it necessary to consider the numerous other errors assigned. Central Vermont Ry. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

In our opinion the decree of the lower court should be affirmed; and it is so ordered.

BLACKSTOCK v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit, October 27, 1919.) No. 5258.

- CRIMINAL LAW \$\ightharpoonup 752, 753(2)\$—Motion for directed verdict, made and overtured at the close of the government's case, not having been renewed at the close of defendant's case, the question of sufficiency of the evidence was waived.
- 2. Criminal law € 1036(8)—Discretion to consider insufficiency of evidence where not raised below.

It is within the sound discretion of the reviewing court to notice claim of defendant's counsel that there was no evidence to sustain the verdict, though the question was not raised below, and this will be done; the case involving defendant's liberty, the question being argued by both parties, and being the only question really presented and argued in defendant's behalf.

3. CRIMINAL LAW €==1175—CONVICTION ON TWO COUNTS ON EVIDENCE SUFFICIENT AS TO ONE.

Though there was a verdict of guilty on both counts, error may not be predicated on insufficiency of the evidence as to one of them; it having

been sufficient as to the other, and the penalty imposed not being in excess of what might be imposed thereon.

4. Prostitution 5-Violation of Mann Act; question for Jury.

Evidence, including prior relation immediately resumed, on prosecution under the Mann Act (Comp. St. §§ 8812-8819) for persuading and enticing a woman to go in interstate commerce for the purposes prohibited by the statute, *held* sufficient to go to jury on the questions of intent and purpose, as well as of inducement.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Fred Blackstock was convicted of violation of the Mann Act, and

brings error. Affirmed.

L. D. Mitchell, of Oklahoma City, Okl., for plaintiff in error. Herman S. Davis, Asst. U. S. Atty., of Frederick, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. The plaintiff in error, hereinafter referred to as the defendant, was indicted in January, 1918, in the District Court of the United States within and for the Western District of Oklahoma, for violation of Act June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. §§ 8812–8819), known as the "Mann Act."

The indictment contained two counts, charging the defendant: (1) With unlawfully transporting in interstate commerce, for the purposes specified in the statute, a woman therein named. (2) With unlawfully persuading and enticing the woman in question to go in interstate commerce from and to the places in question and for the purposes prohibited by the statute.

Upon a plea of not guilty and a trial, a verdict of guilty was duly returned upon both counts of the indictment. Motion for a new trial was denied, and the defendant duly sentenced by general judgment to be imprisoned for a term of three years.

[1] The record discloses that—

"The defendant interposes a demurrer to the evidence introduced on behalf of the plaintiff, and the court being duly advised in the premises, it is ordered that said demurrer be and the same is overruled."

This may have been intended for a motion for a directed verdict of not guilty, for the reason and upon the ground that there was not sufficient evidence to support the allegations of the two counts of the indictment or either of them. This "demurrer" was not renewed, and no motion was made at the close of defendant's case, and there was therefore no ruling of the trial court as to the sufficiency of the evidence to sustain the charges contained in the indictment, upon which an assignment of error could be based. Defendant's failure to make this motion at the close of all of the evidence waived this question, and there was no exception to the charge of the court. The question of

the sufficiency of the evidence to sustain the verdict is therefore not before this court for determination.

[2] An examination of the record in this case, however, reveals the fact that the only question that is relied upon by the defendant, and the only question really presented and argued in defendant's behalf, is the insufficiency of the evidence to sustain the verdict of guilty. Both parties have argued this question, and it is within the sound discretion of this court to notice the claim of counsel for defendant that there was no evidence to sustain the verdict of guilty, although the question was not raised in the trial court. Doe v. United States, 253 Fed. 903, 166 C. C. A. 3, and cases there cited. The fact that this case involves the liberty of the defendant impels us to examine the record upon this assignment of error in his behalf.

[3] We are not disposed to devote time to a consideration of the contention of counsel for the defendant as to the lack of evidence offered in support of the first count of the indictment, as, under the rule, if the evidence is sufficient to sustain either, and the penalty imposed is not in excess of that which might have been imposed upon the one count, error will not be predicated upon an allegation of the

insufficiency of the evidence as to the other count.

[4] Does a fair consideration of the record sustain defendant's contention as to the second count? The brief of the defendant is largely a discussion of the weight and character of the evidence, rather than an attempt to justify his claim that there is no substantial evidence upon which to base the verdict. The determination of this issue of whether or not the evidence sustains the verdict of conviction involves an appreciation in detail of the material facts to which the witnesses testified.

Letters passed between the woman named in the indictment and the defendant; she being in Oklahoma, and he in Kansas City. She testified in substance that defendant left her, and went to Kansas City; that he wrote to her from Kansas City to come there, and he would do what was right by her in his way; that she went to Kansas City pursuant to his invitation, he having told her how to come, just what railroad to take, and that he would meet her when she arrived: that he met her and took her to a designated place in Kansas City, registered under the name of Fred Johnson and wife, occupied a room together, stayed at that place two weeks, then went to another place, securing a room there, and staying there together for some time, he paying the bills. All of this, practically admitted, with other facts and circumstances, including the history of the relations they sustained prior to their separation, when he went to Kansas City and left her in Oklahoma, subsequent letters and subsequent cohabitation after the birth of the baby, with the attitude of the defendant toward her, with the reasonable inferences naturally to be drawn from this state of facts, tended to shed some light upon defendant's intent and purpose when he wrote her the letter to come to Kansas City. It is admitted that the evidence does show that the defendant took a hand in procuring her to go in interstate commerce from Oklahoma to Kansas City, and it was for the jury to determine from all the testimony, including the testimony as to the relations they had sustained prior to his leaving her, her condition at the time of the correspondence, what his directions were to her as to her coming, where she should come, how she should come, his promise to meet her, the fact that he did meet her, that he immediately registered under a fictitious name, and lived with her as man and wife, that he went to another place, living with her as man and wife under a false name, his letters to her thereafter, his attitude toward her—all were matters for the consideration of the jury, and upon which it was its province to determine what his intent and purpose was, if they found that she came to Kansas City upon his invitation or inducement. The circumstances attending her arrival in Kansas City, his taking her and registering with her as man and wife under an assumed name, occupying the same room with her for weeks, certainly permit an inference as to his intent and purpose, justifying the verdict of the jury, supported by her testimony and his admissions.

We think that it cannot be reasonably urged that his attitude was one of indifference, but rather that he had arranged for the immediate resumption of their relations upon her arrival, and the fact that he gave her directions where to go, and that he would meet her, etc., justifies the inference that he anticipated doing with her, when she ar-

rived, just what the facts show was done.

The gist of the offense alleged here is the intention of the defendant which was in his mind when the letters were written, when the directions were given, and when she was induced to go in interstate commerce to him at Kansas City. In that connection, this statute should receive a construction which will make it efficient to accomplish its intent and purpose, but should not be so enlarged or extended by judicial interpretation as to take in transactions which, however reprehensible, cannot reasonably be regarded as within its aims and intent. In our opinion there was abundant evidence which warranted the jury in finding that this unfortunate girl traveled from Oklahoma to Kansas City on the occasion in question because of the inducement and persuazion by the defendant, and that defendant's intent and purpose was to renew their relations upon her arrival at Kansas City.

We are convinced that the record discloses a violation of this statute under peculiarly aggravated circumstances, and that the jury was unquestionably justified in returning a verdict of guilty upon the second count of the indictment.

It is ordered that the judgment of the trial court be and the same is affirmed.

Petition of CLERK FOR INSTRUCTIONS RESPECTING CANCELED BANK CHECKS.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

CLERKS OF COURTS \$\sim 61\$—RIGHT OF CLERK OF CIRCUIT COURT OF APPEALS TO CANCELED CHECKS; "PUBLIC MONEY;" "MONEY OF THE UNITED STATES."

Fees and emoluments received by the clerk of the Circuit Court of Appeals are not "public money," nor "money of the United States," and when deposited in bank by the clerk and checked against to pay expenses of his office, the Treasury Department is without authority to order his canceled checks retained by the bank, but the clerk is entitled to have them returned in the customary manner, to be preserved by him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Money of the United States; Public Money.]

In the matter of the petition of the clerk of the Circuit Court of Appeals, Seventh Circuit, for instructions respecting custody of his paid and canceled bank checks.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. It has been the practice of the clerk to deposit with the Corn Exchange National Bank of Chicago, a designated depositary of the United States, the receipts of his office, and to disburse same through his checks drawn upon the bank, and at the close of each month to receive back his paid and canceled checks in accordance with usual banking practice.

Under date of April 8, 1919, there was sent from the Treasury Department of the United States to said bank a communication as follows:

"The Department of Justice has reported to this department that your bank returns to Mr. Edward M. Holloway, Clerk of the United States Circuit Court of Appeals of the Seventh Circuit, at the close of each month, when his passbook is examined, all paid checks. Under Department Circular No. 102 of December 7, 1906, depositary banks are required to retain in their files all checks of this character and to furnish the clerk of the court monthly reports of checks honored. A supply of form No. 8 has this day been forwarded to you under separate cover, and you are requested in future to comply with Department Circular No. 102 above mentioned."

The clerk was served with a copy of such communication, and he ales his petition in this court asking for the advice and direction of the court. On the filing of the petition a rule was entered that the Treasury Department show cause why such paid and canceled checks should not be returned to the clerk. Notice of the rule was served on the United States district attorney at Chicago, who appeared specially, stating that he had no authority to represent the Treasury Department, but he was granted leave to present the views of the Attorney General upon the subject, which were presented and duly considered.

The funds received by the clerk are derived from two distinct sources: First, such as are paid into court in litigation which is there pending, to be thereafter disposed of under the order of the court; and, second, the fees and emoluments of the clerk's office. This being a

court of appellate jurisdiction, funds of the first-named kind rarely come into the hands of the clerk; but his receipts are mostly of the second kind. It would seem that the contention of the department is predicated largely on section 995, Rev. Stats. U. S. (Comp. St. § 1644), which is as follows:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

But clearly this section has application only to funds of the first-named kind. It designates money paid "in any cause pending or adjudicated in such court," and requires the deposit to be "to the credit of such court"; and we are informed that, whenever funds of such character are paid in, they are deposited to the credit of the court, and are withdrawn in the manner provided in section 996 (Comp. St. § 1645), which is as follows:

"No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn. In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or its successor, to cause such money to be deposited in the treasury of the United States, in the name and to the credit of the United States."

But if it be assumed that the quoted sections have reference also to funds of the second kind, it would seem that section 798 (Comp. St. § 1326) clearly indicates what shall be done with paid and canceled checks (which would be included in the term "vouchers" as employed in that section), which section is as follows:

"At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made, and said accounts and the vouchers thereof shall be filed in the court."

Act June 6, 1900, c. 791, § 1, 31 Stat. 639 (Comp. St. § 1400), makes provision for annual audit of the clerk's account of fees and emoluments, and for turning over to the Treasury Department the balance on hand after certain deductions, as follows:

"Clerks of the United States Circuit Court of Appeals, annually and within thirty days after the thirtieth day of June in each year, shall make a return to the Attorney General of the United States of all the fees and emoluments of their offices respectively. Such return shall cover all fees and emoluments earned during the preceding year and also the necessary office expenses for such year including clerk hire, the compensation of the clerk not to exceed five hundred dollars per annum as now provided by law. Such expenses including clerk hire shall be certified by the senior Circuit Judge of the proper circuit, and audited and allowed by the proper accounting officers of the Treasury Department. The respective clerks of the Circuit Courts of Appeals, after de-

ducting such expenses and clerk hire, shall, at the time of making such returns, pay into the treasury of the United States the balance of such fees and emoluments. In case the amounts claimed for such expenses and clerk hire have not been audited by such accounting officers prior to the time fixed for making such returns and payment, said clerks may retain the sums claimed by them respectively, until the audit is made, and in case any sum so claimed and retained is not allowed the amount disallowed shall within ten days after notice of disallowance be paid into the treasury of the United States. All laws and parts of laws so far as in conflict with this proviso are hereby repealed."

In United States v. Mason, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1133, it was decided that the fees and emoluments so coming into the hands of the clerk are not "public money," or the "money or property of the United States," but that they are received primarily to pay compensation of the clerk and expenses of his office, and that for any balance he is not a trustee, but a debtor to the United States. In United States v. MacMillan, 251 Fed. 55, 163 C. C. A. 305, this court applied the same principle.

We find no authority in the statutes for applying to the clerk, with reference to his paid and canceled bank vouchers for disbursement of fees deposited, any different rule than is applied to other depositors. A similar situation arose in 1916 under a like direction from the Treasury Department with reference to the clerk of the District Court of the Eastern District of Wisconsin, wherein Judge Geiger, of that court, rendered an opinion in substantial accord with the foregoing. Accordingly we advise the clerk that he is entitled to receive, and that he should receive, from the bank, and should carefully preserve, all paid and canceled checks drawn upon his account therein as clerk of the court.

The clerk is directed to present a certified copy hereof to the Corn Exchange National Bank of Chicago, and upon such presentation the bank is directed to deliver to the clerk all such paid and canceled checks, which checks shall be by the clerk safely and carefully kept and preserved. The clerk is further directed to forward to the Treasury Department of the United States a certified copy hereof.

MULLIN v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. November 26, 1919.)
No. 3436.

1. RAILROADS &= 370—STATUTORY SIGNALS NOT REQUIRED WHEN COUPLING IN YARDS.

Code Ala. 1907, § 5473, requiring a locomotive engineer to blow the whistle or ring the bell at "short intervals" while moving within or passing through any village, town, or city, held not to require such signal to be given before or when making a coupling in railroad yards.

MASTER AND SERVANT \$\iiin\$ 180(5)—Negligence of engineer in making coupling without signal.

A railroad engineer, who without signaling coupled to a cut of cars standing in the yard, causing them to move, held not chargeable with

(261 F.)

negligence which rendered the company liable, under federal Employers' Liability Act (Comp. St. §§ 8657-8665), for injury to an employé who was then passing between two cars, where he had no knowledge or reason to suppose that any one would be endangered.

In Error to the District Court of the United States for the Middle

District of Alabama; Henry D. Clayton, Judge.

Action by T. B. Mullin against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

George P. Bondurant, of Birmingham, Ala., for plaintiff in error. C. P. McIntyre, of Montgomery, Ala. (Goodwyn & McIntyre, of Birmingham, Ala., on the brief), for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and EVANS, District Judges.

WALKER, Circuit Judge. The plaintiff in error (hereinafter referred to as the plaintiff), who was a flagman in the employment of the defendant in error (hereinafter referred to as the defendant), received a personal injury while attempting to get from one side to the other of a track in the defendant's yard at Montgomery, Ala., by going under the drawheads between two cars which were part of a cut of cars which was to form a part of a train which was being made up for a trip on the road. The injury resulted from the movement of the cut of cars in consequence of the engine being coupled to it while the plaintiff was in the act of attempting to go from one side of the track to the other for the purpose of performing the duty of checking up the cars in the cut, by getting their numbers and the numbers of the seals on them; a brakeman who was working with him having the task of checking on the side the plaintiff was going from.

The first of the two counts of the plaintiff's complaint charged that the alleged injury resulted by reason of the negligence of some officer, agent, or employé of the defendant, while acting within the line or scope of his authority as such, whose name is to the plaintiff unknown, in that he negligently failed to set the brakes on the cut of cars mentioned. The second count attributed the injury complained of to the negligence of some unknown employé of the defendant in causing the cars to come together with great force and violence. There was a judgment for the defendant, on a verdict in its favor which the court directed. The suit was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]).

There was no evidence to justify a finding for the plaintiff on the first count of his complaint. The evidence, which showed that there was a duty to set up the brakes on a car or cars left on a track in the yard unattached to a locomotive, also showed that the purpose of that requirement was to keep such cars stationary, to prevent them from rolling by gravity from where they were left. There was nothing to indicate that a proper performance of the duty required that brakes be so set as to prevent the movement of such cars by the coupling of a locomotive to them. Evidently the object was to prevent unattached cars from rolling

to a place or track other than where they were left. The evidence did not show a failure to comply with the requirement.

[1] There was evidence tending to prove that the locomotive was coupled to the cut of cars mentioned without giving any signal to indicate that that was about to be done. In behalf of the plaintiff it is contended that an Alabama statute (Code of Alabama 1907, § 5473) made it the duty of the person having control of the running of the locomotive to blow the whistle or ring the bell before moving the cars by coupling the locomotive to them, and that a failure to perform that duty was negligence. No provision of the statute referred to imposes that duty on the person in control of a locomotive, unless it is the one which requires him "to blow the whistle or ring the bell, at short intervals, * * * while moving within, or passing through, any village, town, or city."

Warning to the public of the approach of an engine or train moving in such a place evidently is the object of the quoted provision. The language used indicates that a movement other than such as is involved in making a coupling in a railroad yard was in contemplation. It is not required that a signal be given before starting a movement of an engine or train in a village, town, or city. The requirement is that the signal be given "at short intervals" while a designated movement is in progress. The language used does not indicate a purpose to require the blowing of the whistle or the ringing of the bell before or while making a coupling in a railroad yard within the limits of a village, town, or city. The conclusion is that no breach of the statutory duty of the en-

gineer to ring the bell or blow the whistle was shown.

[2] The cars between which the plaintiff undertook to pass by going under the drawheads were the 2 farthest from the end of the cut of 12 or 14 cars to which the engine was coupled. The plaintiff safely could have reached the other side of the track by going around the last car on the end near which he was, or by going over a car; steps or handholds being provided for the purpose. There was no evidence tending to prove that the engineer was aware, at or prior to the time of making the coupling, that any one at that time was trying to pass between two of the cars in the manner the plaintiff adopted. The fact that the engineer knew that sometimes employes would take the risk of going under the drawheads of cars likely to be moved by a coupling, instead of adopting a safe way of getting from one side of a track to the other, was not enough to make him chargeable with negligence in failing to give a warning not needed for the safety of any train employé who was properly performing his duty. He was not negligent in failing to assume or guess that some employé was taking an unnecessary risk just when the coupling was made.

There was nothing to indicate that any rule of the employer made it the duty of a locomotive engineer, engaged in making up a train preparatory to a movement of it over the road, soon to be begun, to give a signal before making any required coupling. In the absence of any evidence tending to prove that the engineer knew or ought to have known that the plaintiff was in a position to be imperiled by such a movement of the cars as might be caused by the coupling which was

made, a finding that the engineer, in making the coupling, was negligent

with reference to the plaintiff, would not be warranted.

In our opinion the evidence adduced was not such as to support either of the charges of negligence made in the complaint. The court did not err in instructing the jury to find in favor of the defendant.

The judgment is affirmed.

GRIFFITH v. UNITED STATES.*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)
No. 2700.

CRIMINAL LAW \$\ightharpoonup 1172(1)\top-Instructions on trial for violation of White Slave Traffic Act.

Giving an instruction in a prosecution for violation of White Slave Traffic Act, § 2 (Comp. St. § 8813), which permitted conviction if the jury found that the girl named was transported for "some immoral purpose," held not reversible error, in view of the evidence, which clearly showed an offense within the purview of the statute.

In Error to the District Court of the United States for the Western District of Wisconsin.

Criminal prosecution by the United States against Ada Griffith. Judgment of conviction, and defendant brings error. Affirmed

W. P. Crawford, of Superior, Wis., for plaintiff in error. Albert C. Wolfe, of La Crosse, Wis., and B. R. Goggins, of Grand Rapids, Wis., for the United States.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. Plaintiff in error, Ada Griffith, was convicted and sentenced for violation of the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. §§ 8812-8819]), for transporting one Katherine in interstate commerce for a purpose denounced by the act. It appears that Katherine and one Gladys were at Griffith's room in a hotel at Duluth, Minn.; that Griffith went into the hall to answer a phone call, and returning, told the girls that she had some men friends from the range who would soon call, and, if agreeable they would all go to Superior for "a little party." The girls were willing, and shortly afterwards three men, strangers to the girls, drove up, one coming into the hotel, saying, "Here we are," and thereupon all went down and entered a conveyance and drove to South Superior, Wis.; Griffith (who had some time previously conducted a house of prostitution at Superior) directing them to a resort or hotel there which was shown to be of evil repute, and through a side entrance all entered a wine room, where they remained for a time drinking, and then upon Griffith's suggestion the girls retired with the range men to bedrooms in the same building, there having illicit sexual relations with them, Griffith and the third man, presumably a chauffeur, remaining in the wine room. Each of the girls collected for this service \$5 from her man, which was then and there divided with Griffith, who had cautioned

the girls to be sure to get their pay first.

It appears that this was not the first participation which Griffith had in the procurement of at least Katherine for such entertainment for men. The evidence clearly and without any contradiction showed that the expedition to which the interstate transportation of the girls was an incident was arranged wholly by Griffith in Duluth, for the very purpose of doing in South Superior what was there done as stated.

The question here raised grows out of the court's charge to the

jury, wherein it was stated, inter alia:

"I charge you that in this case there is no evidence tending to show that this defendant caused this girl Katherine to be transported for the purpose of debauchery or to become a prostitute, but only under that clause 'for some immoral purpose.'"

Count 5 of the indictment, under which alone conviction was had, charges that defendant transported Katherine—

"for the purpose of prostitution and debauchery and for other immoral purposes, and with the intent and purpose of her, the said Ada Griffith, then and there to induce, entice and compel the said Katherine * * * to become a prostitute and give herself up to debauchery and to engage in other immoral practices."

It is contended as to this count, as well as to the charge, that if an immoral purpose other than that of prostitution and debauchery was intended, the precise nature of such other immoral purpose should have been set forth in the count, and that not only is the count in this respect faulty and ineffectual, but that the charge authorized the jury to find the defendant guilty, if the intended immoral purpose of the

transportation were one other than a sexual immorality.

While we are of the opinion that the count was in this respect sufficient, particularly after verdict, and in the absence of any previous special challenge of its form, or of demand for a bill of particulars, a state of facts is easily conceivable whereunder such a charge might have been harmful; for instance, if there were evidence that one of the immoral purposes of the transportation was the perpetration of an offense so wholly unrelated to debauchery and prostitution as is, say, robbery or blackmail; in such case it might be inferred from the charge that conviction might be had if the jury found such other immoral purpose to have been the purpose of the transportation. Without deciding the proposition, it may be said to be at least doubtful whether the statute was intended to cover transportation for immoralities other than those of a sexual nature.

The charge was evidently predicated on the theory that, as the evidence showed Katherine to have been unchaste and given to prostitution before the occurrence in question, she could not be the subject of debauchery or of inducement to become a prostitute, and that the jury might consider only evidence of such other immoralities as are contemplated by the statute. Whether or not this is too limited an interpretation of the statute we need not here determine. The record abundantly shows that the immoral purpose of this interstate expedition thus arranged by Griffith was only that of illicit sexual intercourse between

these people: and even if this did not, under this record, amount to debauchery or prostitution within contemplation of the statute, as these terms are there employed, it is nevertheless such an immorality as falls within its purview, and is amenable thereto when it is the purpose of the interstate transportation. Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Simpson v. United States, 245 Fed. 278, 157 C. C. A. 470; Johnson v. United States, 215 Fed. 679, 131 C. C. A. 613, L. R. A. 1915A, 862. There is no evidence whatever in the record of any other immorality than that indicated as the purpose of the transportation, and there is not the remotest likelihood that the jury was confused or misled by the charge, or that the defendant was in any way injured thereby. It is to be noted that counsel in the case evidently did not at the trial entertain suspicion or fear that the jury might by the charge be misled into convicting for a transportation having for its object immoralities other than those sexual, since it does not appear that any objection was made or exception taken to the charge. We are of opinion that the proof clearly establishes an offense denounced by the statute as it has been authoritatively interpreted, and that the record discloses no reversible error.

The judgment is affirmed.

STENZEL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1919.) No. 5308.

- 1. Criminal Law &=1170(1)—Harmless error in rejection of evidence.

 In a prosecution for violation of the Espionage Act of June 15, 1917, where defendant claimed that at the time he made the alleged attack on the government he was too intoxicated to have any criminal intent, the refusal of the court to allow a witness to answer the question whether he had heard defendant previously attack the government was harmless, for at best the question would have produced purely negative evidence of a general character.
- 2. CRIMINAL LAW \$\iiiists 371(1)\$—EVIDENCE OF OTHER OFFENSES: ESPIONAGE ACT.

 In a prosecution under Espionage Act for language charged to have been uttered in January, 1918, testimony as to defendant's previous disloyal utterances is admissible on the question of intent, it being defendant's claim that at the time of uttering the language made basis of a prosecution he was too intoxicated to have any unlawful intent.
- 3. CRIMINAL LAW \$\infty\$=1170(1)—WITNESSES \$\infty\$=374(1)—HARMLESS ERROR; STRIKING OF TESTIMONY SHOWING BIAS.

Where defendant introduced evidence that a hostile witness owed him \$5, which he had refused to pay, despite repeated requests, the action of the court in striking such evidence, which could only tend in a slight way to show bias on the part of the witness, was error, but of too little importance to be seriously considered.

4. Army and navy \$\iftsigm 40\top-Intent; Jury Question in prosecution under Espionage Act.

In a prosecution under the Espionage Act, where defendant, who was charged with having uttered language tending to obstruct the enlistment service and to cause insubordination, disloyalty, and refusal of duty in the military forces, offered evidence that he was so drunk at the time he

did not know what he was saying, the question whether defendant was capable, at the time of the utterance, of entertaining the specific criminal intent required by the Espionage Act, should be submitted to the jury, and charges withdrawing that question are erroneous.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Bernard Stenzel was convicted of violating the Espionage Act of

June 15, 1917, and he brings error. Reversed.

A. B. Lovejoy, of Waterloo, Iowa, for plaintiff in error.

F. A. O'Connor, U. S. Atty., of Dubuque, Iowa, and Seth Thomas, Asst. U. S. Atty., of Fort Dodge, Iowa.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. From conviction for violation of Espionage Act June 15, 1917, c. 30, 40 Stat. 217, the defendant brings his writ of error. The indictment was in two counts, based upon the same language, charged to have been uttered January 28, 1918. The first count charged obstruction of the enlistment service; the second, actual and attempted causation of insubordination, disloyalty, and refusal of duty in the military forces. The theory of the defense was that the defendant was so intoxicated that he was incapable of entertaining the necessary criminal intent.

Stenzel relies here upon seven assigned errors. One assignment is a claimed abuse of judicial discretion in denying the application of accused for a continuance. The motion is not in the record, and the record is so meager that we cannot say whether or not the assignment is well taken. The contention is, however, unimportant, since the judg-

ment must be reversed for other reasons.

[1] Another assignment is that witness Hettindorf, on objection, was not permitted to answer the question, "Did you ever hear him [defendant] make any remarks against this government before that time?" If there was any error in this ruling, it was harmless to defendant, since the most favorable answer to him would have produced purely negative evidence of a general character.

[2] Two other assignments object to the reception of the evidence of witnesses Rice and Cullinane as to disloyal utterances of defendant in November and October, 1917, respectively. This testimony bore

upon the intent of defendant and was clearly admissible.

[3] Another assignment was the striking out by the court, on motion, of evidence by defendant that a hostile witness, Cullinane, owed him \$5, which he had refused to pay, though asked for it a number of times. This was error, but of too little importance to be seriously considered. Its only tendency would be, in a rather slight way, to show bias on the part of Cullinane.

[4] The other two assignments deal with portions of the charge, and will be considered together, as they raise the same point. These

parts of the charge are:

"Now, it is claimed that this man was intoxicated. I need not say to you that a defendant, who has committed an offense or crime, cannot plead intoxication to defeat the consequences of his crime; it might be shown in miti-

gation of damages, but it cannot be considered rightly as a defense; at most it might be a circumstance in mitigation, but this is for the court to find."

"I don't know as there is anything further that I can say to you. The questions for you to determine are confined within a narrow compass. Did the defendant make these statements with which he is charged in these two counts of the indictment? If he did so make them, say so by your verdict. If he did not do so, and did not make them with the intent and purpose stated, discharge him."

These quotations, which followed each other in the above order in the charge, were preceded by the following:

"It has been stated in behalf of defendant that the proof must show that his alleged words were willfully, maliciously, and intentionally said by him. 'Willfully,' as used in the Espionage Act, means 'with an unlawful purpose, done with intent to do the acts that are forbidden by this statute.' It is for you to say for what purpose these statements were made by the defendant, if you find they were made by him. Ordinarily a man is presumed to intend the natural and probable consequences of his own deliberate statements or acts, and the only way, in most cases, that you can determine what a man's intentions and purposes are, would be from such statements deliberately made."

These quotations contain those parts of the charge which deal with the matter of intoxication. While there was conflict in the evidence as to the fact or degree of intoxication at the time of the alleged statements by Stenzel, yet there was distinct and positive evidence that Stenzel was so drunk at that time that he did not know what he was saying. In this state of the evidence he was entitled to have the jury pass upon the question of whether or not he was at the time so drunk that he was incapable of entertaining the specific criminal intent required by the Espionage Act. Hopt v. People, 104 U. S. 631, 26 L. Ed. 873; Tucker v. U. S., 151 U. S. 164, 169, 14 Sup. Ct. 299, 38 L. Ed. 112; Winston v. U. S., 172 U. S. 303, 311, 19 Sup. Ct. 212, 43 L. Ed. 456; 8 R. C. L. 131; 16 C. J. 107. Obviously the court denied him this right, thus depriving him of the only defense he was seriously presenting.

The judgment is reversed.

KELL v. CASTLEBURY.

(Circuit Court of Appeals, Fifth Circuit. November 25, 1919.) No. 3439.

Partnership €=345—Accounting; failure to order itemized statement of partnership affairs.

Where, after dissolution of partnership and before suit was brought, two accountants selected by complainant made up a detailed itemized statement of partnership receipts during the period in which the relation existed, and the evidence supported a finding that such statement embraced every proper item of debit and credit, except those specifically dealt with by the decree, refusal of the court to make or have made a formal itemized statement of partnership receipts and disbursements was not prejudicial to complainant, where the decree charged against defendant all items properly chargeable against him, other than such as were embraced in the statement.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Suit by T. M. Kell against S. A. Castlebury. From a decree for defendant, complainant appeals. Affirmed,

The following is the decree appealed from:

"At the March term, A. D. 1918, of the District Court of the United States for the Northern District of Texas, at Ft. Worth, the above styled and numbered suit came on for hearing and was submitted to the court by the parties upon the pleadings and the proofs taken, and from said pleadings and proof the court finds that the defendant, S. A. Castlebury, in his management and conduct of the partnership property of Kell & Castlebury, dealt honestly with his partner, T. M. Kell, and fails to find that the said S. A. Castlebury appropriated to his own use any part of the crops raised upon the partnership property of Kell & Castlebury during the existence of the partnership, and fails to find that the defendant, S. A. Castlebury, has appropriated any of the cattle or proceeds thereof, which belong to said partnership, except such as he has herein accounted for, and the court finds that upon the settlement by the defendant S. A. Castlebury of all of the partnership debts of the said firm of Kell & Castlebury, which was composed of the complainant, T. M. Kell, and the defendant, S. A. Castlebury, the defendant, S. A. Castlebury, was indebted to said partnership in the sum of \$277, proceeds of the cattle left after the payment of said partnership debts, and forty cattle of the value of \$16 each, aggregating \$640, which were the property of said partnership, and that the complainant, T. M. Kell, is indebted to the partnership in the sum of \$140 for 400 bushels of oats belonging to the said partnership appropriated by him in the year 1904.

"The court fails to find that it was an agreement or understanding that upon the termination of the partnership of Kell & Castlebury, the complainant, T. M. Kell, should pay the costs of the improvements made upon his

lands by the said partnership.

"It is therefore ordered, adjudged, and decreed by the court that the complainant, T. M. Kell, take nothing as against the plaintiff [defendant], S. A. Castlebury, on account of his claim against the said Castlebury for crops of wheat and oats, which he alleges were misappropriated by the said Castlebury, and that the complainant, T. M. Kell, take nothing as against the defendant, S. A. Castlebury, on account of cattle which the said Kell claimed were misappropriated by the said Castlebury during the continuation of said partnership.

"It is further ordered, adjudged, and decreed by the court that the defendant, S. A. Castlebury, take nothing against the complainant, T. M. Kell, for the cost and value of the improvements made upon the lands of the said

complainant, by the said partnership, Kell & Castlebury.

"It is further ordered, adjudged, and decreed by the court that the defendant, S. A. Castlebury, pay into the registry of this court for the use of the complainant, T. M. Kell, on or before 20 days from this date the sum of \$388.50, failing in which the clerk of this court is directed, upon the application of the said complainant, T. M. Kell, or his solicitors, to issue execution as at common law against the defendant, S. A. Castlebury, for the said sum of \$388.50.

"It is further ordered, adjudged, and decreed by the court that each party hereto pay one-half of the costs incurred herein, that is to say, the complainant, T. M. Kell, pay one-half of the costs herein incurred within 20 days from this date, in default whereof, execution may issue as at common law against him, and that the defendant, S. A. Castlebury, within 20 days from the date hereof pay one-half costs herein incurred, in default of which execution shall issue as at common law against him."

U. F. Short, of Dallas, Tex. (Thomas R. Bond, of Terrell, Tex., on the brief), for appellant.

George E. Miller, of Ft. Worth, Tex. (Miller & Miller, of Ft. Worth, Tex., on the brief), for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge (after stating the facts as above). The appellant brought this suit for an accounting of the business of a partnership which existed between him and the appellee for a number of years, ending in 1908. The partnership business was a farming and cattle-raising one. Two tracts of land were made use of in the business—one of more than 2,000 acres belonging to the appellant, and the other of 1,600 acres, a half interest in which was owned by each of the partners. When the partnership operations started, part of the work stock, farming tools, and equipment, and cattle used in the cattle-raising branch of the business, belonged to the appellant, and part to the appellee, and the latter contributed his services; the conduct of the partnership business being in his sole charge, the appellant not being required to render any service. The partners were to share

equally in profits and losses.

After the dissolution of the partnership, and before the suit was brought, two accountants selected by the appellant made up, from data furnished part by one partner and part by the other, an itemized statement of partnership receipts and disbursements covering the entire period during which the relation existed. The evidence adduced in the trial was such as to support a finding that that statement embraced every proper item of debit and credit, except those specifically dealt with in the decree appealed from. In this situation the appellant could not have been prejudiced by the failure of the court to make, or to have made under its orders, a formal itemized statement of partnership receipts and disbursements, disclosing what, if any, balance was owing by one partner to the other, if the court by the decree rendered charged against the appellee all items properly chargeable against him other than such as were embraced in the above-mentioned statement of partnership transactions, and adjudged the payment to the appellant of the amount of the balance to which he was entitled on a final settlement of the partnership transactions. Our examination of the record has led us to the conclusion that this was the result of the decree rendered. It has not been made to appear that as a result of a formal and proper statement of the partnership transactions, and a settlement in pursuance thereof, the appellant would receive more than the amount adjudged in his favor by the decree appealed from.

In our opinion, that decree is not properly subject to be reversed on

any ground urged against it. It is affirmed.

FARMERS' STATE BANK OF TEXAHOMA et al. v. THOMPSON. THOMPSON v. FARMERS' STATE BANK.

(Circuit Court of Appeals, Fifth Circuit. November 25, 1919.) Nos. 3184, 3346.

- 1. APPEAL AND ERROR 5356-TIME FOR PERFECTING APPEAL.
 - Where a decree was entered on June 14, 1918, and the petition for appeal, assignments of error, and bond were not filed until December 16th of that year, on which day the appeal was allowed, it must be dismissed, not having been perfected within the 6 months period prescribed by Act March 3, 1891, c. 517, § 11.
- 2. APPEAL AND ERROR \$\infty\$357(2)\to Delay in obtaining allowance of appeal. Appellants cannot excuse their delay of more than 6 months in perfecting an appeal to the Circuit Court of Appeals on the ground that the Judge of the District Court for that district was ill and could not be reached to present the papers, for the District Court is always open for the filing of pleadings, and the appeal might have been allowed by the judge who tried the case under proper designation, or by any Circuit Judge, under Judicial Code, § 132 (Comp. St. § 1124).
- 8. Appeal and error @=357(2)—Excuse for delay in perfecting appeals. Delay in the mail will not excuse appellants for failure to perfect their appeal within the 6 months prescribed, even though the papers were mailed to the Circuit Judge who allowed the appeal in time, had the mail been promptly delivered.
- 4. Receivers 5-16-Discretion in appointing.

Where plaintiff, who sought to impress the proceeds of a life policy with a trust, applied for a receiver on the ground that defendant had removed the fund out of the jurisdiction of the court and would dissipate it, the appointment of a receiver, where an ample bond was exacted before hearing on the merits, was not an abuse of discretion; defendant having admitted that she would continue to use the fund for her own purposes.

5. APPEAL AND ERBOR \$= 790(3)-Moot case.

Where the bill on which a receiver was appointed was dismissed, held that, as the receivership naturally fell with the dismissal of the bill, the question of the propriety of the appointment, it appearing that ample bond had been exacted, will not be reviewed on appeal; the matter being moot.

Appeals from the District Court of the United States for the Nor-

thern District of Texas; Robert T. Ervin and Du Val West, Judges. Bill by the Farmers' State Bank of Texahoma against Mrs. R. S. Thompson, in which C. C. Patten moved to intervene. From a decree dismissing the bill and intervention, complainant and intervener appeal, while defendant appeals from an order appointing a receiver. Appeals dismissed.

Ben H. Stone and R. R. Hazelwood, both of Amarillo, Tex., for plaintiff and intervener.

W. A. Davidson, of Amarillo, Tex., and John W. Davidson, of Childress. Tex., for defendant.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge. [1] These two appeals arise from the same cause of action and were argued at one and the same time. The first-named case presents an appeal from a decree dismissing a bill and an intervention, by which the plaintiff and intervener sought to impress the proceeds of a certain life insurance policy on the life of appellee's husband with a trust in their favor as creditors. It is unnecessary to consider the merits of this case, as at the outset we are met by a mo-

tion to dismiss the appeal because not timely perfected.

The decree was entered on June 14, 1918. The petition for appeal, the assignments of error, and the bond were not filed until December 16, 1918. The appeal was allowed and the order signed on December 16, 1918. The matter was not presented to any judge before that date. Appellants had 6 months in which to perfect their appeal. Act March 3, 1891, c. 517, § 11, 26 Stat. 829. It is apparent the appeal was not prosecuted in time.

[2, 3] Appellants seek to excuse the delay on the grounds that Judge Meek, judge of the District Court for the Northern District of Texas, was ill and could not be reached to present the papers, and that they were mailed to Circuit Judge Batts, who was designated to hold the District Court in the Northern District of Texas, in time, had the mail

been promptly delivered.

As to this it is sufficient to say that the District Court is always open for the filing of pleadings, and the appeal could have been allowed by Judge Ervin, who tried the case under proper designation, or by any Circuit Judge. Judicial Code, § 132 (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. § 1124]). Furthermore, delay in the mail is no excuse. The appeal will be dismissed, at appellants' cost.

[4, 5] The second case is an appeal from an order appointing a receiver. It is evident that the appeal presents now only a moot question, as the receivership naturally fell with the dismissal of the bill. It is earnestly insisted by appellant, however, that the order was unwarranted, and should be reversed, notwithstanding the action of the court on

the appeal in the main case.

It appears that the receiver was appointed by the court merely to take possession of the fund claimed by plaintiffs. An ample bond was exacted. The application for a receiver was tried on bill and answer. The bill substantially alleged that the defendant had removed the fund out of the jurisdiction of the court and would dissipate it. The essential allegations of the bill were verified by the affidavits of two persons. The answer filed in the case was verified by the affidavit of defendant. It admits the defendant had used part of the fund for her own use and would continue to so use it. At the hearing defendant produced witnesses and offered to go into the trial of the merits of the case, which the court declined to do.

On the facts presented we cannot say there was any abuse of discretion on the part of the District Court. The appointment of the receiver merely preserved the status quo, which was right and proper, and the defendant was amply protected by bond. As the controversy is at an end the appeal in this case will also be dismissed, without costs to either party. Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; Bucks Stove & Range Co. v. Am. Federation of Labor, 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345.

Appeals dismissed.

KREIBICH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1919.) No. 5384.

ARMY AND NAVY 5-20—CRIMINAL FALSE STATEMENT WITHIN SELECTIVE SERVICE A CT.

An indictment charging that defendant, being of draft age, "for the purpose of obtaining a more deferred classification," when before the local board, willfully, feloniously, and corruptly made certain false statements, to the effect that his father was dependent on him for support, held to charge an offense under Selective Draft Act, § 6 (Comp. St. 1918, § 2044f), making guilty of a misdemeanor "any person who shall make" any false statement * * * as to the fitness or liability of himself * * * for service. * * * "

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Criminal prosecution by the United States against Arno August Kreibich. Judgment of conviction, and defendant brings error. Affirmed.

Conrad Paeben and Chester H. Krum, both of St. Louis, Mo., for plaintiff in error.

Vance J. Higgs, Sp. Asst. Atty. Gen., of St. Louis, Mo., for the United States.

Before SANBORN and CARLAND, Circuit Judges, and YOU-MANS, District Judge.

YOUMANS, District Judge. Plaintiff in error, hereinafter called defendant, was indicted in two counts under the act of Congress of May 18, 1917 (40 Stat. 76, c. 15), called the Selective Draft Act. He entered a plea of not guilty. Afterwards he withdrew that plea, and filed a demurrer to the indictment. The demurrer was overruled. Later he entered a plea of guilty to the first count and a nolle prosequi was entered to the second count. Defendant then filed a motion in arrest of judgment, which was overruled. Sentence was pronounced by the court on the plea of guilty, and defendant brought error.

The errors urged here are the overruling of the demurrer and the motion in arrest of judgment. The motion in arrest raises the question of the sufficiency of the indictment to sustain a judgment. The demurrer raises the question of the sufficiency of the indictment to state an offense under the Selective Draft Act. They are argued as present-

ing the same question.

The indictment alleges in substance: (1) That defendant was a male person of 28 years of age, a resident of St. Louis, Mo., a registrant and subject to the jurisdiction of the local board for division 13 of said city. (2) That he was before that board pursuant to said act and the acts amendatory thereof and supplementary thereto, and the regulations promulgated by the President, for the purpose of being classified for service under said acts and regulations. (3) That "for the purpose of obtaining a more deferred classification than that to which he was

rightfully entitled" he willfully, feloniously, and corruptly made the statements set out in the indictment, which were to the effect that his father was dependent upon him for support.

The indictment is based on that portion of section 6 of the act re-

ferred to (Comp. St. 1918, § 2044f), reading as follows:

"Any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder * * * shall * * * be guilty of a misdemeanor."

The argument by counsel for defendant is based upon the meaning of the word "liability," as used in the act, and the contention is that whatever false statements were made by defendant related, not to his liability for service, but to his status as defined in the regulations, and that false statements with regard to status constitute no crime under the clause of the Selective Draft Act above quoted. In support of that contention reliance is placed on the following portion of section 2 of that act (Comp. St. 1918, § 2044b):

"Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act."

Counsel for defendant construe the foregoing provision as making "all male citizens * * * between the ages of twenty-one and thirty years" liable to service. A careful reading of the act demonstrates this construction to be wrong. Liability to selection for service is limited to persons included in the class thus created, and liability to service is dependent on selection. The last paragraph of section 4 of the act (Comp. St. 1918, § 2044d) contains the following provision:

"The President * * * shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft."

Section 18 of the "rules and regulations prescribed by the President" designates the persons or classes of persons to be exempted by a local board and provides for the issuance by such board of "a certificate of absolute, conditional or temporary exemption as the case may require." Section 20 of the same rules and regulations designates the persons or classes of persons to be discharged by a local board and provides for the issuance by such board of "a certificate of absolute, conditional or temporary discharge as the case may require."

Liability to service, therefore, is contingent on: (1) Inclusion within a general class; (2) the call by the board of a member of such class for examination; (3) determination of the physical and mental fitness of the person so called; (4) determination of the question of exemption or exclusion.

The false statements alleged in the indictment related to the matter of exemption or exclusion. The term "deferred classification," used in the indictment, is the equivalent of conditional or temporary exemption

in section 18, and conditional or temporary discharge in section 20, of the rules and regulations prescribed by the President.

It follows that the indictment states an offense under the Selective Draft Act. The action of the lower court should be affirmed; and it is so ordered.

NATIONAL HARNESS MFRS.' ASS'N v. FEDERAL TRADE COMMISSION et al.

(Circuit Court of Appeals, Sixth Circuit. November 15, 1919.)

No. 3289.

TRADE-MARKS AND TRADE-NAMES \$\infty 80\frac{1}{2}\$, New, vol. 8\textit{A Key-No. Series-Printing of Record on Petition for Review of order of Federal Trade Commission.}

On petition for review of an order of the Federal Trade Commission, made under Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), rule 19 for the Circuit Courts of Appeals (202 Fed. xiii, 118 C. C. A. xiii), relating to the printing of the record in ordinary appellate cases, is not applicable, but the general equity rule 75 furnishes an analogy for the proper practice; and as the commission is required to file a transcript of the record in case its order is not obeyed, or defendant feels aggrieved by the same, it is sufficient if the petitioner prepare and serve upon the commission a statement of those portions of the record which it deems should be printed, whereupon the commission may propose amendments, and, in case of disagreement, the matter shall be settled by the court.

Petition to review order of Federal Trade Commission.

Petition by the National Harness Manufacturers Association to review an order of the Federal Trade Commission of the United States and others. In the matter of the printing of the record of the commission. Practice stated.

Lorbach & Garver, of Cincinnati, Ohio, for National Harness Manufacturers' Ass'n.

Claude R. Porter, of Washington, D. C., for Federal Trade Commission.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. The Federal Trade Commission, proceeding under section 5 of the act of Congress approved September 26, 1914 (38 Stat. 719, c. 311 [Comp. St. § 8836e]), conducted an investigation and thereupon made an order requiring the Harness Manufacturers' Association to desist from using certain methods of competition therein specified. Thereupon the association filed its petition, asking this court to review and set aside such order. At a previous session we denied the motion of the association to dispense with printing the record; and, the record not having been printed, the commission now moves to dismiss the petition for review.

We think our previous order, which assumed that printing was necessary and thereupon declined to dispense with it entirely, did not sufficiently take into account the character of this proceeding. Our rule 19 (202 Fed. xiii, 118 C. C. A. xiii) provides for the printing of all records, but contemplates only records in those proceedings to which the body of the rules is applicable, viz., records on writs of error or appeals or on some specified petitions. In all these cases the record has been prepared under some supervision which insures printing only the essential parts. This rule 19 should not be interpreted so as to require printing at large such a record as this. By the provisions of this act, the commission conducts a general investigation and takes proofs: there is no judicial regulation of the reception of evidence. Thereupon the commission makes a finding of facts and an order. If the order is not observed, the commission may apply to this court for a mandatory order of enforcement, and files in this court a copy of the entire record and of its finding of facts. In case of such application, there is a provision for taking further testimony, to be ordered by this court, at the request of either party. In case the defendant feels aggrieved by the order of the commission, he may file a petition in this court for review, and the commission is required to file the transcript of the record. The court then has the same duty of review as if the commission had brought the matter here.

The provision regarding further proofs indicates that the transcript first filed is not of the permanent character of ordinary transcripts, and that the printing of parts of the original might be rendered inadvisable by later proofs; and though this provision for further proofs does not in terms apply to a defendant's application for review, we should hesitate to construe our printing rule as ap-

plicable to one and not to the other method of review.

The statute further provides that the finding of facts by the commission shall be conclusive, if supported by any evidence. It follows that there will be no occasion to resort to the record on which the findings were based, unless it is alleged that there was no evidence to support a particular finding, and then it would be necessary to examine only so much of the evidence as pertained to that subject. The statute further provides that the proceedings shall be in every way expedited and shall be given precedence over all other cases pend-

ing.

All these considerations persuade us that there should be a revision and condensation of the transcript before it is printed. We think a satisfactory practice will be obtained by following the analogy of general equity rule 75 (198 Fed. xl, 115 C. C. A. xl). The order, therefore, will be that the former order refusing to dispense with printing be vacated; that the petitioner, within 30 days, prepare and serve upon the commission a statement of such parts of the record as the petitioner thinks should be printed, including a condensed narrative of so much of the testimony as is material to the points to be raised; that within 30 days thereafter the commission propose such amendments to such statement and narrative as it thinks proper; and that, if the parties do not thereupon promptly reach an agreement as to the record necessary to be printed, the matter be brought to the further attention of the court.

GRANZOW v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1919.)
No. 5287.

1. WAR \$\sim 4\$—Espionage Act; impeachment of administration of Red Cross.

As the Red Cross, though not a part of the military and naval forces, worked during the World War as an auxiliary to such forces, an interference with the Red Cross by the utterance of remarks which would shake public confidence in its administration, and thus reduce contributions, is a violation of Espionage Act June 15, 1917, where the remarks were made with such intent.

2. CRIMINAL LAW \$\iftharpoonup 400(6), 419, 420(12)—ADMISSION OF FINANCIAL STATEMENT OF RED CROSS IN PROSECUTION FOR VIOLATING ESPIONAGE ACT BY ATTACKING THAT SOCIETY.

As the Red Cross is a national corporation, required by Act Jan. 5, 1905, c. 23, § 6 (Comp. St. § 7702), to file annual reports with the Secretary of War, a financial statement sent to a county chairman of the Red Cross committee from the general office of the society is not admissible in a prosecution for violating the Espionage Act, by attacking the Red Cross, the identifying witness having no knowledge of truth of report, it being simple for the prosecution to obtain a copy of the official report, and the hearsay rule will not be relaxed in such a case.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Fred A. Granzow was convicted of a violation of the Espionage Act of June 15, 1917, and he brings error. Reversed.

J. E. E. Markley, of Mason City, Iowa (J. E. Williams, of Mason City, Iowa, on the brief), for plaintiff in error.

F. A. O'Connor, U. S. Atty., of Dubuque, Iowa (Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa, on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Error from conviction on two counts for violation of the Espionage Act of June 15, 1917 (40 Stat. 217, c. 30). The sentences were concurrent, except as to a fine assessed under the first count.

As to count 1, plaintiff in error contends, first, that the evidence was insufficient upon the element of intent; and, second, that an exhibit (A) showing expenditures of the Red Cross was improperly admitted, because it was hearsay, and not the best evidence, not being a governmental publication.

As to count 2, the claims are, first, that there was no sufficient evidence of "obstruction" of the recruiting or enlistment service of the United States; and, second, that the evidence of those hearing the statement as to its effect upon them was improperly excluded.

[1] There were also urged exceptions to the definition of "will-fully," as contained in the charge of the court, and to a portion of the charge that an interference with the Red Cross would be an interfer-

ence with the operation of the military and naval forces, within the

meaning of the Espionage Act.

There was sufficient evidence of intent to authorize submission on that point under count one. While the Red Cross is not itself within the term "military and naval forces," as used in the statute, yet to cripple the Red Cross as operated in this war is to interfere with such forces. One effectual way of crippling the Red Cross is to destroy confidence in its administration, and thus reduce its income through the usual source of voluntary contributions. These statements of defendant were calculated to have that effect, would certainly do so if believed by those who heard them, and it was proper for the jury to say with what intent they were made.

[2] Exhibit A was improperly admitted. This was a report by the American Red Cross Society to the public of its war work as of March 1, 1918. It purported to contain the financial statement of that organization for the fiscal year ending March 1, 1918. The portion offered covered the financial statement, personnel of the officers, and references to relief work done in France. Identification for purposes of introduction was sought to be made by the chairman of a Red Cross committee for Webster county, Iowa, who testified that it had been sent to him from the general office of the society. Proper objection was made to the offer upon this identification. The Red Cross is a national corporation, and its services, volunteered, have been used during the war virtually as an auxiliary to the armed forces. The statute of incorporation (Act Jan. 5, 1905, c. 23, § 6, 33 Stat. 602 [Compiled Stat. of 1916, § 7702]) requires annual reports by such society to the Secretary of War, who audits the same, transmitting a copy to Congress. This report is required to contain an itemized report of receipts and expenditures. The report offered was not of this character, and came from no official source. When a report from a proper official source was so readily and easily obtainable by the United States attorney, there is no reason to relax the usual and wellknown rule against hearsay evidence. The witness here did not claim to know anything concerning the truth of the matters shown by the report; no one connected with its preparation or the statements it contained was offered. There was no foundation whatsoever laid for its introduction. Both sides regarded it as important testimony. Its admission under the above circumstances was clearly error.

As to count 2 the court erred in striking out the testimony of the witnesses who heard the remarks covered by this count. The statute does not make it a crime to intend to obstruct, or to attempt to obstruct, but to intentionally obstruct. Where the utterance is calculated to result in obstruction, and is uttered under conditions which would naturally so result, there is a presumption that such a result followed, but that presumption is rebuttable.

Without considering the other assignments, the judgment should be

and is reversed.

CHAVEZ et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1919.)
No. 5113.

Conspiracy \Longleftrightarrow 43(8)—Indictment; interference with elections.

An indictment charging that defendants conspired to injure and oppress citizens of the United States in the free exercise of their rights and privileges in respect of an election for presidential electors, United States Senator, etc., held not to charge an offense under Criminal Code, § 19 (Comp. St. § 10183), denouncing conspiracy to injure or oppress any citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States; the rights and privileges in question being specifically described in the indictment as those appertaining to the candidates as such and to the electors of the state at large.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Jose Chavez and others were convicted of violating Criminal Code, § 19, and they bring error. Reversed and remanded.

John R. McFie and A. M. Edwards, both of Santa Fé, N. M., for plaintiffs in error.

Before HOOK, Circuit Judge, and AMIDON and BOOTH, District Judges.

HOOK, Circuit Judge. Chavez and others were convicted and sentenced for violating section 19, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. § 10183]), which makes it a crime to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The indictment charged that the defendants were the judges and clerks in a precinct in McKinley county, N. M., at an election November 7, 1916, at which certain persons named were candidates for presidential electors, United States Senator and Representative in Congress; that defendants conspired "to injure and oppress certain citizens of the said state and of the United States in the free exercise and enjoyment of certain" federal rights and privileges; "that is to say, the rights and privileges appertaining to the said several candidates, and to all the legally qualified voters at said election voting in said state of New Mexico (the latter forming a class of persons not capable of individual designation herein because of the large number thereof)." It then states that the right mentioned is of having all legal votes cast properly received, counted, and returned, of having only such votes cast, counted, and returned, and of having the election determined accordingly. Finally, there is a specification of the means and methods whereby defendants were to accomplish the object of the conspiracy. We have italicized certain quoted parts of the indictment to bring prominently into view the dominant character of the crime charged.

It was held in United States v. Bathgate, 246 U. S. 220, 38 Sup. Ct.

269, 62 L. Ed. 676, that an indictment much like the one before us did not charge an offense under section 19, Criminal Code. It was there contended by the government that the federal rights or privileges protected by the statute embraced the right of the candidates and of the lawful voters at the election that the election should be fairly and honestly conducted; but the court held that it meant only a definite, personal right, such as that of the individual to vote, and not the general interest of the candidates, or of the electors or the public at large, in the proper conduct of the election.

It needs but a glance at the language of the indictment above quoted to show that it proceeds upon a broad conception of the statute held in the Bathgate Case to be erroneous. The conspiracy charged is, in apt and express words, against the right of the candidates and the voters in the state at large—the right of the former as standing for office and of the latter not distinguishable from the general public in-

terest.

In United States v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. Ed. 1355, the court held the protection of the statute embraced the personal right of a voter to have his ballot counted and returned as he cast it. That is an essential part of the right to vote. In the indictment before us there are some averments which might in other circumstances afford ground for a charge under that construction; but as they now appear they are merely descriptive details of the main charge of conspiracy which as already observed cannot be sustained. They are referable by way of detail to that charge, and do not compose its substantial character. But, however this may be, it clearly appears that the trial below, including the instructions to the jury, proceeded in part upon the broad and erroneous view of the scope of the statute.

The sentences are reversed, and the cause is remanded.

MORRIS v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. March 4, 1919. Rehearing Granted June 30, 1919. Opinion Refiled October 7, 1919.)

No. 2460.

PERJURY \$\infty 11(2)\to Materiality of testimony.

On petition to a court of bankruptcy for restoration of property, which was in petitioner's possession under claim of ownership prior to the bankruptcy, and was unlawfully taken from it by a receiver, the question in issue is petitioner's right to restoration of possession, and not his ownership, as against bankrupt, and perjury cannot be predicated on false testimony going to the latter question, which, if raised, is immaterial.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Criminal prosecution by the United States against Michael Morris. Judgment of conviction, and defendant brings error. Reversed.

Jacob F. Grossman, for plaintiff in error.

Chas, F. Clyne and John E. Madigan, both of Chicago, Ill., for the United States.

Before BAKER, MACK, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Plaintiff in error, convicted of subornation of perjury, attacks the verdict because unsupported by the evidence, and urges that the false testimony related to an immaterial issue in a

bankruptcy proceeding.

The jury was amply warranted in finding that false statements were willfully and knowingly made by several witnesses and that plaintiff procured such witnesses to so testify. But to make out a case of perjury another element must be established. The government must show the false testimony was relevant to a material issue in controversy. We are therefore confronted with an inquiry into what were the triable issues presented by the petition in support of which this false testimony was given.

It appears upon the hearing in the bankruptcy matter that petitioner secured an assignment of bankrupt's stock of goods some four days before an involuntary petition in bankruptcy was filed; that a properly drawn and duly executed bill of sale was delivered by the bankrupt to the petitioner at the time of the transfer, which bill of sale was duly and promptly recorded; that the petitioner, immediately upon receiving the transfer instrument, entered into and continued in possession of the stock of goods up to the time he was forcibly dispossessed thereof by the receiver, during all of which time he asserted title in himself and denied the right of the receiver to the possession; that after being forcibly dispossessed of the property he filed a petition in the District Court, praying for the return of his goods. Upon the hearing on this petition, to which no answer was interposed, witnesses were sworn and falsely testified that a full cash consideration passed from the petitioner to the bankrupt at the time of the execution of the bill of sale.

Were these statements in reference to the payment of cash for the stock of goods within the triable issues presented by the petition? Under a practice now too well settled to be disturbed, save through congressional action, one in possession and claiming title to property obtained from a bankrupt prior to an adjudication in bankruptcy cannot be dispossessed or have title to the property adjudicated in a summary proceeding against his objection. Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 96; In re Kolin, 134 Fed. 557, 67 C. C. A. 481; Blum v. Houser, 202 Fed. 883, 121 C. C. A. 241; Benjamin et al. v. Central Trust Co., 216 Fed. 887.

Viewing the facts from any angle, the receiver exceeded his authority in forcibly taking possession of the stock of goods. Grant that the conveyance was a preference and voidable, still petitioner was entitled to a trial of the issues upon which preference must be determined, and in a plenary action. He was entitled to the prayer of his petition, to wit, the return of the goods, without showing that any present consideration passed at the time of the transfer. Allegations, inserted ex industria,

alleging these facts, were surplusage. They were immaterial to the de-

termination of petitioner's right to the only relief sought.

Nor did petitioner, thus unlawfully dispossessed of the property, waive his right to a trial in a plenary action by appearing in the bankruptcy court and demanding a return of his goods. His petition tendered no issue of title, but only a question of a right to possession. On this issue it was proper to ascertain whether petitioner held possession for the bankrupt or under a claim of title in himself. It was the existence of the claim of title rather than the merits of the claim that was determinable on this hearing. Upon this issue it was immaterial whether the consideration which moved to the bankrupt was a present or a past one. Either was sufficient to support an asserted claim of title, which, in turn, when accompanied by possession prior to bankruptcy, was sufficient to entitle petitioner to the possession of the property.

We see no escape from the conclusion that the false statements constituting the basis of the government's claim of perjury were immaterial to the triable issues raised by the petition in support of which the testimony was given. It is unnecessary for us to consider the effect of other pending applications upon which a single hearing might have been held; for it was admitted on the oral argument that the petition, heretofore considered, was the only matter before the court for de-

termination when this false testimony was given.

The judgment is reversed.

GOERNER v. EASTMAN.

(Circuit Court of Appeals, Fifth Circuit. November 22, 1919.)

No. 3378.

BANKRUPTCY \$\infty\$ 414(3)—EVIDENCE JUSTIFYING REFUSAL OF DISCHARGE.

An order denying bankrupt's application for discharge held supported by the evidence.

Appeal from the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

In the matter of George F. Goerner, bankrupt. The bankrupt appeals from an order refusing discharge on objections of Herbert C. Eastman, a creditor. Affirmed.

John F. Weeks, of El Paso, Tex. (John F. Weeks and Chas. Owen, both of El Paso, Tex., on the brief), for appellant.

John L. Dyer, of El Paso, Tex., for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. This is an appeal from an order confirming a recommendation of the referee that the appellant bankrupt's application for a discharge be denied. The referee's recommendation was a result of a finding that the bankrupt obtained money upon a materially false statement in writing made by him to the appellee, a cred-

itor who appeared and filed specifications of objections to the discharge

applied for.

The finding of the referee was supported by testimony of the bankrupt himself given at the first meeting of his creditors. The only basis for the contention that the finding was unsupported by evidence is the circumstance that testimony of the bankrupt on the hearing of the objections to his discharge was in conflict with his previously made admissions. The evidence was such that it fully justified the finding of the referee, and the action of the court in confirming it and denying the application for discharge. The record does not show the commission of any error.

The order or judgment appealed from is affirmed.

ÆOLIAN CO. v. SCHUBERT PIANO CO.

(Circuit Court of Appeals, Second Circuit. June 13, 1919.)

No. 197.

1. Patents \$\infty 328—For music sheet guide valid and infringed.

The Thomson patent, No. 841,356, for a music sheet guiding device for mechanical piano and organ players, *held* to cover a patentable improvement on prior devices, and entitled to a fair construction and a reasonable range of equivalents; also *held* infringed.

2. PATENTS \$\infty 289-Suit for infringement not barred by laches.

A delay of four or five years after defendant's device was placed on the market held not such laches as barred a suit for infringement.

Ward, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Æolian Company against the Schubert Piano Company. Decree for defendant, and complainant appeals. Reversed.

Louis W. Southgate, George D. Beattys, and E. W. Scherr, Jr., all of New York City, for appellant.

J. Edgar Bull and C. A. Weed, both of New York City, for appellee. Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] In order that there may be a clear understanding of the patent in suit and its contribution to the art, it is well to consider music sheet guiding devices and the musical instruments, such as the organ or piano, which play automatically and upon which it is used. An automatic piano or organ is constructed by having a series of little motors incorporated therein, each of which is connected to operate one particular action or sound-producing mechanism. One of its features is a tracker bar. This is a smooth piece of metal having a series of little apertures in transverse line. Each aperture is connected to control one of the motors. A perforated music sheet is drawn longitudinally over the tracker. The music sheet consists of a long strip of paper having a series of perforations cut therein corres-

ponding in arrangement and spacing to the notes of the music composition which is to be rendered. Which notes are to be played is determined by the lateral positions of the perforations in the music sheets, and the length of the various perforations determine the time the particular note shall be held. The music sheet roll consists of a spool upon These music rolls which the perforated music sheet is wound up. are sold and treated as compositions, and can be played interchangeably in the instrument. The end of the perforated music sheet is connected to a winding roll arranged below the tracker bar, which roll is rotated by a motor. As a perforated note sheet is drawn longitudinally forward over the smooth face of the apertured tracker, the perforations in the music sheet will uncover, in sequence, the corresponding apertures in the tracker; thus the notes of the instrument will be played in the order of the cutting of the perforations in the music sheet and the musical composition will be rendered. After playing the perforated music sheets, the sheet is drawn longitudinally backward and rewound on the spool.

The music sheet of standard arrangement is eleven and one-fourth inches wide and is so arranged as to accommodate eighty-eight apertures in line in the tracker, and therefore eighty-eight notes of the piano may be played. The construction provides metallic bridges between the apertures in the tracker bar of about one-fiftieth of an inch. In organs of the Æolian type, such as the inventor Thomson purchased as hereinafter stated, a music sheet of ten and one-eighth inches wide is employed and the tracker has one hundred and sixteen apertures. It would be recognized at once that, if the perforated music sheet during its longitudinal forward travel should slip sideways or deflect longitudinally a greater distance than one of the minute bridges between two adjacent apertures in the tracker, a given perforation in the music sheet would uncover, not only its proper aperture in the tracker, but the one adjacent thereto, and thus discord would be produced. The need, therefore, to keep the music sheet during its longitudinal travel forward in correct lateral position on the tracker required an appliance to instantly correct any deflection, so that the continued forward longitudinal travel of the music sheet would always be in correct lateral position on the tracker. The purpose of the appellant's invention, a music sheet guiding device, is to cause the perforated music sheet to travel longitudinally forward over the apertured tracker, always in exact sidewise register and to correct any sidewise deflection thereof before discord can be produced. The guiding device is used only when the music sheet is moving forward, or, in other words, while the piano is playing. When the music sheet is being rewound around the spool or moving longitudinally backward, the guiding device is thrown out of operation; the backward movement is at high speed. A device to accomplish these objects must necessarily be a very delicate and nicely operated piece of mechanism, for it works on a moving strip of perforated paper, which it must keep in correct lateral position within the dimensions of a bridge in minute measurement.

The pioneer inventor of the music sheet guiding device was O'Connor. He had granted to him patent No. 789,053, on May 2, 1905, and

two reissues thereof, No. 13,283, August 15, 1911, and No. 13,398, April 2, 1912. They have been the subject of litigation and were before this court in Autopiano Co. v. Amphion Piano Co., 186 Fed. 159, 108 C. C. A. 291, Autopiano Co. v. American Co., 222 Fed. 276, 138 C. C. A. 38, and Autopiano Co. v. Claviola Co., 234 Fed. 314, 148 C. C. A. 216. Instruments of this character, known in the art, work pneumatically. The pneumatic operation has taken the form of, first, the pressure system, which employs air pressure above that of the atmosphere; and the other, a suction system, which employs air exhaust below that of the atmosphere. These systems, known equivalents, are both used as the manufacturer desires. The suction system is employed on player pianos, and the pressure system is commonly employed on organs. The O'Connor construction, referred to, works on the suction plan. Since O'Connor was the pioneer inventor, we will refer to his construction.

It is the claim of the appellant that the Thomson patent is an improvement on the O'Connor. O'Connor adjustably secured a block to the right-hand part of the tracker, which block had an opening called a control or guiding opening, and which block was adjusted so that the control opening would come just under the right-hand surface of the music sheet. This control opening connected by a tube to control a valve arranged to connect and disconnect the suction chest through another tube, with an actuating pneumatic arranged on the right-hand end of the tracker, and connecting to the right-hand end of the shaft of the music sheet roll. While the music sheet is traveling longitudinally, if it should wander to the left, this right-hand control opening is uncovered, the valve opens the suction chest connecting to the actuating pneumatic, which then is deflected to pull the music sheet roll to the right, and hence adjust the traveling music sheet to the right, to remedy its deflection to the left. So as to provide operation in the other direction, there was adjustably mounted another block on the lefthand end of the tracker, which had a control opening, and which block was adjusted so that the control opening would come just under the left-hand surface of the music sheet. This connected by tube to control another valve, which was arranged to connect and disconnect the suction chest through another tube, with another actuating pneumatic arranged on the left-hand end of the tracker and connected to the lefthand end of the shaft of the music sheet roll, so that if the perforated music sheet, during its travel, should wander to the right, the left-hand control opening would be uncovered, the left-hand valve open the suction chest connected to the left-hand actuating pneumatic, which would then be deflected to pull the music sheet to the left, and hence adjust the traveling music sheet to the left to remedy its deflection to the right.

In this way, the surface of the sheet was employed to cover and uncover control openings. In the construction of the O'Connor device, the mechanism is duplicated, and as one mechanism is employed for adjustment to the right and another mechanism for adjustment to the left, the sheet music expands and contracts with changes in the temperature and humidity, requiring adjustment of the blocks, and these adjustments are difficult, as they have to be relative to each other

to account for the expansion and contraction, and also have to be made relative to the apertures in the tracker to keep the music sheets normally and in proper relation thereto. Then, too, there was some variation in the width of the music sheet during its entire length, and there was danger that the device might not work properly, as its operation depends upon the operation of the two blocks to a given width of music sheet. In other words, the O'Connor device provided a double surface method of control by means of the two guiding devices, one on each side. When Thomson, the inventor of the patent in suit, at one time purchased an organ for his home, and found that the O'Connor device did not track properly the music sheet over the tracker bar, and did not serve the purpose of his automatic playing organ, he set about to invent a device which would. He has succeeded, and in our opinion he has invented an improvement over O'Connor, and has contributed to

The claims in suit are as follows:

"1. A music sheet guiding device comprising means normally operative to move the sheet laterally in one direction (the spring) and means including a part bearing against an edge of the sheet movable laterally thereby for governing said sheet-moving means (lever valve, and actuating pneumatic).

"2. A music sheet guiding device comprising pneumatically actuated means (actuating pneumatic and spring) for moving the sheet laterally, a movable part (lever) against which the sheet bears when laterally deflected from its path, and connections between said movable part and said moving means for controlling the latter said connections including a pneumatic valve moved by said part.

"3. A music sheet guiding device comprising means normally operative to move the sheet laterally in one direction (the spring), a movable part (lever) against which the sheet bears when moved by said means from its path, and connections between said movable part and said sheet-moving means (valve

and actuating pneumatic) for controlling the latter.

"4. A music sheet guiding device comprising means including an actuating pneumatic and suitable connections (levers, links, etc.) for moving the sheet laterally, and means including a movable part (lever) against which the sheet bears when deflected from its path and a valve connected to said movable part, and pneumatic connections (tubes and connections) between said valve and said actuating pneumatic for governing the latter."

The inventor states:

"My invention relates to music sheet guiding devices such as are used in mechanical instrument players and mechanical players for musical instruments. Such players are ordinarily controlled by a perforated music sheet

moving over the tracker.

"The object of the present invention is to guide the sheet laterally during its longitudinal movement, so as to insure the exact registration of the perforations in the sheet with the corresponding ducts in the tracker, or, more broadly speaking, to insure such relative movement of the sheet and the tracker transversely of the path of the sheet as will secure their proper alignment. It is of course obvious that any considerable lateral deviation of the music sheet would interfere with or destroy the proper rendition of the music."

The patent describes the working of the invention of the device on the pressure system, but also points out that the invention can be employed just as well on the suction system. It is the control of the sheet, by guiding it from one side alone, that is claimed to be the improvement. The inventor claims only that he has invented a "certain new and useful improvement in music sheet guiding devices." The first element of construction consists of a compression spring placed in the bearing, which supports the left-hand plunger for the left-hand end of the music roll. This spring is under compression and is normally operative to move the music sheet in one direction. Pushing on the left-hand side of the music sheet roll, it always tends to push the music sheet to the right so that when there is no pneumatic pressure in the instrument, the music sheet roll and the music sheet is pushed to the extreme position to the right. Likewise, there is a compression spring on the left hand axis of the winding roll. There is an actuating pneumatic having connections to the shaft, which carries the right-hand end of the music sheet roll. The left-hand wall of the actuating pneumatic is movable, and the connections of the music sheet roll extend from the movable wall. This actuating pneumatic has a light pull spring tending to deflate the same, which spring thus makes the pneumatic double acting; that is, when pressure is admitted to the pneumatic, it expands to the left and pulls on the spring, and when the pressure is discontinued, and the pneumatic connects to the atmosphere, the spring pulls the pneumatic to the right and deflates the same. The spring thus acts in conjunction with the compression spring at the left of the music sheet roll, and acts to move the music sheet to the right.

The actuated pneumatic is made of a size so that, when it is called into operation for making an adjustment, its operative force is greater than the action of the compression spring. There is a normally operative force in springs to push the music sheet roll and hence the music sheet to the right, which normally operative force is opposed by a superior force; that is, the inflation of the actuating pneumatic. The music sheet moves in space, being normally impelled to the right by the action of the spring, and being pushed to the left by the actuating pneumatic when called into operation. The device then provides a movable member bearing against the edge of the music sheet and carrying a pneumatic valve for governing the operation of the actuating pneumat-This member bearing against the edge of the music sheet comprises a pivoted lever having a shoe, against which the left-hand edge of the music sheet rubs. This lever carries a pneumatic valve at its inner end, and a light spring is employed to pull the pneumatic towards its seat. Pneumatic connections are arranged between the valve and the actuating pneumatic. These parts are so combined that, when the music sheet is too far to the right, the pneumatic valve is pulled towards its seat, and the operative pneumatic pressure is connected to the actuating pneumatic. As a result of this combination, the actuating pneumatic operates the music sheet to the left until the valve is open sufficiently to stop this action of the pneumatic. This provides that the music sheet roll is always impelled to the right by the action of the normally operative spring, and pushed to the left against the spring by the operation of the actuating pneumatic, and this later operation is governed by the left-hand edge of the music sheet rubbing on the moving part and operating the pneumatic valve.

By this combination the operation is governed by one edge of the traveling music sheet rubbing on the movable part carrying the pneu-

matic valve. Therefore, if the music sheet during its longitudinal forward travel should slip to the right, the left-hand edge of the music sheet would move away from the movable part, and the pneumatic valve would be pulled towards its seat by the light spring pulling on the valve bringing the actuating pneumatic into operation, so that it will expand to push the music sheet to the left to its correct position, and thus cure its deflection to the right; and, on the other hand, if the music sheet during this longitudinal forward travel should slip to the left, the left-hand edge of the music sheet, pushing on the movable part, will hold the valve in a wide-open position, and will cut the actuating pneumatic out of operation, so that the spring will push the music sheet to the right, back to its normal position. This provides the proper guiding during its longitudinal forward travel.

By this combination and operation, an improvement over O'Connor's double surface method of control was established. It avoids the duplication of parts, and there is no lost motion in connections as the spring or springs are pushed. Since it operates entirely from one edge of the music sheet, it is only necessary to set one pivoted lever in proper position relatively to the tracker bar. If the music sheet varies in width, the operation will not be materially interfered with. It operated by contact of the traveling edge of the music sheet with a movable part. A very small lateral movement of the music sheet will move said part, whereas the movement of the music sheet required in O'Connor's device must be enough to cover one of the control openings a considerable

distance.

That it has been an improvement over the O'Connor device is best exemplified by the results obtained. The witnesses say it worked successfully and satisfactorily, and there were some 30,000 sold beginning June, 1911. It should be given a fair construction and a reasonable range of equivalents. Dowagiac Mfg. Co. v. Minn.-Moline Plow Co., 118 Fed. 136, 55 C. C. A. 86; Nat. Hollow Brake-Beam Co. v. Interchangeable B. Co., 106 Fed. 693, 45 C. C. A. 544.

The appellee's guiding device, constructed under the Dickinson patent, No. 1,194,725, works on the suction system, instead of on the pressure system. Thomson, however, in his patent, says this is immaterial, and points out that one familiar with the art may readily change to the suction system. In appellee's device, the first element consists of a compression spring placed in the bearing which supports the left-hand plunger or shaft for the left-hand end of the music sheet roll. The spring is under compression and is normally operative to move the sheet in one direction. This compression spring, pushing on the left-hand shaft of the music sheet roll, always tends to push the music sheet to the right. When there is no suction in the instrument, the sheet roll and the music sheet is pushed to an extreme position to the right. This is the same action as the spring in the Thomson device.

In appellee's device, the next operative element is the actuating pneumatic having connections to the shaft which carries the right-hand end of the music sheet roll. It has three walls, the two outer walls of which are movable, and are connected by a link to move as one part, and the connections to the music sheet roll extend from the right-hand wall.

There are two bellows or chambers in appellee's actuating pneumatic. The bellows which operates to adjust the music sheet roll is the lefthand bellows. The appellee's actuating pneumatic operating by suction, when this adjustment is made, will move to the right; hence any connections from the actuating pneumatic to the shaft of the music sheet; a chain motion device, a cam, is employed. The actuating pneumatic moving to the right by suction, and having chain motion connections to the right-hand end of the music sheet roll, is the same mechanically as Thomson's actuating pneumatic expanding to the left under pressure and connected by direct connections to the right-hand end of the music roll. It makes the pneumatic double acting, so that, when the operating section is disconnected from the left-hand bellows of the pneumatic, the right-hand bellows moves the parts to the left to inflate the left-hand bellows; the right-hand bellows thus acts in conjunction with the compression spring at the left of the music sheet roll, and acts to draw the music sheet to the right. This pneumatic is of such a size, when called into operation for making an adjustment, its operative force is greater than the action of the compression spring to the left of the music sheet roll. When the actuating pneumatic thus operates to make an adjustment, it pushes the music sheet roll and stores energy in the spring. Therefore, there is normally an operative force, the spring normally operative to push the music sheet roll to the right, which normally operative force is opposed by superior force, the deflection of the left-hand bellows of the actuating pneumatic, the normally operative force and the actuating pneumatic force opposed to each other.

When the music sheet floats in space, being normally impelled to the right by the action of the spring, it is pushed to the left by the actuating pneumatic when called into operation. The appellee's device then arranges a movable part bearing against the edge of the music sheet and carrying the pneumatic valve for governing the operation of the actuating pneumatic. The part bearing against the edge of the music sheet and movable laterally thereby comprises a pivoted lever having a surface against which the left-hand edge of the music sheet rubs. This lever carries the pneumatic valve at its inner end, and the light spring is arranged to pull the pneumatic valve toward its seat. Pneumatic actions are arranged between the valve and the actuating pneumatic. The parts are combined, so that, when the music sheet is too far to the right, the pneumatic valve is pulled toward its seat and the operative pneumatic suction is connected to the left-hand bellows of the actuating pneumatic; thus the same result is obtained as provided for in the Thomson patent.

In appellee's apparatus, only one relay is employed in the connection between the pneumatic and other actuating parts, while the Thomson employs two relays in the connection between his pneumatic valve and the actuating pneumatic. A relay is a mechanism employed when desired in pneumatic connections to amplify the action, so that a small gust of air is amplified up into a larger gust. The relays are added parts increasing the efficiency of the operation. There is a slight oscillating or wavering of the music sheet when it is traveling in correct

position on the tracker. It is about one two-hundredths of an inch, as testified to; it is variously estimated as from one two hundred and twenty-fifth to one two hundred and fiftieth of an inch. It is so slight as to be immaterial, because it is much less than the bridge between the apertures and the tracker, which is usually one-fiftieth of an inch. Whether or not the relays are used is merely a matter of manufacture. The appellant used the Thomson device with and without them. With the use of relays, a quicker action is obtained, and the cost of the relay is about from fifty cents to one dollar.

We do not think a proper comparison between two devices involves the degree of trembling or wavering of the music sheet when traveling correctly in normal position. The proper comparison is between the devices when each functions to adjust the traveling music sheet to correct a sidewise deflection. To attempt to distinguish the devices as the appellee does, by calling the operation of the appellant's device that of the law of the pendulum, and that of the appellee's the law of the bleeding port, based upon the immaterial trembling balance in Thomson's device, we do not think sound. The test is whether the appellee's apparatus employs the combinations which Thomson has invented.

[2] We think that claims 1, 2, 3, and 4 have been infringed, and that the parts specified in these claims are identical in appellee's devices, and operate the same way to produce the same result. We are of the opinion that Thomson was the first to grasp the idea that edge control could be used for music sheet, and that such control could be made from the one edge only. His invention is not anticipated by the O'Connor patent, but is an improvement thereon, and is entitled to take its place in the art under all rules of fair construction. We are of the opinion that the appellant is not guilty of laches, and may maintain this suit as late as May, 1916, at a period of some four or five years after the appellee placed its device complained of, on the market. There is no rule of law that requires a patentee to sue infringers upon all the patents he owns at the same time, or that deprives him of equitable relief if he delays his suit for the period specified here. Ide v. Trorlicht, 115 Fed. 137, 53 C. C. A. 341; Edison, etc., Co. v. Sawyer, etc., Co., 53 Fed. 592, 3 C. C. A. 605.

Judgment reversed.

WARD, Circuit Judge (dissenting). In Autopiano Co. v. American Player Piano Co., 222 Fed. 276, 138 C. C. A. 38, we held the O'Connor patent, second reissue, 13,398, to be entitled to a most liberal range of equivalents as a pioneer. I think edge control is therefore to be regarded as equivalent to surface control. Persons who had acquired intervening rights while the first reissue was in force, of whom the defendant is one, are entitled to immunity for this reason.

In Autopiano Co. v. Claviola Co., 234 Fed. 314, 148 C. C. A. 216, we held the O'Connor patent good against edge control devices operat-

ed pneumatically by O'Connor's means.

The present suit is upon Thomson, 841,356, which is a method of edge control operated, in my opinion, by the same means as O'Connor, and therefore an infringement. But Thomson is an improvement and

patentable as such, so that, if the defendant uses an equivalent device

to his, it infringes.

I think the District Judge was right in holding that the defendant's device is different. Thomson uses a spring to shift the music sheet roll to the right, and pneumatic bellows to shift it to the left. There is a constant struggle between these two forces; the one alternately overcoming the other and so causing a continual oscillation of the music sheet as it travels longitudinally. The defendant's device, on the other hand, shifts the music sheet roll in both directions by the pneumatic bellows, and there is no oscillation of the sheet while it travels longitudinally. True, there is a spring at the left end of the music roll, but it is not intended to function in the shifting, and if it actually does so its co-operation is negligible. Such a spring is used on all piano players, however operated, for the mere purpose of enabling the music sheet roll to be put in and taken out of the structure.

Therefore I think the defendant does not infringe, and the decree

should be affirmed.

SCHUBERT PIANO CO. v. ÆOLIAN CO.

(Circuit Court of Appeals, Second Circuit. June 13, 1919.)

No. 198.

PATENTS \$28-FOR MUSIC SHEET GUIDE NOT INFRINGED.

The Dickinson patent, No. 1,194,725, for a music sheet guiding device, held not infringed.

Ward, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Schubert Piano Company against the Æolian Company. Decree for defendant, and complainant appeals. Affirmed.

J. Edgar Bull and C. A. Weed, both of New York City, for appellant. Louis W. Southgate, George D. Beattys, and E. W. Scherr, Jr., all of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This appellant, which was the defendant in the case of Æolian Co. v. Schubert Piano Co., 261 Fed. 178,—C. C. A.—, decided herewith, sues, contending that the Æolian Company's sheet music guiding device infringes patent No. 1,194,725, granted to it after invention by Joseph W. Dickinson, on new and useful improvements in sheet music guiding mechanism.

On April 11, 1911, the application for this patent was filed. Then there was no reference or description to the so-called law of the bleeding port operation, as is now advanced, nor were any of the claims here in suit then made. A claim for a movable port and means for adjusting the same was advanced. The patent was granted on August 15, 1916, and this suit instituted on November 9, 1916. When finally

disposed of, the appellant relied upon claims 40 to 44, inclusive, and upon claim 49. It was stipulated upon the trial that the evidence taken in the case of Æolian Co. v. Schubert Piano Co. may be used in this action.

The appellant's claim, in substance, is that the Dickinson patent was distinguishable from the Thomson patent, referred to in the Æolian Company suit, by the statement of function, that the valve carried by the movable part engaged by the edge of the sheet maintains the port with which the valve co-operates in a bleeding position during the prop-

er tracking of the sheet, and it is called a bleeding port.

As we have stated in our opinion in Æolian Co. v. Schubert Piano Co., the appellant's device, made pursuant to Dickinson's patent, employs a spring; the opposed actuating pneumatic and the movable part engaging the edge of the sheet and carrying the pneumatic valve controlling a port governing the operation of the actuating pneumatic adapted to an instrument operated by suction. The only difference in detail of construction, that we are able to discover, is that, in the Thomson device, relays are interposed between the port and the actuating pneumatic; but as we have pointed out, relays are not in any way made essential, nor, indeed, are they referred to in the claims of the Thomson patent. In the Dickinson patent, the relays are omitted. A relay, as used by the appellee in its device is the apparatus employed in the pneumatic connections to amplify the power. The so-called bleeding port is present in appellee's music sheet guiding device, as it is in the Thomson patent, just as much as it is in the Dickinson patent. The so-called bleeding port consists of a pinhole in the diaphragm. The statement in the Dickinson patent in relation to the size of the pipes, is as follows:

"Leading from the bellows to the usual pneumatic of the musical instrument is another tube 27; the opening thereinto from the bellows being somewhat smaller than that of the tube connecting the bellows with the movable port to permit proper operation of the bellows in a manner about to be described."

The drawings of the Dickinson patent do not show the diaphragm contended for by counsel for the appellant. Claims 40 and 41 in suit, describe the music sheet guiding device during the proper tracking of the sheet.

In both the Thomson and Dickinson devices, the operation of the guiding is accomplished as follows: If the sheet wanders to the left, the valve is moved further away from the port, letting too much air in the port, and weakening the actuating pneumatics, and allowing the adjusting spring to work to adjust the music sheet to the right to cure the left-hand deflection; and again, if the sheet wanders to the right, the valve will come closer to its seat than it was during the proper tracking of the music sheet, the actuating pneumatic will be strengthened, and will adjust the music sheet to the left to cure the right-hand deflection. In both devices a normal balance between the sheet and the actuating pneumatic is obtained by a bleeding port. The port must bleed during the proper tracking of the sheet, whether or not there are relays, for if it did not and remained closed for any ap-

preciable instant of time, the actuating pneumatic would overpower the opposed spring and throw the music sheet out of track.

To keep the superior actuating pneumatic reduced to a strength which balances the opposed spring, a proper amount of bleed must be kept in both devices, and the only difference in appellant's device is that the power reducing atmosphere goes directly from the port into the actuating pneumatic, and in appellee's device, with its relays, the atmosphere in turn is admitted into the actuating pneumatic from relay to relay, in larger and more effective quantities. Thus, in both devices, there is the constant bleed into the port, which maintains the pneumatic reduced to a balanced strength against the opposed spring when the sheet is properly tracking. Thomson's device anticipated the Dickinson device, and there is no infringement.

Other defenses are interposed. The appellee contends that there has been an abandonment of the invention prior to the renewal application, and that the examiner rejected the proposed change in the specifications and claims describing the bleeding port theory, and that, if Dickinson wished to proceed in good faith, he should have appealed from such decision and thus have made the issue of anticipation by the

Thomson patent.

While the trial judge considered and sustained this claim of the appellee, and dismissed the bill, we do not deem it necessary to consider it now, nor to consider the other claims of anticipation, since we have concluded that the appellee does not infringe the patent in suit.

Judgment affirmed.

WARD, Circuit Judge (dissenting). The infringement of the Dickinson patent, 1,194,725, charged here, is the commercial device of the Æolian Company without relays. If this were made according to the patent. I think there would be the same constant struggle between the spring and the pneumatic bellows which distinguishes that device as patented. On the contrary, there is both in the Dickinson device and in the commercial device of the Æolian Company an equilibrium while the music sheet is traveling longitudinally. This is maintained by making the tube leading from the pneumatic bellows to the suction chamber with a restricted opening smaller than the valve port of the tube, with which it coacts. This was inherent in Dickinson's invention, although he did not at first appreciate it. It think it is admitted that each of these devices does operate upon what has been called the law of the bleeding port. This was incorporated by Dickinson in the specifications and claims while going through the Patent Office by amendment and as the opinion of the court proceeds upon noninfringement. only add that it seems to me the amendments were properly allowed, and that Dickinson was not chargeable with laches.

As the Æolian Company did not begin to sell its commercial device until June, 1911, and Dickinson filed his application April 22, 1911, the Æolian Company infringes.

Therefore I think the decree should be reversed.

RODMAN CHEMICAL CO. v. DEEDS COMMERCIAL LABORATORIES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2643.

1. PATENTS \$\infty 328-Prior use.

Rodman patent, No. 1,076,453, for a method for making case-hardening material, held not invalid on the ground of prior use.

2. Patents \$\infty 328-Infringement; case-hardening material.

The Rodman patent, No. 1,076,453, for a case-hardening material, which material was composed of carbonaceous pellets, held infringed.

3. PATENTS €=328-ANTICIPATION.

The Rodman patent, No. 1,076,453, for a case-hardening material, claims 1, 7, 17, 22, and 25, consisting of pellets of carbon, etc., held not anticipated, and to show invention.

4. Patents @=118-Vague and incomplete claim invalid.

The claim of a patent, which is incomplete and vague, because omitting an essential element, is invalid.

Appeal from the District Court of the United States for the District of Indiana.

Bill by the Rodman Chemical Company against the Deeds Commercial Laboratories. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Fred W. Winter, of Pittsburgh, Pa., for appellant. V. H. Lockwood, of Indianapolis, Ind., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. Letters patent No. 1,076,453, granted to appellant, as assignee of Hugh Rodman, on October 21, 1913, are entitled as for a "method of making case-hardening material." In the specifications, the invention, it is stated, "relates to improved methods of manufacturing carbonizing material for dry packing." The product sought to be obtained by the patented method was small masses or pebbles of carbonizing material, made out of what was theretofore largely waste dust. The advantage over other carbonizing products was its reduced cost, due to the utilization of a waste product, its greater thermal conductivity, easier handling over powdered or dusty carbonizing materials, and especially its retention of identity under heat.

While the preferred method indicated in the specifications necessitated the use of powdered coking coal, and made the internal coking thereof a step in the method of manufacturing the product, the inventor specified also the use of powdered charcoal as a substitute, with the omission of coking as a necessary step in the method.

Claims 1, 7, 10, 17, 22, and 25 are in suit. Claim 1 reads as follows:

1. The method of adapting finely divided material for use as carbonizing material, which consists in mixing the material with a binding agent and forming small masses, which will maintain their identities when heated.

Claim 22 differs only in describing the binding agent as "tacky," and claim 25 by adding after the words "binding agent" the phrase "such as molasses."

In claim 7, the method of forming "small rounded pebbles," instead of "small masses," is stated as "tumbling to form."

In claim 10, the finely divided material is limited by adding "for dry packing," and in lieu of the final clause in claim 1, "forming * * * heated," there is substituted, "separating the resulting mass into relatively small masses of appreciable size."

Claim 17 reads:

17. The method of preparing carbonizing material which consists in fashioning finely divided material into substantially smooth-surfaced pebbles and in then applying heat thereto.

A bill to enjoin alleged infringement was dismissed for want of equity. No opinion was filed. The defenses relied upon were prior use, anticipation and invalidity for lack of invention, and noninfringement.

- [1] 1. Prior Use.—While there is some evidence tending to show use and sales of this product more than two years before the application for patent was filed, not only does it fall far short of the clear proof required to sustain this defense, but we are satisfied that it is clearly and conclusively controverted. Plaintiff manufactured successively and contemporaneously several kinds of carbonizing materials; the product from the method of the patent in suit was the final and most successful one; it differed both in substance, in form, and in quality from the others; each marked an advancing step in the manufacture of a valuable commercial product; each was produced by a definitely distinct method. The proof is clear that neither the method in suit nor the product thereof was used by plaintiff prior to 1912.
- [2] 2. Infringement.—Concededly there is infringement, except as to claim 7, if the claims are to be broadly interpreted. Defendant uses charred carbonaceous materials in powdered form and a solution of molasses and water; they are mixed in a mixing machine; small balls or pills are thereby produced. The proper sized ones are first air-dried, and are then dried in a revolving drum with heat applied. While the alleged purpose of the final heating is to dry out excess moisture, the effect thereof in this revolving drum is to reduce the size of the pills and to compact and harden them. Whether this be technically a "tumbling" operation or not, it is the clear equivalent thereof; the sole purpose of tumbling is to compact and harden the pill; whether this be accomplished in one operation, during their formation as pills, or in two, is immaterial. As heretofore stated, plaintiff is not confined to the use of such carbonaceous material as requires coking; defendant's use of coked or charred powder as against plaintiff's preferential method of using coking coal dust does not therefore avoid infringement. While some carbonaceous materials, like charred leather, require no special preparation, others, like charcoal, coke, or coal, require for commercial use at any practicable temperature the addition of a chemical, called energizer, such as lime, in order to activate the carbon. But the patent is not limited to the use of a carbonaceous material requiring the addition of an energizer; the carbonizing material in each of the claims covers as well carbonaceous

materials, such as charred leather or corncobs used by defendant,

having in themselves sufficient energy to activate the carbon.

[3] 3. Anticipation and Want of Invention.—Case hardening is a species of carbonizing. If it be desired to harden the metal throughout, a carbon is dissolved into the molten metal. If, however, only the surface is to be hardened, so-called case hardening, the finished product is packed in dry carbonizing material; the box is sealed and placed in a red hot furnace for several hours; the carbon gases produced are absorbed only by the surface of the metal. When the required depth of carbonization is secured, the article is dropped, red hot, into cold water; this makes the carbon skin or "case" perfectly hard. The interior of the article, not having been carbonized, remains soft and tough. The desirable and sought-after product for case hardening was one that would be susceptible of repeated use; the small pill, maintaining its identity when heated, answered this need. The uniform distribution of carbon and energizer, resulting from their use in powdered form, and the maintenance of this relation by the permanent binding together of the particles, as well as the freedom from dust, were additional advantages of this pill or pellet formation. Moreover, a waste material, the coal or coke dust, theretofore discarded, was utilized.

A new product was thus created; a product of commercial value

for definite uses.

Earlier patents, Dodds, British, No. 571, Aube, British, No. 738, Demenge, No. 564,053, Logan, German, No. 181,531, all of which mention incidentally case hardening, and Meyer, No. 524,904, while referring to the use of carbonizing briquets made of powdered materials or of balls of carbonizing paste, give no hint that these products will not be completely absorbed in a single carbonizing process, or that they will maintain their identity under heat; nothing whatever is said in any of them as to the method of manufacture. In our judgment, they are different products than those made under the process of the patent in suit.

Rodman's own earlier process and product patents, Nos. 949,442 and 949,448, and others, are likewise for a different product and pro-

cess.

While each step in the process of making these pellets may be old as applied to other articles, the conception of this novel product, and of

the combination of acts necessary to produce it is novel.

That the possible hints given by the patents cited were never grasped, that tons of coal and coke dust were allowed to go to waste, strengthen the presumption, inherent in the grant of the patent, that the conception involved an exercise of the inventive faculties and was not an obvious deduction.

In the light of the present knowledge, it may have been a simple matter for defendant's expert, from a reading of the earlier patents, to create a product identical with that of the process in suit and by the same means; this, however, is no demonstration that the product or method would have been obvious to one skilled in the art but ignorant of the patent in suit.

Plaintiff's essential contribution to the art through the patent in suit was the step by which the identity of the small pellets was maintain-

ed, and their continued use, in actual practice for some 500 hours, made possible. Defendant made a substantially identical product by a substantially identical method.

Of the claims in suit, all except claim 10 cover the entire process of manufacturing the product that will retain its identity under heat; in claim 17, the final application of heat is expressly specified as a step in the process. Each of them must be held valid and infringed.

[4] Claim 10, however, omits this element; it is incomplete and

vague, and must be adjudged invalid.

The decree will be reversed, and the cause remanded for further proceedings consonant with the views herein expressed.

REED v. HUGHES TOOL CO.*

(Circuit Court of Appeals, Fifth Circuit. October 6, 1919. Rehearing Denied December 6, 1919.)

No. 3218.

1. PATENTS \$\iff 328\$—PATENT FOR WELL DRILLS VALID AND INFRINGED.

The Griffin patent No. 1.195.209 and the Hughes patent No. 1.195.209.

The Griffin patent, No. 1,195,209, and the Hughes patent, No. 1,124,241, each for a rotary well-boring drill, held not anticipated, valid, and infringed.

2. PATENTS \$\infty 82-Validity of patent not affected by nonuser.

The validity of a patent is not affected by nonuser of the patented device, if it has utility, in the sense of being capable of successful mechanical operation.

3. PATENTS 240—IMPROVER CANNOT APPROPRIATE INVENTION OF PREDECESSOR.

An improver cannot appropriate the invention of his predecessor, who has obtained a patent, as a base for his improvement without infringement, even though the improvement has been patented.

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit in equity by the Hughes Tool Company against Clarence E. Reed and others. Decree for complainant, and defendant named appeals. Affirmed.

C. A. Teagle, of Houston, Tex., Edwin T. Merrick, Ralph J. Schwarz, and Philip Gensler, Jr., all of New Orleans, La., and William F. Hall, of Washington, D. C., for appellant.

John A. Mobley and Jesse R. Stone, both of Houston, Tex. (Andrews, Streetman, Logue & Mobley, of Houston, Tex., on the brief),

for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. This is an appeal from a decree of the District Court of the United States for the Southern District of Texas, Houston Division, in favor of the plaintiff (appellee), and against one of the defendants (appellant), establishing the validity of two certain patents sued on by the plaintiff, namely, patent No. 1,195,209, issued

(261 F.)

to T. J. Griffin on August 22, 1916, and patent No. 1,124,241, issued to Howard R. Hughes on January 5, 1915, and determining that the appellant, Clarence E. Reed, had infringed certain of the claims of each of the patents sued upon. The patents related to rotary boring drills used in the drilling of oil wells. The appellant alleged infringing device had also been patented by him.

The principal grounds upon which the validity of each of the two patents sued upon by the appellee were assailed by the appellant were that both had been anticipated by the prior art, and a number of prior patents were cited and relied upon by the appellant to show anticipation, and that the patents in suit had never been successfully and com-

mercially exploited by appellee.

[1] One of the two patents sued on was issued to Thos. J. Griffin on August 22, 1916, and the other was issued to Howard R. Hughes on January 5, 1915. The application for the former was, however, filed on June 11, 1913, while that for the latter was not filed until November 1, 1913. The plaintiff was the owner of both patents when the bill was filed. The inventions covered by the patents consisted of a bit for drilling wells which had a cylindrical head with two cutting discs in the base of the head, the discs being offset relatively to the axis of rotation of the head, for the purpose of affording clearance to the bit. The claim of novelty was based on the arrangement of the cutter discs relatively to each other and the shape of the discs themselves. The plaintiff contended that this arrangement and shape of the discs performed the two functions of shearing off the material by the action of a sharp advancing edge and of pulverizing or disintegrating the sheared-off material by the action of a broad crushing face, curved to bear across the entire width of the bore hole, and which also prevented the rapid wearing away of the edge. The plaintiff contended that no such arrangement with corresponding functions existed in the prior art in boring drills.

The appellant relied upon a number of prior patents, some of which covered stone-dressing tools, and some rock-boring drills. We have examined these patents, as bearing upon the state of the prior art at the time the patents in suit were applied for. Probably what is designated as the Litaker patent comes nearer to anticipating the invention disclosed by the patents in suit than any of those cited and relied upon. An examination of the claims of that patent differentiates it from the Griffin and Hughes patents in suit, in that there is an absence in the Litaker discs of any crushing surfaces, such as are present in the discs of the Griffin and Hughes patents, and also an absence of any provision for the disintegrating of the material that is cut away by the action of the cutting discs, so that it can be removed in suspen-

sion by the water used for flushing.

The patents in suit have the feature peculiar to them of rotary revolving discs, so placed, formed, and operated as to make a hole with a cup-shaped bottom, which is deepened by cutting or shearing or scraping material from the sides and grinding it up in the bottom so fine that it can be removed in suspension from the drill by a flushing gream of water. The Litaker patent discloses a cutting disc that

performs only the single function of cutting or shearing away the material from the bottom of the bore hole, and is without any provision for crushing or pulverizing the material as it is cut away in the operation of the device. The Litaker drill, according to the language of its claims, provides discs only as cutting elements and for the removal of the loosened material without crushing or disintegration before removal. Certainly in the art of well boring the patents in suit were the first that had this feature, and we think it has sufficient importance and novelty to give it the quality of invention, and that it was not anticipated by any of the earlier patents cited, including the Litaker patent.

[2] We conclude from the record that the bits constructed according to the Hughes and Griffin patents were physically operative devices capable of successful practical use. There is evidence that they had not been commercially developed, possibly because of their comparatively high cost, and the conservatism of well drillers. The validity of the patents is not affected by nonuser of the patented devices, if they have utility in the sense of being capable of successful mechanical operation. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Lewis Machine Co. v.

Premium Mfg. Co., 163 Fed. 954, 90 C. C. A. 310.

We conclude, as did the District Judge, that either the Griffin or the Hughes patent on each of which the plaintiff sued, was a valid patent.

Coming to the question of infringement, we think that the Reed drill was substantially identical in structure and functions with the drills of the patents in suit. It has a cylindrical head, with two cutting discs housed in slots in the base of the head, and arranged with an offset in the same manner as the devices of the patent in suit. The cutting discs are substantially the same, except that the edge of the Reed cutter is beveled. The Reed drill has an improvement upon the drills disclosed by the patents in suit, consisting of the closing of the slot at the rear edge of each of the cutting discs, thus affording a restricted passage for the flushing water, thereby preventing a clogging of the discs. It is conceded that this constitutes an improvement upon the drills covered by both the Griffin and Hughes patents. It is also true that a patent has been issued to Reed to cover this improvement. The Reed bit, however, appropriates for the base of this improvement the invention of the patents in suit.

[3] The law is settled that an improver cannot appropriate the invention of his predecessor, who has obtained a patent, as a base for his improvement, without the consent of the patentee, and without infringement, even though the improvement has become the subject matter of a patent. In the case of Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, the Supreme Court said:

"Two patents may both be valid, when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent."

In the case of Cochrane v. Deener, 94 U. S. 780, 787 (24 L. Ed. 139), the Supreme Court said:

"The defendants admit that the process produced a revolution in the manufacture of flour, but they attribute that revolution to their improvements. It may be as they say, that it is greatly due to these. But it cannot be seriously denied that Cochrane's invention lies at the bottom of these improvements, is involved in them, and was itself capable of beneficial use, and was put to such use. It had all the elements and circumstances necessary for sustaining the patent, and cannot be appropriated by the defendants, even though supplemented by and enveloped in very important and material improvements of their own."

In the case of Yancey v. Enright, 230 Fed. 641, 647, 145 C. C. A. 51, 57, this court said:

"The addition of an improving feature does not excuse the appropriation of the appellant's invention, covered by the patent, since we have construed the appellant's idea to be more than a mere improvement in form, and a distinct and valuable advance in the art."

As we are of the opinion that the patents in suit are valid patents and have been infringed by the appellant, the decree of the District Court appealed from is affirmed.

BATTS, Circuit Judge, did not take part in the decision of this case.

WOLF, SAYER & HELLER, Inc., v. UNITED STATES SLICING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2682.

1. PATENTS \$\iiis 328\$—For meat-slicing machines valid and infringed.

The Van Berkel patents, Nos. 806,603 and 895,213, for meat-slicing machines with removable meat plates, held valid and infringed as to claim 2 of the earlier patent and claims 8, 9, and 10 of the later.

2. PATENTS \$\infty 289-Laches barring recovery for infringement.

Where the owner of patents notified one who was already infringing that suit would be brought if improvement patents controlled by the owner were infringed, and no suit was brought for seven years, during which the infringers continued to make and vend the infringing machines, no recovery for that period of infringement of the original patents can be allowed; the owner being barred by laches.

3. Corporations \$\iff 30(6)\$—Ratification by corporation of acts of unincorporated predecessor.

Complainant corporation, which was the owner of patents, held to have ratified the acts and statements of a representative of its unincorporated predecessor with reference to suit for infringement of improvement patents, which amounted to acquiescence in infringement of original patents.

4. PATENTS \$\infty 261\to Knowledge of and consent to infringement.

Where a representative of the owner of a patent notified an infringer that, if improvement patents were infringed, suit would be brought, and the infringer continued to make and vend the infringing machines for a number of years, held, that the statement amounted to no more than a parol license to the infringer, which was revoked when infringement suit was begun; hence, though the owner was barred by laches from recovering damages for the past infringement, he might recover damages for infringement occurring after the suit, the conduct of the owner and statement of its representative not amounting to an estoppel.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the United States Slicing Machine Company against Wolf, Sayer & Heller, Incorporated. From a decree for complainant (249 Fed. 245), defendant appeals. Modified, and, as modified, affirmed.

Max W. Zabel, of Chicago, Ill., for appellant. Frank T. Brown, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. [1] The decree from which this appeal is taken sustains two patents involving meat-cutting machines known as the Van Berkel patents, Nos. 806,603 and 895,213. The opinion of the District Court, appearing in 249 Fed. 245, so far as it deals with questions of validity and infringement, meets with our approval. We see no reason for any further discussion of these two questions.

[2] The decree provides for a reference and "that the plaintiff recover from the defendant * * * the profits, gains, and advantages which said defendant has derived * * * since February 3, 1911," etc. Appellants insist that, even though validity be found and infringement appear, appellee's rights have been lost by its laches, and further urges that this court should at least deny all relief for past infringements.

While the record does not establish the facts as conclusively as we might wish, we feel justified in concluding that appellee, the successor to an unincorporated company of the same name, has since 1909 been the United States representative of the owner of the patents in suit and possessed certain exclusive rights for this territory; that its president was associated with patentee and his exclusive licensee in Great Britain prior to taking charge of the business in the United States, and was at the time of the interview, hereinafter detailed, authorized to speak for the owner of the patent and its licensee in this country; that in April or May, 1909, the president of appellee called upon the president of the appellant company, and, to quote the former's language, "threatened him with an infringement suit * * * if he copied any of our improvement patents"; that the meaning of the expression "improvement patents" is clearly shown by a reference to a machine then in appellant's possession embodying the then latest improvements in meatcutting machines; that the machine embodying the Van Berkel patents here involved was sold prior to this date under a license from Van Berkel to the American Slicing Machine Company; that appellant was at that time also making a meat-slicing machine which infringed the Van Berkel patents here involved, and the president of appellee in the same conversation, and by way of explanation of what was meant by "our improvement patents," said, "But if he insisted on copying our machine, as he had already copied the Van Berkel machine sold by the American Slicing Machine Company, I would certainly go to the court on the patent;" that after this conversation appellant delivered to appellee the machine which it had in its possession, and which embodied "our improvement patents" above referred to, and

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was paid therefor by appellee; that thereafter appellant continued to make and sell in large quantities meat-slicing machines of the style and design referred to as the American Slicing Machine Company's machine, an infringement of the two Van Berkel patents, and was so

engaged up to the commencement of this suit, July 7, 1915.

From this conversation appellant was justified in concluding that appellee acquiesced in the continued making of a machine, which merely infringed the two Van Berkel patents in suit, and which was a copy of the machine made by the American Slicing Machine Company, but that legal proceedings would follow any attempt to embody the improvement patents controlled by appellant. During all the succeeding years, from 1909 to 1915, appellee knew of appellant's making and selling the other model, and frequently replaced such machines with new ones of its own make.

We have given due consideration to the argument, most forcibly urged by appellee, that the machine made by appellant and referred to in the conversation above quoted did not in fact infringe the Van Berkel patents. But a careful examination of the record convinces us that the appellant's machine made prior to 1909, and continuously thereafter, was the same machine, so far as these patents are involved,

as the one of which complaint is made in this suit.

[3] We have also given attention to the contention that the representative of the unincorporated company, known as the United States Slicing Machine Company, had no authority in 1909 to represent or to bind either Van Berkel or appellee. Such a position is exactly contrary to the one taken by appellant at the time the testimony was of-This testimony was received on the theory that the witness came to the United States with authority from the owner of the patents to organize a company to handle the meat-slicing machine business under the Van Berkel patents. While the first United States Slicing Machine Company was unincorporated, and therefore a distinct entity from the subsequently incorporated company of the same name. yet the witness stated that it was lack of familiarity with the laws of this country that prevented an earlier incorporation, and that the subsequently incorporated company, the appellee herein, operating under the same name, acquired the rights of the predecessor company. That he was speaking in 1909 for the company in which he was largely interested cannot be denied, and his subsequent conduct as the chief officer of appellee, as well as his testimony and his attitude upon the trial, indicates most clearly that these statements were duly ratified by appellee.

[4] But it does not follow that, because appellee failed to assert its rights for seven or more years, it should be denied any and all relief in this suit. Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828. The conversation relied upon by appellant constituted at most merely a parol license to the infringer to construct machines, which it otherwise had no right to make, and was terminable upon notice. This termination of

the parol license occurred when suit was begun.

The evidence, we think, discloses such laches as to prevent appellee

from collecting damages for past infringements, but fails to establish an estoppel. We conclude, therefore, that the decree should be modified, by denying appellee's right to recover damages for infringements prior to the commencement of the suit.

The decree is modified, by inserting "July 7, 1915" for the words "February 3, 1911," appearing in the fourth paragraph, and, as so modified, is affirmed; appellant to recover costs on this appeal.

MANN v. MOIR HOTEL CO.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)
No. 2683.

PATENTS \$\iff 328\$—Improvement in water-closet not infringed.

The Mann patent, No. 1,128,799, for improvement in water-closets, held of narrow scope and not infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Marion P. Mann, executrix, against the Moir Hotel Company. Decree for defendant, and complainant appeals. Affirmed.

This appeal is from a decree dismissing appellant's bill which charged infringement of United States patent to Mann, No. 1,128,799, February 16, 1915, for improvement in water-closets. The improvement relates to that class known as wall closets or bowls, which are supported on or back of the closet partition, and not upon the floor itself, leaving the floor beneath the bowl entirely clear. Of the ten claims of the patent infringement is charged as to the following two:

"6. In combination, a wall bowl provided with a bearing shelf adapted to engage a partition and extending above the body portion of the bowl, a piping system back of the partition, and connecting means extending through the shelf and connected to the piping, for partially supporting the bowl; the outer ends of the said connecting means at the front of the shelf being formed so as to act as hinge supports."

"9. In combination, a wall bowl structure adapted to engage a partition, rigid supporting means back of the face of the partition, connecting means extending through the partition and a portion of the wall bowl structure and secured at their inner ends to the said supporting means; the outer ends of the said connecting means being provided with means for holding the bowl against movement away from the partition, and being formed so as to act as hinge supports."

The defenses are noninfringement, noninvention, and aggregation.

Paul Synnestvedt, of Philadelphia, Pa., for appellant.

Wallace R. Lane and Clarence J. Loftus, both of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). Wall bowls are admittedly old in the art. In most of them the main support for the bowl is afforded by some form of connection between the bowl and the perpendicular soil pipe or stack back of the partition. The asserted novelty of the Mann patent is a shelflike upward projection of the wall side of the bowl structure, through which the con-

necting bolts engage the bowl at a point higher than was customary, thereby giving to the bowl the added holding strength which comes from this higher connection, and the further feature of the seat and cover hinges attached to the outer end of the horizontal connecting bolts, to enable the bowl cover and seat to be hinged to such bolts, and not to upright bolts or posts projecting vertically through the upper surface of the bowl.

Whether or not this upper extending shelf of the bowl structure involves invention, or whether the attaching of the seat and cover hinges to the ends of the connecting bolts is any more than a mere aggregation of parts without producing a new result, are questions which, in view of the conclusion we have reached respecting the issue of in-

fringement, it will be unnecessary to consider.

A structure which would respond to these claims would include as an integral part the partition wall itself. Claim 6 calls for "a wall bowl provided with a bearing shelf adapted to engage a partition." Claim 9 has similar language, and refers to connecting means for holding the bowl against movement away from the partition. The patent structure disclosed appears not only to regard the partition wall as an integral part, but it makes provision for reinforcement of this wall by clamping immediately back of it a large metal plate, between which and the bowl the partition wall is firmly held; the plate in turn being securely bolted to the soil pipe, which is back of it. In the alleged infringing structure, however, the partition wall back of the bowl is entirely absent. The bowl is bolted to a sort of spider or tripod, which in turn is firmly attached to the soil pipe, without engagement whatsoever with the partition itself, which, of course, is set near enough to the bowl, so that any opening between them may be closed by cement or plaster, but with no relation whatever to any support to the bowl, either at its upper or lower part. Appellant and some of his witnesses testified at first that appellee's partition wall was likewise held in engagement, and to the necessity of such construction to enable the wall to receive the thrust of the lower part of the bowl when weight was placed on the bowl; but it transpired that in this respect they were in error, and admittedly in appellant's construction the partition wall back of the bowl was wholly cut away, in which respect a material element of the claims is wanting in the alleged infringing structure.

In view of the very narrow scope, at best, of the Mann patent, and its necessary limitation to what it shows, the entire absence of partition wall as an integral part of appellee's construction avoids infringe-

ment and justifies the decree, which is accordingly affirmed.

CARR SCHOOL OF PREVENTIVE DENTISTRY AND MEDICINE v. JAMES.

(Circuit Court of Appeals, Seventh Circuit, October 7, 1919.)

No. 2704.

PATENTS \$\sim 328\$—For dentists' tools void for lack of invention.

The Carr patent, No. 1,138,355, for dentists' tools, held void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Carr School of Preventive Dentistry and Medicine against Austin F. James. Decree for defendant, and complainant appeals. Affirmed.

Appeal from the decree dismissing a petition charging appellee with

infringing patent No. 1,138,355, relating to dentists' tools.

William F. Freudenreich, of Chicago, Ill., for appellant.

Percy B. Eckhart and Luther Johns, both of Chicago, Ill., for appel-

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. Errors relied on are that the court erred in not holding:

I. That claim 2 of the patent in suit is valid and infringed.

II. That the infringement amounted to unfair competition. Claim 2 is as follows:

"Tools for the treatment of teeth, comprising a series of straight handles, each tool adapted for use upon a predetermined shaped portion of the tooth, and each having a cutting edge and a guiding portion; the guiding portion serving to engage with the tooth in advance of the cutting edge to steady the same, and the cutting edge being in the line of the axis of the handle, whereby the instrument has no tendency to turn when in use, and planes as contradistinguished from scraping the surface."

Stripped of all verbiage, the claim is:

First. For a guiding portion of the tool to touch the tooth in advance of the cutting edge.

Second. For a cutting edge in line of the axis of the handle.

I. The specifications do not tell how this "guiding portion" is made or where it is or should be located. An examination of Figures 10, 11, 12, 13, and 14 in the Carr letters patent conclusively indicate that the "guiding portion" is not and cannot be definitely fixed anywhere, but is merely the necessary contact between the side of the tooth and the side of the instrument. In Figure 14 there is no contact at all, and in his testimony patentee Carr said that in some cases, without proper adjustment of the angle of the cutting bit or blade, there could be no rest or "guiding portion."

In addition to this, the uncontradicted testimony shows that many dentists used the same sort of contact and that resting the instrument against the tooth was, in most cases, unavoidable. It further appears that in this respect there is no appreciable difference between the Carr tools and the construction of the Cravens tools and many others testified about and in evidence, made and used long before the Carr ap-

plication was filed.

II. While, on first reading, the language, "the cutting edge being in the line of the axis of the handle," seems simple, it will not stand analysis. The cutting edge is a line, and, if the language means anything, it means that that line, in construction and use, is merely an extension of the longitudinal axis of the handle.

An examination of the Carr tools shows that no tool is constructed on this plan. If any one such tool would be of use in dentistry, Carr did not make it, and 150 such tools, as contemplated by appellant for

a set, would evidently be purposeless.

If the language means that the line indicating the cutting edge is at right angles with the longitudinal axis of the handle, so that the point marking the center of the line would be touched by an extension of the longitudinal axis of the handle, it will be found to be true in only one or two instances in the Carr tools; but it was and is also true in the Cravens, and numerous other tools made and used long before the alleged Carr invention.

What the language was probably intended to mean is that the center of the cutting edge is in line with the longitudinal axis of the handle. An examination of the tools in evidence shows that this is probably true generally and it also shows that in a great majority of the instruments the cutting edge is so made that in use the tool is not pulled directly toward the operator, but must necessarily be operated by pulling or pushing against the side of the tool. If pulled directly toward you, as a Japanese plane is operated, it would neither scrape nor plane, but would merely scarify the tooth by drawing the cutting edge quartering across it. This would be a useless device.

The decree of the District Court is affirmed.

POLLOCK et al. v. MARTIN GAUGE CO. MARTIN GAUGE CO. v. POLLOCK et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.) Nos. 2641, 2694.

- 1. Patents \$\isim 328\$—Automobile tires: validity and infringement.

 The Pollock patent, No. 1.220,272, for an automobile tire pressure gauge, held valid and infringed.
- 2. Patents \$\iff 316\$—Infeingement by assignor of patent.

 Though an inventor, who had assigned his patent in connection with others, infringed the same, such conduct, though reprehensible, is no ground for a decree compelling the inventor to assign another patent to his assignee.
- 3. Patents \$\iiii 319(1)\to Damages in excess of compensation.

 While Comp. St. \\$ 9464, provides for the punishment of willful infringers, the question whether damages in excess of compensatory damages shall be awarded must be determined by the District Court on accounting.

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Martin Gauge Company against Albert E. Pollock and others. From the decree (251 Fed. 295), which granted part only of the relief sought, defendant appeals, and complainant also appeals. Affirmed.

Frank H. Drury, of Chicago, Ill., for appellants.

Edward Rector and Lynn A. Williams, both of Chicago, Ill., for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVANS, Circuit Judge. [1] The opinion of the District Judge, appearing in 251 Fed. 295, fully and accurately describes the patent in suit, sets forth the issues in controversy in No. 2641, and the various contentions in support of them, and relieves us of the necessity of stating them. We are in accord with the views expressed in that opinion and agree with the conclusions there reached. We therefore adopt the opinion of the District Court.

Patent No. 1,220,272 is valid and infringed.

The Martin Gauge Company has, likewise, appealed from the decree, assigning as error the court's refusal to direct the assignment of patent No. 1,219,865 to it. We have examined the record with care, but fail to find evidence that would justify us in disturbing the finding of the District Court on this issue.

[2, 3] Reprehensible as was the conduct of the infringer, we find therein no basis for a decree directing an assignment of another patent. Other evidence, upon which assignment might be ordered, we do not find. The statute (section 9464, U. S. Comp. Stats. 1916) provides for the punishment of the willful violator. But whether damages in excess of the compensatory damages shall be awarded, as well as the amount thereof, must be determined by the District Court upon the accounting.

The decree is affirmed, appellants to pay the costs, in No. 2641. In 2694, the appellant, Martin Gauge Company, shall pay the costs.

DUNKLEY CO. et al. v. PASADENA CANNING CO. et al. (District Court, S. D. California, S. D. August 19, 1918.)

No. C-8.

- 1. Patents \$\iiii 327\$—Infringement suit; persons concluded by decree in a prior suit to which they were not parties of record, and where, pending such suit, it was stipulated by the parties in the present suit that the evidence there taken might be used in their suit by either party.
- 2. PATENTS &=328-VALIDITY AND INFRINGEMENT; FRUIT-PEELING MACHINE.

 The Dunkley patent, No. 1,104,175, for a fruit-peeling machine, held void for anticipation; also not infringed.
- 3. Patents \$\iiii 328\$—Validity; process of peeling fruit.

 The Dunkley patent, No. 1,237,623, for process of peeling fruit or vegetables, held void for lack of invention, in view of the prior art.

In Equity. Suit by the Dunkley Company and the Michigan Canning & Machinery Company against the Pasadena Canning Company and George E. Grier. Decree for defendants.

Raymond Ives Blakeslee and Dockweiler & Mott, all of Los Angeles, Cal., Fred L. Chappell, of Kalamazoo, Mich., and John H. Miller, of San Francisco, Cal., for plaintiffs.

Francis J. Heney, Kemper B. Campbell, and Frederick S. Lyon, all of Los Angeles, Cal., for defendants.

TRIPPET, District Judge. This suit is brought to enjoin the infringement by the defendants of two patents held by the plaintiffs. One of the patents, No. 1,104,175, was involved in a suit entitled Dunkley Co. v. Central California Canneries Co., et al., hereinafter referred to as the San Francisco case. That suit was tried in the United States District Court for the Northern District of California, and an appeal taken. The case was decided by the Circuit Court of Appeals and is reported in 247 Fed. 790, 159 C. C. A. 648. This patent is for a machine for peeling peaches and other fruit by a process spoken of as the "lye process." The other patent is a patent upon a process of peeling peaches or other fruit or vegetables, and known as the "lye process." The number of this patent is 1,237,623, and was issued August 21, 1917.

[1] The first matter for the court to consider, in determining the question concerning the patent for the machine, is whether or not the defendants here are estopped by the judgment in the San Francisco case. The plaintiffs claim that defendants here are in privity with the defendants in the San Francisco case, and for that reason are bound by that decision. The defendant Grier was the manufacturer of one of the machines, which was held to be an infringement of the machine patent. Grier employed an attorney when this suit was brought to defend this case. He sought to get permission from the defendants in the San Francisco case to join in the defense of that case, but, before arrangements were completed to join in such defense, there was a

disagreement, and Grier refused to have anything further to do with it in the sense of joining in the defense thereof. Grier instructed his attorney to attend the trial at San Francisco and keep informed concerning the same. He was not, however, employed to assist in the defense of said cause. The attorney, however, was during the trial made a party of record in said cause, as attorney of the defendants therein. The defendant Grier and his wife attended the trial at their own expense. Grier also took his device to San Francisco to exhibit at the trial at his own expense. He testified as a witness therein. Other attorneys employed in the San Francisco case were employed by defendant Grier in this case. Grier in all these matters represented his codefendant, Pasadena Carming Company.

During the trial of the San Francisco case, negotiations were entered into between the parties here concerning an agreement as to the effect a decree in the San Francisco case should have, and the parties, pending the trial of the San Francisco case, entered into a stipulation as follows:

"It is hereby stipulated and agreed by and between the parties to the above-entitled suit:

"(1) That the final hearing or trial of this suit be continued over the January, 1916, term of said court, and shall not be set for trial prior to November, 1916.

"(2) That either of the parties hereto, upon the trial of this suit, may use as evidence herein, with the same force and effect as if given in open court in this suit, any or all of the testimony of any witness, together with the accompanying exhibits, forming part of the transcript and records of the trial of suit in equity No. 201, in the United States District Court for the Northern District of California, wherein said Dunkley Company is plaintiff and Central California Canneries Company is defendant, as the same is finally submitted to the latter court for determination, or either party hereto may likewise use the testimony of any one or more of such witnesses and call in open court any other of said witnesses, or any other or additional witnesses; it being the intent hereof to perpetuate for use in this suit all the testimony and proofs adduced in said suit No. 201, and render the same as available for use herein on behalf of the respective parties as though the same had been given in open court in this suit. It is further stipulated and agreed that the certificate of the official reporter to a copy of the manuscript of testimony in said suit No. 201, or to the testimony of any witness therein, shall be deemed a full and sufficient certification as to the correctness thereof, and that no further certification thereof shall be required to render the same admissible in this court under this stipulation," etc.

This stipulation was entered into on April 3, 1916, and the San Francisco case was decided on December 4, 1916.

The evidence here shows that the plaintiffs knew, at the time of entering into this stipulation, all the circumstances that tended to show that the defendants here were engaged in defending the San Francisco case, and, notwithstanding that knowledge, the plaintiffs entered into that stipulation. Now, if the plaintiffs believed at the time that the defendants here were estopped, why did the plaintiffs enter into a stipulation concerning the use of the evidence, as set forth in that document? What was the use of preserving the evidence, as introduced in that case, to be presented here as evidence in this case, if the defendant here were to be estopped by the judgment in the San

Francisco case? It seems perfectly plain that the plaintiffs cannot be permitted to assume the situation that they now seek to assume, because it is inconsistent with the position they took in entering into this stipulation.

The defendant Grier never directed any attorney to represent him or the Pasadena Canning Company in the San Francisco case, as a litigant in that case. Grier was neither a party nor a privy in that litigation. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was a stranger, and was not concluded by that judgment as a party thereto. He was indirectly interested in the result, because the question there litigated was one which might affect his own liability as a judicial precedent in this suit, and therefore he sought to assist and advise the defendants in that case, in order that there might not be a precedent established to his injury.

The record does not disclose a state of facts that would justify the court in holding that the defendants here are estopped by the San Francisco record. Having determined that the judgment in the socalled San Francisco case is not an estoppel, it is necessary for the court to determine what effect shall be given to that decision. The whole record, including all the evidence taken in San Francisco, is introduced in evidence here. In addition to that, the court sat for many, many days taking evidence not in the San Francisco case. The proof here is so entirely different from the proof in the San Francisco case—that is to say, the evidence here contains so much proof, in addition to the proof taken in the San Francisco case—that this court cannot consider the question here involved as having been decided. If the San Francisco case were based upon the same facts proved in this case, this court would be strongly inclined to follow the decision in that case, regardless of whether or not there is an estoppel. But this court must be bound by the proof produced here, and what is decided must be the opinion of this court, and must contain the convictions of the judge. If any doubt remains, after considering all the evidence introduced here, the court should give great weight to the opinion rendered in the San Francisco case, for the purpose of resolving that doubt. Under the circumstances the San Francisco case cannot lead this court to a conclusion.

[2] The plaintiffs claim that Dunkley conceived the process of peeling peaches by lye in 1901; that he made his first model or experimental machine in the peach season of 1902, and the plaintiffs insist that the Dunkley patent should be carried back to these dates. The first question, therefore, for the court to consider is: How far back of the date of application for patent can the Dunkley invention be carried?

Mr. Dunkley, the patentee, and his son, both testify here that the first machine that was built, as an invention of Dunkley, was built in the early part of the peach season of 1902. Mr. Dunkley testifies that he conceived the process in 1901; that this first machine, made in 1902, and the improved machine, which they testify was made in 1902–03, were used in 1903, in the Dunkley Company's factory, at South Haven, Mich., and most of the peaches in that season peeled by the last-men-

tioned machine. Their testimony is supported by the evidence of other witnesses, either by testifying to circumstances that would indicate that the first or model machine was made in 1902, or directly and positively to the fact. Among these witnesses are Simpson, Schau, Sergeant, Wiers, Mrs. Lilly, Mrs. Mace, and Verhage and wife. The evidence given by Crary and Mrs. Wing Eastabrook is so confusing and contradictory that no weight can be attached to it. There does not seem to be any documentary or circumstantial evidence of any kind tending to support this testimony.

There is much circumstantial and documentary evidence in the case tending to show that Dunkley did not make his first or model machine prior to the summer of 1903. Dunkley made his application for patent on November 29, 1904. Dunkley was an inventor long prior to that time—had taken out patents and knew of the necessity of covering inventions with patents.

There was an interference proceeding between Dunkley and one Beekhuis. In that proceeding the evidence, on behalf of Dunkley, carried the date of the construction of his first machine back to July, 1903, only. Mr. Dunkley testified, in the interference proceeding, that he first conceived the thought of the structure in the month of August, 1902, and that he made a drawing in 1902. This drawing, however, is not produced. He testified further in that proceeding that the model machine was made in the month of July, 1903, and put together at the factory at South Haven, Mich., and used there. Other evidence, in the interference proceeding, was along the same line. One witness, a Mr. Newton, produced by Mr. Dunkley in the interference proceeding, who testified that this machine was made in July, 1903, now testifies that he was mistaken, and that it was made later that year.

Counsel for the plaintiffs argue that the evidence in the interference proceeding should be construed with reference to the fact, as I understand it, that it was only necessary to prove, in this interference proceeding, that the invention of Dunkley was prior to that of Beekhuis; that it was not necessary for Dunkley to carry his invention back to the date that he now claims he made it. This contention of counsel does not appeal very strongly to the court. It would seem that these statements of Dunkley, and the evidence produced on that hearing, are very strong admissions that his first or model machine was made in 1903, and not in 1902. In Dunkley Co. v. California Canneries Co., No. 203, in equity, Northern District of California, on December 3, 1903, Mr. Dunkley, patentee, testified that the first machine was put up in June or July of 1903. Mr. M. E. Dunkley, the son of the patentee, testified in both of these proceedings, practically the same as his father.

The books of Mapes, which show on their face their authenticity, indicate that material to construct the first or model machine for the Dunkley Company was supplied to the Dunkley Company in the latter part of September, 1903. The books of Riddeford Bros., of Chicago, are in evidence. These books show that they are old, very much used, and they certainly show on their face that they have not been doctored.

They show that they have been systematically and accurately kept; that brushes were made for the Dunkley Company, like the brushes used in the first or model machine. The plaintiffs offer no explanation anent this evidence. The books of John F. Noud Lumber Company are in evidence. This company supplied lumber to the Dunkley Company in 1903. They show the delivery of lumber suitable to construct a long table, at which women sat to peel peaches in 1903. There was such a table in the building, about 150 feet long. The books of John C. Miller, a plumber, of South Haven, Mich., are in evidence. These books show that Miller supplied 300 feet of double-headed galvanized trough to the Dunkley Company July 23, 1903. There was a trough under this long table, on each side thereof, such as would be built from such material. These troughs were used by the women to wash their knives in while they were peeling. The books of Noua and Miller are almost conclusive evidence that that long table was built just prior to the peach season in 1903.

There is no explanation from the plaintiffs as to what such material, sold the Dunkley Company, could be used for, it not used as claimed by the defendants, in the construction of the table. The construction of this table, and the existence thereof, in the peach season of 1903, is utterly inconsistent with the theory of the plaintiffs' case. The plaintiffs claim that a complete and perfect machine, namely, the second machine, was operated during the peach season of 1903, where this long table stood. Plaintiffs further claim that practically all the peaches of the season of 1903 were peeled by the second machine. Several photographs, which witnesses testify were taken in 1903, are in evidence. One of the photographs is this particular long table, with the women sitting at it peeling peaches by hand machines and knives. The photograph of the peaches on the table shows that the peaches were peeled by a knife or hand machine, which made little ridges around the peach. When a peach is peeled by lye, it is perfectly smooth, and such ridges do not appear. This is inconsistent with the theory of plaintiffs' case. One of these photographs contains a picture of a singular circumstance, tending to show that the picture was taken in 1903. This circumstance is that the picture itself shows a bouquet, containing the date of a party held by the employes of the factory in 1903. There can be no doubt in any one's mind but what that picture was taken in 1903. It shows many of the same people that sat at the long table peeling peaches by hand during that year.

This evidence of these books and photographs must be explained by witnesses, and the explanation has been ample to show that these books and photographs represent what the defendants claim for them. For instance, take the books of Mapes. They recite that the material was furnished for a peach-peeling machine. Mapes and Stewart Campbell corroborate what these books show, and the books certainly corroborate them. The testimony of Mr. Riddeford, concerning his books, is straightforward and clear. He corroborates Stewart Campbell concerning the ordering of these brushes, and the books certainly corroborate both of them. If Stewart Campbell did not order these brushes, as claimed by him, how did it happen that the defendants could find

this testimony, and the plaintiffs do not know anything about the account? The books of the lumber company and Miller are satisfactorily explained. They corroborate Stewart Campbell concerning the building of the table in 1903. It is proven by a great many witnesses that the photograph introduced in evidence of the long table, and the women peeling peaches thereat, was taken in 1903. Some of the reasons assigned by some of these witnesses, for their convictions that this photograph was taken in 1903, are very simple. Each has a different circumstance by which the witness' mind has been refreshed, and which corroborates the witness concerning the date. If these pictures that were taken in 1903 show what was going on in the factory of the Dunkley Company at that time, it certainly would be a most remarkable thing that no photograph was taken of this wonderful machine for peeling peaches, if it existed at that time.

The letters passing between Dunkley and his business associates, the Nortons, strongly corroborate the theory of the defense. If this correspondence had passed between Dunkley and Norton in 1902 and 1903, instead of between 1903 and 1904, it would, of course, have supported Dunkley; but, as the correspondence stands, it supports the defense. For instance, September 17, 1904, Dunkley wrote to Norton, "The peeler works fine;" and on September 22, 1904, he wrote, "The peeling machine is running fine; so are the rotaries." On February 10, 1904, Mr. Dunkley wrote to Mr. Norton:

"We have the lye machine now nearly completed, with the rotary cleaner attached. This machine Mr. Campbell calls the 'prevaricator.' This we are sure will work, as we worked the same thing last year, and there is no question about it."

There is certainly no intimation in this letter that the machine was used in 1902; but does not it clearly show that he was informing his business associates that they had experimented with the machine in 1903?

There is other documentary evidence, such as the books of the Clark Engine & Boiler Company, which throw more or less light upon the controversy. Then there is the testimony of Crosthwaite, which is almost documentary evidence, because it is based upon a newspaper article concerning the operation of the factory. It was written October 1, 1903. He went there for the purpose of writing up an article about the factory, and, if this wonderful peach-peeling machine had been in operation he certainly would have had an account of it in his article. Referring to his article appearing in the paper, he testifies that there was no such machine there.

It is proper that the court should notice especially the testimony of Stewart Campbell. Reference has already been made to much evidence to corroborate his statement concerning the making of the first or model Dunkley machine; but there is much other evidence to corroborate it. The evidence of the plaintiffs shows that Stewart Campbell was regarded as a sort of genius. He was there making new machines. He made the peach separator and a peach pitter. The letters of Mr. Dunkley to his associates show that Stewart Campbell

was regarded by him as the man who would most likely make the machine, and they show conclusively that Stewart Campbell made the three-line or second machine. This is the machine exhibited by the drawings in the patent, and which the defendants claim was never used until 1904. There is no reason in any event for discrediting Campbell's story.

The first or model machine is a reproduction of the Baker orange washer, patented many years before. It is almost an exact reproduction of the drawing set forth in the Baker orange washer patent. The only difference between the first or model Dunkley machine and the Baker orange washer is that in the Dunkley machine there were three pipes, with a single row of perforations in each, while in the Baker orange washer there was one pipe, with three rows of perforations for sprays. In the Dunkley first or model machine brushes as conveyors were put on the belt, instead of some other kind of conveyors, as on the Baker orange washer. The difference between the two is simply a mechanical divergence. I cannot help but think that the idea for the first or model Dunkley machine was taken from this patent. There is no evidence that Campbell ever saw the drawing; there is, however, no evidence that he did not see it. Campbell's testimony would seem to indicate that he wanted it understood that he devised this first or model machine, and that it was an original creation of his own. This may be so, and yet his ideas may have come from a vision of the Baker Orange Washer patent drawing. He may have seen it, and forgotten that he had.

It is also proper that the court should refer to the evidence of William Brunker. It is argued that the evidence of Brunker is most astounding, and that it should not be believed. Brunker, in his evidence, does not seem to take credit to himself for making any discovery. The process of peeling peaches by hot lye had been known for a generation before Dunkley made his experiments. It was inserted in a publication, known as the "Archdeacon's Kitchen Cabinet," which was in existence in 1876. It had been previously patented by Mrs. McDermott in 1895, and it was well known even in South Haven, where Brunker worked. The method he used was the common form of using that process in peeling peaches. Why, then, is his story to be regarded as startling and unworthy of credit, as claimed by the plaintiffs? His story is very simple; he said that he, at the instance of Mr. Dunkley, experimented with the process of peeling peaches by lye. The only thing he did that could be regarded as new was to rub the peeling off with a brush. He states that Dunkley said, "What you are doing with your hands, we must do with a machine." This is a very simple story. To my mind it corroborates the description given of the machine in the patent. It convinces me that Mr. Dunkley originally thought that the brushes had a great deal to do with the process and the success of the machine.

There are many witnesses, on behalf of defendants, who testify that the Dunkley machine was made in the autumn of 1903, and first used then. Other witnesses testify to circumstances which tend to corroborate these witnesses. Take the evidence of Mrs. De Pue, a very

bright and intelligent lady—a woman of authority in the Dunkley factory. She testifies that she did not want to come to California; refused to come, until they proposed to take her deposition; that when she was approached by the defendants concerning the case she immediately communicated with Melville Dunkley. She went to the office of the Dunkley Company's attorney to tell him what she knew. Subsequently, when she was further approached by agents of the defendants, she communicated the fact to the Dunkleys, and offered to testify for the Dunkley Company, if they wanted her evidence as she stated it to them. This shows that she is a fair witness. Take her simple story that, in the autumn of 1903, she pitted a pan of peaches, peeled by the lye process. She told in a simple way this simple story. She did not remember the small things surrounding the circumstance, and that is to her credit as a witness. If she had been lying, she would have testified to have remembered many of the trifling details concerning which she was asked. Many other witnesses might be mentioned, who told simple stories that strongly sustain the theory of the defense, such as Augensen and Hetherington. The attorneys have so carefully digested and analyzed the evidence that it would not be much labor to state here what each of the great number of witnesses, testifying on behalf of the parties hereto, said; but it is deemed unnecessary.

It is sought by the plaintiffs to discredit the testimony of the witnesses for defendants, because their expenses and per diem were paid to them to come here and testify. A trip to California might influence the testimony of some witnesses, but it is hardly to be believed that the testimony of so many witnesses could be influenced in such a way. If the expenses and per diem were not paid by the plaintiffs to their witnesses to come here and testify what shall we think of them? Would it not show that they were greatly interested in the plaintiffs winning the case? Then how shall we weigh the circumstances concerning the payment of witnesses' expenses and per diem, or not paying them?

In view of what has been said, and much more that could be said, the court is convinced that the first or model machine ever built for Dunkley to peel peaches by the lye process was built in the autumn of 1903, and no machine at all was built in 1902. The evidence heretofore stated tends strongly to prove that the Dunkley conception was not made until the summer of 1903, and that Mr. Dunkley is wrong in his claim to a conception at a prior date. It is therefore the opinion of this court that the Dunkley patent cannot be carried back beyond the summer of 1903. It seems proper to say that the evidence convinces the court of the above conclusion beyond a reasonable doubt.

Was the Dunkley machine anticipated? Having reached the conclusion that the Dunkley invention cannot be carried back of the summer of 1903, it follows necessarily that the Pyle machine, being a combination of the Cunningham prune dipper, the Anderson-Barngrover & Co. prune grader, with the sprays thereon, the Grier grass-hopper and shaker machine, with the sprays thereon, and the Roach (so-called) "squirrel cage" pea-grader attachment, were each and all

anticipations of the Dunkley machine, in so far as in issue here. Each of these machines had a spray to wash the peeling from the peaches. The Pyle machine was successfully used in 1901. This is conclusively shown by the records and files of the Pyles, and these are amply corroborated by disinterested third party witnesses. Even if the Dunkley invention could be carried back to 1902, this Pyle machine would be prior. It is wholly unnecessary for the court to describe these machines, for it is plain they were infringing, if not prior.

Much stress is laid upon the claim that the Dunkley machine sprayed the water under hydraulic pressure of great force. If the amount of the pressure were the controlling feature in the case, it would seem that even in this the Dunkley machine was anticipated, for a pump was installed to assist the pressure in the Vernon machine at Fresno, and the Dunkleys did not install a pump to assist the pressure until 1905. But the amount of pressure placed upon the water cannot control here, because it is a matter that must be regulated during the operation of the machine. The amount of pressure is varied according to the character of the fruit and according to the condition of the lye solution. It is simply a question of exercising mechanical judgment in the operation of the machine.

The plaintiffs claim that the Dunkley machine should have a broad interpretation, covering the spraying of the water upwardly on the fruit. The defendants have never used a machine with peeling jets of water spraying upwardly on the fruit, nor have they used a machine where jets of water strike the fruit tangentially. The question, therefore, concerning the validity of the plaintiffs' patent as to peeling jets or sprays of water playing upwardly or tangentially on the fruit, is not involved in this case.

Dunkley was late in adopting the device of pitting the peaches before subjecting them to the peeling process. The fact that he ran the peaches through the machine whole largely necessitated stronger hydraulic pressure producing the jets of water than was necessitated in the other machines.

The Pasadena washer does not infringe the Dunkley patent, even giving the patent the very broadest interpretation and validity. The Pasadena washer is but an improvement upon the McDermott machine. Mrs. McDermott, it would seem, mothered the progress made by this machine in the handling of peaches. The claim made by the plaintiffs that the Pasadena washer uses a jet or spray of water in the washing of peaches is far-fetched. What difference is there between Mrs. McDermott's machine, where the peaches are lifted out of one compartment of the machine into another, and the water sprayed through holes, and the Pasadena washer, where the peaches are lifted out of one compartment and brought into another with similar holes in the buckets or dippers? In some of the Pasadena washers it is true that the water can be made to spray into a compartment or compartments of the washer, but the defendants never intended that these sprays should be used for the purpose of peeling peaches, but only for the purpose of filling the vats with water. Such sprays would be wholly inefficient for the purpose of peeling peaches.

[3] Is the Dunkley process patent valid? The most essential feature of this patent is the use of lye or caustic soda in a hot solution. Mrs. McDermott secured a process patent for peeling peaches with lye and alum many years before the Dunkley experimentation. She asked for a claim in her patent without the use of alum, but this was disallowed. Her application for a patent, with such a claim, however, was a disclosure to the world. Then why should Dunkley have a patent for the use of lye or caustic soda, when she could not get one? Her process contemplated the use of hot scalding lye, and then washing the lye off with water. There is an allowance in the Dunkley patent of hydraulic sprays of sufficient force to remove the loosened skin. This, however, is not an essential feature of the process. So far as the process is concerned, the cleaning of the fruit may be done in any manner. The element in the claims of Dunkley's process patent, concerning the passing of the fruit into the range of action of hydraulic sprays of sufficient force to remove the loosened skin, amounts to no more than the patenting of the result of the Dunkley machine. I am clearly of the opinion that there is no validity at all to the Dunkley patent. No. 1.237.623.

The defendants will draw a decree, dismissing the bill and supplement thereto, in accordance with this opinion, and submit it to the plaintiffs.

GUTSCHALK v. PECK.

(District Court, N. D. Ohio, W. D. May 26, 1919.)

No. 2620.

- 1. STATUTES \$\infty 181(2)\$—Construction; unjust consequence.
 - A construction placed on a statute should avoid an awkard and unjust consequence, unless the language compels such a result.
- 2. STATUTES ≥217, 224—Construction; history of legislation and other sections of law.

The construction of a statute should be with reference both to the history of the legislation and to other sections of the law with which it is in pari materia.

- 3. Statutes \$\iff 206\to Construction; Punctuation and Choice of Language.

 It is a fundamental and general canon of construction of a statute that attention must be given to all parts of the particular piece of legislation, with some consideration both for punctuation and choice of language.
- 4. COURTS 270—JURISDICTION OF FEDERAL COURTS; DISTRICT OF SUIT.

 Judicial Code, § 51 (Comp. St. 1033), authorizes a civil suit to be brought in a federal court in the district of plaintiff's residence, where jurisdiction depends alone on diversity of citizenship, only when defendant may be found and served in such district.

At Law. Action by Katherine M. Gutschalk against Walter Peck. On motion to quash service of process. Motion sustained.

Young & Young, of Norwalk, Ohio, for plaintiff. Graves & Stahl, of Toledo, Ohio, for defendant.

KILLITS, District Judge. This is an action for damages, only, for breach of a contract of marriage. The plaintiff is a resident of this district. The defendant resides in the district of Nebraska. The action is brought in this court. On the præcipe of the plaintiff a summons from this court was issued to the marshal of the district of Nebraska for service upon the defendant in the latter's home district, and the return shows service had at Ravenna, Neb. The petition alleges the diverse citizenship of the parties.

The defendant appears specially with a motion to set aside and quash service, on the alleged ground that the court is without jurisdiction over the defendant's person, and that the service of summons upon him without this district was unauthorized. We think this motion well taken. The proceeding is sought to be justified under provisions of section 51, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1033]), and in quoting that section we under-

line the features upon which plaintiff depends:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a District Court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

[1, 2] Two canons of interpretation are to be applied: First, that the construction placed upon the statute should avoid an awkward and unjust consequence unless the language compels such a result; second, that the construction should be with reference both to the history of the legislation and to other sections of the law with which it is in pari materia.

[3] Of course, as a fundamental and general canon of construction, attention must be given to all parts of the particular piece of legislation, with some consideration both for punctuation and choice of lan-

guage.

[4] Applying these criteria, we hold that the language depended upon from section 51 of the Judicial Code is not in fact an attempt to enlarge, from previous legislation, the court's jurisdiction over the person of a nonresident defendant, but it is a limitation thereof. Previous to 1888, when section 51 became the law, jurisdiction of an individual was given to a federal court of first instance in this language (Act March 3, 1875, c. 137, § 1, 18 Stat. 470):

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided."

Comparing this language with that above quoted from the act of 1888 (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [Section 51, Judicial Code]), it will appear that the broad provision that a person might be proceeded against in a civil action in any district in which he might

be found was repealed in the provision, in the new legislation, that "no civil suit shall be brought in any District Court against any person by any original process of proceeding in any other district than that whereof he is an inhabitant; * * * " In writing this into section 51, Congress undoubtedly was protecting the individual against process wherever he might be. This language just quoted ends with a semicolon. The statute proceeds thereupon to a limitation of its effect to operate under certain circumstances, and so the statute says:

"But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

When we bear in mind that Congress is amending a statute which provided that the defendant might be sued in any district in which he is found, the meaning of this provision, it seems to us, is clear. By the old statute the plaintiff could begin an action in the district where he found the defendant, commanding for that purpose the power of the court to cause its own officers to summon the defendant, but this law, of course, compelled the plaintiff to go into the district in which he found his adversary to commence the action. The limitation in section 51 we are considering must, we think, be considered to be, pro tanto, a preservation, under the circumstance provided for, of the right accorded in the Act of 1875, and it should not be construed to give this court a kind of jurisdiction which was not provided for by the act of 1875.

We are therefore of the opinion that the language in question means this, and nothing more than this: That a party may go into his adversary's district to sue him, or if he catches his adversary in plaintiff's own district, he may sue him there. To say that this language means that a party may go into the court of his own district, and command process to run out of that court, in an action of this general character, to a far-distant district where the adversary may be, is to plead for an innovation in the law which we cannot see that the language of the statute requires, and for one which is of so far-reaching a character, and so fraught with disadvantage to and possible invasion of the rights of a defendant, that it is inconceivable that Congress intended such a result. If such is the true meaning of this statute, then it follows that the processes of the court of the district of Maine are available in an action for money only to bring a sole defendant from the district of Alaska or Hawaii and force him to a defense under unconscionable conditions. Congress certainly meant to do no such thing.

The motion to quash, therefore, is sustained.

FIREPROOF STORAGE CO. v. HINES, Director General of Railroads, et al. (District Court, E. D. Washington, N. D. October 29, 1919.)

No. 3264.

HAILROADS \$\ightarrow\$81—Lease of right of way; right of warehouseman to sue for cancellation.

A Washington corporation, which maintained a warehouse in the city of Seattle, cannot maintain a suit against an interstate carrier and those engaged in interstate commerce allowed by the carrier to erect warehouses on portions of its right of way, to cancel such leases or privileges, on the ground that they were granted in violation of the Interstate Commerce Act; the damage being too remote for legal redress.

In Equity. Suit by the Fireproof Storage Company against Walker D. Hines, Director General of Railroads, and others. On motion to dismiss. Motion granted.

Oscar Cain, of Spokane, Wash., for plaintiff. Cannon & Ferris, of Spokane, Wash., for defendants.

RUDKIN, District Judge. The case made by the amended complaint is substantially this: The plaintiff, a corporation organized under the laws of this state, is the owner of a lot in the city of Spokane immediately adjacent to the tracks of the railway company, upon which is erected a three-story brick building suitable for warehouse purposes. The Northern Pacific Railway Company is a corporation organized and existing under the laws of the state of Wisconsin, engaged in interstate commerce between the several states. The railway company owns a right of way through the city of Spokane approximately 200 feet in width, and has erected and permitted others to erect buildings suitable for warehouse purposes, and has leased its property for a mere nominal rental to persons engaged in interstate commerce, to the great and irreparable damage and injury of other persons engaged in the like commerce and unable to secure the benefits and privileges of such leases, and of other owners of warehouses and warehouse property, including the plaintiff. The defendants, other than the railway company and the Director General, hold leases of property on and along the right of way of the railway company, such as those above described. Such leases are unlawful and void, and their maintenance and existence against public policy for the following rea-

"(1) That they operate as a restraint of trade. (2) That they give an unlawful preference to persons receiving the benefit of same. (3) That they are intended as and amount to a rebate to shippers receiving the benefit thereof. (4) That they are an unjust discrimination against other owners of warehouse property and other shippers in interstate commerce not receiving the benefit thereof."

The relief sought is that these several leases be decreed null and void, and that the defendants be enjoined and restrained from their further continuance, and for general relief.

A motion to dismiss has been interposed in behalf of the defendants for want of sufficient facts. The question presented is: Does the

amended complaint state a cause of action in favor of the plaintiff? Or, in other words, has the plaintiff any standing in a court of equity to question the validity of the leases or entitle it to the relief demanded?

It was conceded on the argument that if private parties owned the warehouses and warehouse sites along the right of way, and gave leases for a mere nominal consideration, the plaintiff would not be heard to complain, although such a course of dealing would have the same effect upon the plaintiff and its property rights as if pursued by the railway company. It is claimed, however, that, inasmuch as the railway company is a corporation engaged in interstate commerce, the granting of such leases or privileges is a violation of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), and that a different rule should obtain. Such a distinction no doubt exists, but is it not a distinction without a difference? In Ro'ddy v. Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333, the court said:

"The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications, in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume. * * * The rule is put upon two grounds. either of which is unquestionably sound. One ground is given by the court in the opinion in Winterbottom v. Wright, as follows: 'If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.' The other ground is thus stated in the New Jersey case above cited: "The object of parties in inserting in their contracts specific undertakings with respect to the work to be done is to create an obligation inter sees. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts.' Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries, resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them."

The Roddy Case was cited with approval by the Supreme Court of this state in Ninneman v. Fox, 43 Wash. 43, 86 Pac. 213, and if a third party cannot complain of a breach of contract between strangers, why should he be permitted to complain of performance? It was further held in the case last cited that it was immaterial whether the act complained of was a tort or a mere breach of contract, quoting with approval from Connecticut Mut. Life Ins. Co. v. New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571, as follows:

"An individual slanders a merchant and ruins his business; is the wrongdoer liable to all the persons who, in consequence of their relations by contract to the bankrupt, can be clearly shown to have been damnified by the bankruptcy? Can a fire insurance company, who has been subjected to loss by the burning of a building, resort to the responsible author of the injury, who had no design of affecting their interest, in their own name and right? Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property, that rarely is a death produced by human agency, which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known. So self-evident is the principle that an injury thus suffered is indirectly brought home to the party seeking compensation for it that courts have rarely been called upon to promulgate such a doctrine."

In New York, N. H. & H. R. Co. v. Ballou & Wright, 242 Fed. 862, 155 C. C. A. 450, it was held by the Circuit Court of Appeals for this circuit (quoting from syllabus):

"Where a railroad company exacted unreasonable freight rates, which were paid by petitioner, to whom merchandise was consigned, petitioner's recovery of damages on account of the unjust charges cannot be denied, because petitioner, in disposing of the merchandise, sold it for a price in excess of the factory list price, so as to cover the discrimination in charges."

That case was cited with approval by the Supreme Court of the United States in Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S. 531-535, 38 Sup. Ct. 186, 62 L. Ed. 451; the court holding as follows (again quoting from syllabus):

"The fact that one who paid unreasonable freight charges has shifted the burden by collecting from purchasers of the goods does not prevent him from recovering the overpayments from the carrier, under an order of reparation made by the Interstate Commerce Commission. He is the proximate loser; his cause of action accrues immediately, without waiting for later events; the purchaser, lacking privity, cannot recover the illegal profits from the carrier, and, practically, to follow each transaction to its ultimate result would be endless and futile."

Yet the damages to the purchaser in these cases would seem to be more certain and less remote than the damages claimed or alleged by the plaintiff in this case. Such was also the view of the Interstate Commerce Commission in the case of Pittwood v. Northern Pacific Ry. Co., 51 Interst. Com. Com'n R. 535. Pittwood, who appears to have been the predecessor in interest of the present plaintiff, filed a complaint before the Commission on the 26th day of June, 1917, claiming an award of damages for the same wrongful acts here complained of, and it was held by that body that a warehouse owner is not entitled to recover damages for depreciation in the rental value of his property as a result of leases by a railroad company of similar property at nominal rentals to shippers. Whether the latter decision has any binding force beyond the high authority of the Commission itself I need not inquire, because the conclusion there reached is in entire harmony with my own views.

For the reasons thus stated, I am satisfied that the plaintiff has no standing in a court of law to recover damages, or in a court of equity to annul or interfere with the private contracts of others, and the motion to dismiss the amended complaint is accordingly granted.

LOUGHNAN v. HINES, Director General of Railroads, et al. (District Court, W. D. Washington, S. D. November 7, 1919.)

No. 2788.

REMOVAL OF CAUSES &== 19(1)—ACTION AGAINST DIRECTOR GENERAL OF RAIL-ROADS.

Under Federal Control Act, § 10 (Comp. St. 1918, § 3115¾j), providing that actions against railroad companies not previously removable shall not be removable because of federal control, such an action, brought against the Director General, is not removable from a state court on the ground that it is one arising under a United States statute.

At Law. Action by Jessie Loughnan, administratrix of the estate of Hulton Loughnan, against Walker D. Hines, Director General of Railroads, and John Doe Truesdale, whose true Christian name is unknown. On motion to remand to state court. Motion granted.

C. D. Cunningham, of Centralia, Wash., and Troy & Sturdevant, of Olympia, Wash., for plaintiff.

C. H. Hanford and Geo. W. Korte, both of Seattle, Wash., for defendants.

CUSHMAN, District Judge. The suit is to recover for the wrongful death of the driver of an automobile truck in a collision with a train, claimed to have been negligently operated by the defendants, the Director General of Railroads and the locomotive engineer. The motion is one to remand.

The diversity of citizenship necessary to give this court jurisdiction does not exist; but, the suit being "of a civil nature" and "one arising under the Constitution and laws of the United States, the matter in dispute exceeding the sum and value of \$3,000, exclusive of interest and costs," under the Judiciary Act (Act March 3, 1911, c. 231, § 28, 36 Stat. 1094 [section 1010, U. S. Compiled Statutes 1918]), it would be removable. Cummings v. Chicago, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525; Dunn's Case, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558; Martin v. St. Louis S. W. Ry. Co. (C. C.) 134 Fed. 136; Landers v. Felton (C. C.) 73 Fed. 314; Cobb v. Sertic, 218 Fed. 320, 134 C. C. A. 116. The motion to remand should therefore be denied, unless the law has made an exception of this case to the general rule. In Muir v. L. & N. R. R. Co. (D. C.) 247 Fed. 888, the cause of action arose before the Federal Control Act was passed. Therefore in no proper sense could it be said that the cause of action arose under that act.

The act of Congress of the 29th of August, 1916 (39 Stat. 645 [U. S. Comp. St. § 1974a]), empowered the President, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same for war purposes. Pursuant to such act, the President, on the 26th day of December, 1917, directed that the possession, control, operation and utilization of the railroad transportation systems of the

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United States should be exercised through a Director General of Railroads. U. S. Comp. St. § 1974a, note. Thereafter, on the 21st day of March, 1918, Congress passed the law commonly known as the Federal Control Act (Act March 21, 1918, c. 25, 40 Stat. 451 [U. S. Comp. St. § 3115¾a et seq.]), sections 8, 9, and 10 of which provide:

"The President may execute any of the powers herein and heretofore granted him with relation to federal control through such agencies as he may determine. * * *

"The provisions of the act entitled 'An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. * *

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

Since the passage of this act, the control, operation, and utilization of the railroads by the Director General has been, and is, exercised under its provisions; and upon taking possession and entering upon such operation and control of the railroads of the United States the Director General became the railroad carrier of the country and the carrier contemplated by the foregoing act, although, prior to the accomplishment of such completed control, the operating companies may have been the carriers contemplated within that act. Rutherford v. Union Pac. Ry. Co. (D. C.) 254 Fed. 880; Dahn v. McAdoo (D. C.) 256 Fed. 549. In recognition of this, the Directors General have made certain orders providing:

General Order No. 18: "It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose."

General Order No. 18-A: "It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

General Order No. 18-B: "It is therefore ordered, that all suits against the Director General of Railroads as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose; or where the cause of action would but for federal control accrue against the initial carrier (as under section 20, paragraph 11, of the Act to Regulate Commerce), such action may be brought in the county or district where the property was received for transportation."

General Order No. 50: "It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise. * * *"

General Order No. 50-A by Director General Walker D. Hines is similar to General Order No. 50 promulgated by Director General William G. McAdoo.

In Nueces Valley Town-Site Co. v. McAdoo (D. C.) 257 Fed. 143, where it was sought by a suit in equity in the state court to enjoin the Director General from changing the location of certain of his employés, a motion to remand was denied; but Judge West, in his opinion in that case, points out that the suit was one to virtually take the control and operation of the railroad out of the hands of the Director General, and that it was not a suit which involved—

"any common carrier liability either of the owning corporation or of the Director General, but is a suit against the Director General directly involving his right to direct and control the operation of the property in his possession." 257 Fed. 148.

Section 10 of the Federal Control Act, above quoted, in part, provides:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted."

Unless an action such as the present was contemplated by Congress in making the foregoing provision—denying the carrier the right to transfer such an action to the federal court—virtually all effect must be denied it. Contrasting actions at law and suits in equity in the first part of the quoted portion of the section with actions, alone, in the latter part of the section, may perhaps show an intention that suits in equity, where a federal question is involved, could be removed, as heretofore. But, however that may be, by the language of the latter part of the section, an intent is clearly shown that actions at law, where merely the liquidation and settlement of the amount of a claim upon a common carrier liability are involved, and the control and use of railroad property by the Director General is not sought to be inter-

fered with, should, if started in the state court, not be removed, over the objection of the plaintiff, to the federal court upon the ground that they involve a federal question.

The motion to remand is granted.

In re LUBER et al.

(District Court, E. D. Pennsylvania. November 12, 1919.)

No. 6284

1. BANKRUPTCY \$\infty\$ 143(11)—RIGHTS OF TRUSTEE IN BANKRUPT'S PROPERTY.

On adjudication of bankruptcy, the title to fire policies issued to the bankrupts, together with any right of action thereon, vests, under Bankruptcy Act, \(\xi \) 70a (Comp. St. \(\xi \) 9654), in the trustee.

2. ATTORNEY AND CLIENT \$\igcred{\infty} 182(3)\ldots \text{Lien of attorney.}

Where an insured, who had suffered a loss, engaged an attorney to collect the proceeds of fire policies, delivering the policies to the attorney, the attorney has a lien on the policies for his compensation.

 Bankruptcy = 188(1), 310—Attorney's loss of lien on surrender of documents on bankruptcy.

Prior to bankruptcy, the bankrupts, who had suffered a loss, engaged an attorney to collect the proceeds of fire policies, delivering the policies to the attorney, and the attorney negotiated a settlement before institution of bankruptcy proceedings, but after institution of proceedings delivered the policies to the trustee, filing a claim for compensation as a general creditor. Held that, as the institution of bankruptcy proceedings did not invalidate the attorney's lien, and as he was not entitled to fees under Bankruptcy Act, § 64b (3), being Comp. St. § 9648, he waived any right to a prior lien on the policies and their proceeds, and can claim only as a general creditor.

In Bankruptcy. In the matter of Ethel Luber and Isaac Kruger, individually and trading as the Diamond Skirt Company, bankrupts. On certificate for review of an order denying priority to the claim of an attorney for the bankrupts. Order affirmed.

Abram Peterzell, of Philadelphia, Pa., for claimant. Julius C. Levi, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The petitioner is, and was prior to the bankruptcy proceedings, attorney for the bankrupt. He filed a claim for \$313.62, claimed to be due for costs paid and fees for services rendered, prior to bankruptcy, in connection with the adjustment of the claim of the bankrupts against fire insurance companies for loss sustained by the destruction of their stock and fixtures by fire. The petitioner filed a petition for leave to amend his proof of claim as a general creditor to a claim for priority.

The referee disallowed the claim upon the ground that there is nothing in the record to show that the services were not rendered in the interest of the bankrupts before bankruptcy was contemplated. The certificate does not contain any findings of fact by the referee, but from the minutes of the meeting at which the claim was presented and

heard, the facts may be stated as follows:

In November, 1918, the bankrupts sustained loss by fire of all their stock and fixtures. Shortly after the fire, the petitioner was retained by the bankrupts to present a claim against the insurance companies to recover the loss sustained. The bankrupts had insured their stock and fixtures in four different companies and they delivered to the petitioner the four policies of insurance. The petitioner thereupon gave notice to the insurance companies that the loss had occurred and filed an inventory of loss and damage sustained amounting to \$3,941.40. The petitioner then took up with the Adjustment Bureau the question of having the claim adjusted amicably, and, after numerous conferences, obtained from the General Adjustment Bureau representing all the fire insurance companies an offer of \$1,970.70. This offer was accepted by the bankrupts, the General Adjustment Bureau was notified of its acceptance, and the manager of the Bureau confirmed the acceptance of the offer by letter, and sent agreements to be signed by the bankrupts, stating that, after the agreements were signed, they would be attached to the proof of loss and payment made on that basis. The petitioner then submitted the offer to a meeting of creditors of the bankrupts, but was unable to obtain unanimous consent to the settlement necessary in order to distribute the fund pro rata. The petition in involuntary bankruptcy was then filed. The petitioner was in possession of the policies of insurance, which he turned over to the trustee at his request, in order that he might proceed to obtain the fund from the insurance companies. The fund thus obtained by the trustee is the only asset of the estate.

[1-3] It is clear that under the circumstances stated the claim for attorney's fees cannot be allowed under section 64b (3), Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. § 9648]). If allowable, it is only because of a lien upon the policies the petitioner had in his possession and turned over to the trustee in bankruptcy. The fund derived from the settlement did not come into the hands of the petitioner. In McKelvy's and Sterrett's Appeals, 108 Pa. 615, the rule in Pennsylvania was stated as follows:

"As a general rule an attorney has a lien for his services only upon what he has in his possession. If he has papers, he may retain them until paid for his services in regard to the particular case to which they belong. If he has money in his hands which he had collected he may deduct his fees in that particular collection and pay over the balance. Yet according to Dubois' Appeal, 2 Wright [Pa.] 231 [80 Am. Dec. 478], this right is one of defalcation rather than lien. The word 'lien' is sometimes used without due regard to its legal meaning, and we must be careful to avoid the consequences of such misapplication."

Upon the adjudication of bankruptcy, the title to the policies, together with any right of action upon them, vested under section 70a (Comp. St., § 9654) in the trustee. The lien which the petitioner had upon the papers of the bankrupt was a possessory lien, which gave him the right to retain possession until his charges were paid. The institution of bankruptcy proceedings did not in itself invalidate the attorney's lien upon the policies in his possession. In re Eurich's Ft. Hamilton Brewery (D. C.) 158 Fed. 644; Hartman v. Swiger (D. C.) 215 Fed. 986; Rogers v. Winsor, Fed. Cas. No. 12,023; Finance Co.

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v. Railway Co. (C. C.) 52 Fed. 526; Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589.

While the facts upon the record indicate that the petitioner's services were instrumental in producing the fund which formed the only asset of the bankrupt estate, it is apparent that he did not retain his lien through possession of the papers, but voluntarily turned them over to the trustee without asserting a lien and filed his claim in bankruptcy as a creditor of the bankrupts. If the papers had been surrendered to the trustee under an order of the bankruptcy court, the petitioner would have been entitled to have the order for the delivery, if made, subject to his lien. As he surrendered the policies without adverse proceedings against him and filed his claim as a general creditor, he must be held to have lost his possessory lien, and to be entitled to come in only upon his proof of claim as a general creditor.

The petition is dismissed, and the order disallowing the claim for

priority affirmed.

UNITED STATES V. PARSONS.

(District Court, D. Montana. October 16, 1919.)

No. 3453.

Poisons @=9-Harrison Narcotic Act; indictment.

An indictment charging that defendant, as a physician registered under Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), by means of the prescribed forms, obtained opium for his own personal use, held not to charge an offense under section 2 of the act, which, to be constitutional, must be construed as in aid of the revenue features of the act.

Criminal prosecution by the United States against Dr. W. B. Parsons. On demurrer to indictment. Demurrer sustained.

E. C. Day, U. S. Atty., of Helena, Mont. Chas. H. Hall, of Missoula, Mont., for defendant.

BOURQUIN, District Judge. The indictment charges that defendant is a physician duly registered in conformity to the Harrison Drug Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [West's Comp. Stats. §§ 6287g-6287q]); that with the prescribed order forms he "did wrongfully, unlawfully, and feloniously obtain * * * opium, * * * for the purpose and with the intent in him, the said Dr. W. B. Parsons, then and there having to personally take and consume" the same, "and not for the purpose of using" it "in the conduct of any lawful business * * or in the legitimate practice of his profession of physician." Demurrer (in effect), no offense charged.

The act is ostensibly a revenue measure, and within limits the courts must recognize it as such. At the same time any one with sense enough to be at large without a keeper knows the revenue feature, which possibly returns cents for dollars spent in administration, is but a fiction and device to enable Congress, otherwise disabled to suppress opium traffic and use, to hinder and obstruct such traffic and use so far as may

be done incidental to exercise of revenue power. It is one of many like and regrettable devices to evade constitutional limitations, to impose duties of the states upon the United States, and to vest the latter with nondelegated and reserved police power of the former. The limits are that, if in any such measure Congress incorporates arbitrary and unreasonable inhibitions, in that they are not calculated to promote the revenue features, but intended to promote some object not within congressional power, to that extent the statute is unconstitutional and void, and the courts are bound to so declare it. See U. S. v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493; Webb v. U. S., 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497.

Plaintiff's contention is that the act creates and denounces as a crime purchase of opium with the prescribed order forms for personal use; that this is found in section 2 (Comp. St. § 6287h), which provides:

"It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

The objections to this are: (1) The alleged offense is not clearly and definitely expressed in section 2, and intendment and construction should not be resorted to to characterize acts and persons as within a new statute and criminal, without reasonable notice from the language of the statute. See U. S. v. Carney (D. C.) 228 Fed. 165, and cases cited. (2) Congress having no power to directly prohibit the purchase of opium for personal use, it cannot indirectly do so by incorporation of such prohibition in a revenue measure, the prohibition having no reasonable relation to the revenue. (3) If the section is so intended, it is to that extent unconstitutional and void. (4) Capable of another reasonable construction, viz. to prohibit business or practice in disregard of the details of procedure prescribed by the act to protect the revenue, which is constitutional, this will be adopted, rather than the one contended for which is unconstitutional. Business and practice conforming to the prescribed formalities are lawful and legitimate; otherwise, unlawful and illegitimate. Section 2 must be construed to be in aid of the only object of the act that is constitutional, viz. to create and safeguard revenue. How the purchase herein alleged could in any wise affect the revenue is inconceivable.

Nothing in section 2 forbids purchases for any lawful use. Among such may be purchase to destroy, or to absorb the supply, or to prevent purchase by others, or to obstruct illegal traffic, all of which are lawful purposes, and none of which are within section 2, even as purchase for personal use is not.

Demurrer sustained.

UNITED STATES v. CHRISTOPHERSON et al.

(District Court, E. D. Missouri, E. D. November 19, 1919.)

No. 7025.

1. Indictment and information \$\sim 86(2)\$—Averment of venue.

The place of the commission of an alleged offense ought to be stated with such certainty that it may be seen that the court in which prosecution is brought had jurisdiction of the charge.

2. Indictment and information \Longrightarrow 86(2)—Sufficiency of averments of jurisdiction,

In a prosecution under Penal Code, §§ 35, 37 (Comp. St. §§ 10199, 10201), an indictment alleging that defendants, who were officers of a corporation with its chief place of business in St. Louis, Mo., knowingly, unlawfully, willfully, and feloniously made and presented for approval a false claim to an officer in the military service of the United States, held insufficient to charge that the offense was committed in the Eastern district of Missouri.

3. United States \$\infty 123\text{--Indictment as to false claims.}

In a prosecution under Penal Code, §§ 35, 37 (Comp. St. §§ 10199, 10201), an indictment which alleged that defendants, who were officers of a corporation, prepared a false claim and voucher, which they submitted to an officer of the United States army, held insufficient, not showing that the officer was clothed with authority to examine and approve the claim and youcher.

4. United States = 123-Indictment as to false claims.

In a prosecution under Penal Code, §§ 35, 37 (Comp. St. §§ 10199, 10201), where defendants were charged with feloniously presenting a false claim and voucher to a military officer, a count charging a false claim as to sale of coffee made to the United States held insufficient.

5. Indictment and information \$\infty\$76—Use of technical expressions.

Where defendants were indicted for presenting a false claim and voucher to an officer of the United States army, and it appeared that defendants in making the claim used technical expressions or trade terms, the indictment may follow such terms.

6. United States = 123-Indictment as to false claims.

In a prosecution under Penal Code, §§ 35. 37 (Comp. St. §§ 10199, 10201), where it was charged that defendants made a false claim for furnishing cans of black pepper, which purported to weigh one-quarter of a pound each, when in truth they did not contain one-quarter of a pound of such pepper, the indictment should clearly show the exact facts as they existed, and an indictment which merely alleged that the cans purported to weigh one-quarter of a pound, but did not contain that much pepper, is defective, though not fatally defective, because it is obvious that the can or container must have weighed something.

7. United States \$\infty 123\to False claims.

It is no defense to a prosecution under Penal Code, §§ 35, 37 (Comp. St. §§ 10199, 10201), for presenting false claims against the United States or conspiring to do so, etc., that the army officer to whom the false claim was presented certified that the articles set out in the voucher and claim had been received by him in the quality and quantity specified.

Louis Christopherson and Charles J. Bauer were indicted for violations of Penal Code, §§ 35, 37. On demurrer to indictment. Demurrer sustained.

Walter L. Hensley, U. S. Atty., and Eustace C. Wheeler, Asst. U. S. Atty., both of St. Louis, Mo.

Robert A. Holland, Jr., Thomas G. Rutledge, and J. M. Lashley, all of St. Louis, Mo., for defendants.

FARIS, District Judge. I. The indictment in this case contains five counts. In four of these counts it is sought to charge against the defendants violations of section 35 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1095 [Comp. St. § 10199]). In the fifth count the provisions of section 37 of the Penal Code (section 10201) are invoked, and it is sought in the latter count to charge these defendants with a conspiracy under section 37. To each count defendants demur, for reasons below discussed in their order.

[1,2] Imprimis it is urged against counts 1, 2, 3, and 4, by emendation to the demurrer, pursuant to permission, that it is in neither of said counts charged that the offense for which the defendants were indicted occurred in the Eastern division of the Eastern judicial district of Missouri. Apposite upon the latter contention as also upon another ground of demurrer hereinafter referred to, the language of the indictment attacked is as follows:

"That on or about the 31st day of December, 1917, one Louis Christopherson and Charles J. Bauer, who were then and at all times hereinafter mentioned the president and secretary respectively, of the St. Louis Coffee & Spice Mills, a corporation duly organized and existing under the laws of the state of Missouri, with its chief office and place of business in the city of St. Louis, Missouri, and in the division and district aforesaid, and within the jurisdiction of the court aforesaid, did unlawfully, knowingly, willfully, and feloniously make and present, and cause to be made and presented, for approval and payment to one Capt. A. R. Piper, who was then and there an officer in the military service of the United States, a certain false claim and public voucher upon and against the Quartermaster Department of the United States Army."

The above language is all that is contained in the first four counts in the indictment, or either of them, which pertains to the jurisdiction. It is obvious, I think, that while it is charged that the St. Louis Coffee & Spice Mills, a corporation, has its chief office and place of business in the division and district wherein the indictment in this case was found, it is not obvious, nor is it plainly charged, that the offense for which the defendants here stand indicted occurred in said division and district. It is fundamental, I think, that the indictment ought to allege that the crime or offense upon which the indictment is bottomed was committed within the jurisdiction of the court.

I do not think that the language quoted (which, as stated, is all that is contained in the indictment touching the jurisdiction) sufficiently charges that the alleged crime was committed within the jurisdiction of this court. Upon this point the following cases seem apposite: Barrett v. U. S., 169 U. S. 218, 18 Sup. Ct. 327, 42 L. Ed. 723; Rosencrans v. U. S., 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708; Post v. U. S., 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415.

The rule seems to be that the place of the commission of the offense alleged ought to be stated with such certainty that it may be seen that

the court has jurisdiction of the charge. 22 Cyc. 308. I am therefore constrained to conclude that this objection ought to be sustained.

[3] II. The second point of objection urged by the defendants against the indictment herein applies to each of the five counts contained in the indictment. This objection is bottomed upon the fact that the indictment does not aver that the alleged false voucher was presented to any officer of the United States clothed with authority to examine and approve such voucher for payment, nor does either of the five counts thereof so aver. I have set out above in the quoted excerpt from the indictment all that either of the counts thereof alleges touching such authority. It will be noted that the only charge made therein apposite to this point is that the alleged false voucher was—

"presented for approval and payment to one Capt. A. R. Piper, who was then and there an officer in the military service of the United States."

It will be observed that nothing whatever is averred in the indictment as to the authority of Capt. Piper to approve and pay, or approve for payment, the voucher in question; nor does such indictment set out the arm or branch of the service to which Capt. Piper belonged, so that judicial notice might eke out this omission. While the language of the statute merely makes it an offense to present a false voucher to any civil, military, or naval officer, yet obviously by this language is meant that the officer to whom such voucher shall be presented must be a civil, military, or naval officer, clothed with power to approve and pay the same. Otherwise the mere presentation of a false voucher to any officer of the United States, military, naval, or civil, would be a crime, whether such officer had authority to act in the premises or not. Such condition is unthinkable. I am of opinion that the ruled cases require that an apt allegation of such authority ought to be made in each of the five counts of the indictment. Bridgeman v. U. S., 140 Fed 577, 72 C. C. A. 145; U. S. v. Reichert (C. C.) 32 Fed. 142; U. S. v. Franklin (C. C.) 174 Fed. 161; U. S. v. Wallace (D. C.) 40 Fed. 144; U. S. v. Greene (D. C.) 115 Fed. 343.

While some of these cases were not prosecutions under either section 35 or 37 of the Penal Code, yet what is said in them obviously is apposite to the condition presented in the instant case. I therefore hold that an apt allegation that the officer, to whom the voucher in question was presented, was vested with authority to approve for payment, or to pay such voucher, was necessary, and that lacking such allegation the indictment as to each of the five counts thereof is in this behalf defective.

[4] III. It is specially objected that the fourth count of the indictment herein against the defendants is defective in that the voucher alleged to have been false, and upon which the fourth count of the indictment is bottomed, contains no false statement, but that upon the face of this voucher, which is set out in this count, and upon the face of the charges of falsity contained in this count, it appears that no such falsity existed. Specifically it is charged, in the body of the indictment, that the alleged falsity in the voucher presented consisted of the statement (presumably bottomed upon a contract which so required) that defendants had furnished to the United States "100,000 pounds of Santos B No. 1 grade coffee, as per itemized statement therein set

forth," while in truth and in fact the coffee so furnished by the defendants to the United States was not "Santos B No. 1 grade coffee as per itemized statement therein set forth."

This charge of falsity is bottomed upon the voucher, which voucher contains the whole of the false claim on which each of the four counts is bottomed. The only allegation contained in this voucher pertaining to coffee, reads as follows "Coffee, issue R. & G. 100,000 lbs. 14.25, 14250.00." Nothing seems clearer than that no charge of falsity in the voucher or falsity in the claim made, can be bottomed upon this written language of defendants, and, as stated, this language and this alone, forms the sole basis for the charge in the fourth count of the indictment. I think that the fourth count does not charge any crime against the defendants or either of them, and that as to this count the demurrer ought to be sustained. It is apparent that this defect cannot

be cured, even by the finding of another indictment.

[5] Other grounds of demurrer are urged against the fourth count of the indictment; but, without taking up space to consider them, I am of opinion that they have no merit. In brief, the chief of these latter contentions is that the words "Santos B No. 1 grade coffee" meant nothing without explanation, and the indictment contains no explanation. It is obvious that, if the defendants had used technical expressions or trade terms in making the false claim, nothing more ought to be required of the pleader than to follow in the indictment the terms used by defendants themselves. The case of U.S. v. Reichert (C.C.) 32 Fed. loc. cit. 147, does not impress me as being in point, although strenuously urged by defendants' learned counsel as being decisive. It follows that the latter contention ought to be overruled.

[6] IV. It is next contended that counts 1, 2, 3, and 5 of the indictment herein are defective, in that the language used in said counts, by which the alleged falsity of the claim made is sought to be established, shows upon its face that no falsity existed and no false claim was made. All four counts here under discussion had relation to the charge that defendants had made a false claim for furnishing cans of black ground pepper, which purported to weigh one-fourth of a pound each, when in truth and in fact such cans, so furnished, did not contain one-fourth of a pound each of such pepper. The language of the said four counts is similar, except as to quantity, and that of the third count of the indictment reads thus:

"Black ground pepper, as per itemized statement therein set forth, and particularly ninety-six thousand (96,000) cans of black ground pepper purporting to weight one-fourth (14) of a pound each."

The charging language in the indictment then is that these cans did not contain one-fourth of a pound each of black ground pepper. It is urged that, since the allegation is made that the defendants purported to furnish and did furnish cans of black ground pepper, weighing onefourth of a pound each, the charge that the amount of pepper furnished in such cans by the defendants did not weigh net one-fourth of a pound each is so obvious as not to constitute a false claim. This is so, it is urged, because the court will take judicial notice that the containing can had some weight. While this contention is highly technical, and while of itself it would not constitute a fatal defect, since the meaning of the pleader is obvious, I am yet of opinion that, if the defendants are again to be indicted, it will be well to correct this language so as to aptly charge the exact facts as they existed.

[7] I think there is no merit in the point that this prosecution cannot be maintained because the alleged false claim, or voucher, contained the certificate of Capt. Piper, that the articles set out in this voucher had been received by him "in the quality and quantity above specified."

It results, therefore, that the demurrer to the indictment herein, and to each of the five counts thereof, ought to be sustained for the reasons set forth in this memorandum. Let this be done.

UNITED STATES v. PAN-AMERICAN COMMISSION et al.

(District Court, S. D. New York. August 8, 1918.)

No. 14/79.

1. ACTION 6-6-GROUNDS FOR DISMISSAL: "MOOT CASE."

That equity case is "moot" in which no decree consistent with both pleadings and existing facts will benefit any party as against the other parties to the litigation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moot Case.]

2. EQUITY &=388—Motion to dismiss; presumption of truth of allegations of bill.

Where, prior to hearing of a motion to dismiss, complainant has put in all its evidence taken for final hearing and rested, allegations of the bill are to be taken as true on the motion only so far as sustained by complainant's evidence.

3. Equity \$388-Grounds for dismissal; moot case.

Where, prior to suit by the government to dissolve an alleged illegal combination in restraint of trade, the parties had become hostile toward each other, one party had repudiated the agreement, which had never been carried into effect for any illegal purpose, and it was afterward abrogated by mutual consent, the case held moot and dismissed.

In Equity. Suit by the United States against the Pan-American Commission and others. On motion to dismiss bill. Motion granted.

This cause having by consent of parties and consequent direction of the court been set for final hearing on July 29, 1918, the defendants Pan-American Commission, Wexler, and Dinkins moved on July 26th to dismiss the bill as to them on the ground that since January 2, 1918, "the question" sought to be raised in this litigation has become altogether "moot"; there being at present "no subject-matter upon which the judgment of this court can operate." On July 29th, this motion having been brought on to be heard, defendants Reguladora, Marin, and Ferraez joined therein. Defendant Martinez did not appear.

The moving papers on the motion consisted of the joint affidavit of Wexler and Dinkins, verified July 26th, and the exhibits thereto attached. To this evidence the plaintiff "demurred" in open court, and asked leave to offer the evidence taken in support of the bill, both for that purport, and to induce denial of motion. Leave so to do having been granted, plaintiff put in all the evidence taken by deposition, and most definition of motions.

in all the evidence taken by deposition, and rested.

The original moving defendants then "for convenience" took all their testimony and rested. The other defendants present (who had joined in the motion to dismiss) obtained adjournment of trial until August 16th; it being understood that, if bill be not by that date dismissed on motion, a day would then be set for the production of their evidence.

Joseph M. Cox, of Washington, D. C., and John E. Walker, of New York City, for the United States.

Levy Mayer, of Chicago, Ill., and Charles C. Deming, of New York

City, for defendants Pan-American Commission and others.

Nelson S. Spencer and Otto C. Wierum, Jr., both of New York City, for defendants Reguladora and others.

HOUGH, Circuit Judge. The decisions, most of them recent, filed by the Supreme Court, on motions to dismiss in form like the one at bar, or on the suggestion of the court itself, must be all harmonious (that is, rest on the same logical foundation), because that tribunal continually so treats them; yet I find great difficulty in finding the principle applicable to facts of course slightly differing from anything ruled on by the highest court.

In Hamburg-American Case, 239 U. S. 466, 36 Sup. Ct. 212, 60 L. Ed. 387, the general principle seems to be stated by quoting from Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, viz. that only when the "intervening event is owing to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand." Comparing this announcement with the exact point ruled in the Trans-Missouri Case, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, it seems plain enough that the mere dissolution of the defendant Pan-American Company would not render the case moot.

But evidently the moving papers in this case were drawn with an eye to the latter decision; it is here plainly averred that this dissolution partly resulted from and had "connection with the pending case," and Wexler and Dinkins do "allege a purpose not to enter again into a similar arrangement," all of which elements were lacking in the Trans-Missouri dissolution, and such significant omissions were (semble) made grounds of ruling by Peckham, J. (166 U. S. 308, 17 Sup. Ct. 546, 41 L. Ed. 1007), who finally justified retention of cause by saying that "the

relief granted should be adequate to the occasion."

What, then, is the vital distinction leading to differing results, in the Trans-Missouri and Hamburg-American decisions? Plainly the European War, which in the latter case not only made united action among the defendants impossible and unlawful, but in plain language made them hate each other. This was a cause beyond the control of any party. But it has also been laid down, supra, that the intervening cause which is to hold the hand of the court must be (if not exterior and superior force) the act of the plaintiff. But in Berry v. Davis, 242 U. S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441, and Directors, etc., v. Court, etc., 239 U. S. 633, 36 Sup. Ct. 220, 60 L. Ed. 478, as explained in same volume (239 U. S. at page 466, 36 Sup. Ct. 212, 60 L. Ed. 387), the intervening act was plainly that of defendants.

In the first case the action was in substance against the state of Iowa

to restrain enforcement of an allegedly unconstitutional statute; the suit was aborted by repeal of the statute. In the second the object was to restrain fulfillment of a sentence of death, on the ground of some illegality in judicial procedure, execution pendente lite made the case moot. Yet dissolution of a corporation is legal death, and the difference between executions and felo de se for moot purposes remains to be explained.

Doubtless, also, there is a real distinction between private litigation between nonofficial persons, and suits wherein (as put in plaintiff's brief) "the public interest is involved" (Trans-Missouri Case, 166 U. S. 309, 17 Sup. Ct. 546, 41 L. Ed. 1007); yet I fail to see how the public interest can be more directly involved than in the lawful and constitutional administration of the criminal law. Nor is it plain why the "public interest" of a state in such a matter as taxation is any the less to be regarded than that of the United States as representing its citizens in respect of trusts or combinations. But see California v. San Pablo, etc., R. R., 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747.

The conclusion to which I come, and came before I ever heard of this litigation, is that there is no verbal touchstone, no hard and fast

rule, by which motions such as this can be disposed of.

[1] That equity case is "moot" in which no decree consistent with both pleadings and existing facts will benefit any party as against the other parties to the litigation. The San Pablo Case, supra, illustrates this. There was on that appeal a real question as to taxing power generally, but there was no existing contest between the parties. In the Trans-Missouri Case, on the other hand, the name by which the cause is known was not even corporate; it was a partnership style under which the defendants of record had chosen to do business in an obnoxious way. Said defendants dropped the name, but continued the way.

The foregoing is not an attempt to define—that is, to state the limits of meaning for—the word "moot"; it is only an illustration of meaning, which seems sufficient for present purposes. Therefore I turn to the record to ascertain what can be done in this month of August,

1918, under a bill filed January 20, 1917.

[2] The fundamental position assumed by the United States at this point is that "for the purposes of this motion the combination alleged is to be regarded as illegal." This is usually true, where the only facts before the court are those in the moving and answering affidavits. But here plaintiff elected to put in all the evidence it had procured for the final hearing of July 29th, and to "rest." So far as the government is concerned, it has advanced its whole cause; and it would be a refinement of technicality to consider for any purpose the combination alleged as anything more than or different from what the plaintiff's own evidence shows it to be.

In considering this record, stuffed with irrevelancies and of almost unbelievable prolixity, I have not deemed as plaintiff's evidence anything not (in my opinion) fairly cross-examination on matters sworn to on direct. But I have considered it proper to regard as evidence anything relevant elicited by any moving defendant, when evidently

treating a deponent as his own witness, and have, of course, received the depositions and oral evidence offered by the Pan-American Com-

pany, Wexler, and Dinkins at the hearing.

[3] From the record, so regarded, I find that the Reguladora is not, and was not when bill filed, a voluntary association of farmers or planters, producing and wishing to sell through a common agency henequin or sisal; but it is and then was another name for, or means of enforcing the power of, Gen. Alvarado, the substantial dictator under Gen. Carranza of the state of Yucatan. To it all sisal growers are, and were at time of bill filed, compelled to deliver their product, receiving therefor or thereupon advances, which may or may not be the whole price they receive. Their ultimate net depends not so much on the terms of their contract as on elements political and fiscal, which cannot be called proven.

Before November, 1915, this forcible political or military monopoly did not exist, but the Reguladora did; it was one of the buyers of sisal, and by no means the most influential; it lacked the means to make advances to sisal growers—at all events in attractive amounts. In that month of November, 1915, two things happened: Gen. Alvarado by proclamation substantially required universal delivery of sisal to the Reguladora, and the agreement complained of was made between the then United States manager of the Reguladora, Rendon, and Wexler

and Dinkins as second parties.

For purposes of suit, that agreement speaks from February 16, 1916, when (and before any business had been done under it) it was modified. By the modified agreement, the Reguladora could borrow, on pledged sisal warehoused in this country, at 6 per cent. up to \$10,000,000 at any one time, and on each bale up to 60 per cent. of the market, but not over ³⁶/10 cents per pound—the lenders to get also \$1.12½ per bale commission, with a guaranteed minimum borrowing on 400,000 bales per annum for five years; this last in consideration of the promise to keep or get \$10,000,000, available if wanted, whether actually wanted or not.

But one loan was ever asked or made; this in summer of 1916. The Rendon who made the contract fell from favor, was superseded as United States manager, and remained in this country for reasons interestingly divulged in the evidence, but which seem to me quite immaterial. Then the Reguladora repudiated Rendon's action, and has in this suit denied throughout that any binding and lawful contract (under the law either of this country or Mexico) was ever made. Having ceased to do business with Wexler and Dinkins, or their company (the Pan-American), it also refused to pay the guaranteed minimum commission, but finally, and after this suit was begun, settled threatened litigation over the matter; Wexler & Dinkins getting, all told, about two years' commissions for their five years' contract, which was then formally abrogated.

The Reguladora has raised the price of sisal to about three times what it was when contract made, and the relations between the two sets of persons said to be conspirators by this bill is, and has been since before this action become distinctly bestile.

since before this action began, distinctly hostile.

Admittedly the only way of reaching this foreign monopoly is to find some private resident persons who have combined and confederated with it to raise the price of the monopolized articles in the United States, and committed in furtherance of that object an overt act in the United States. This at least is the argument now made under, the Wilson Tariff Act (Act Aug. 27, 1894, c. 349, 28 Stat. 509) as amended.

Let it be assumed that in 1915 there was a conspiracy—i. e., an agreement to work together—to raise prices. There is positive disproof that any such conspiracy, or any meeting of minds of any kind, now exists, or did exist when this bill was filed. Nor humanly speaking can there ever hereafter be any combination between these two sets of defendants.

It follows that any decree that could now be entered would and could only declare that several years ago certain parties made an unlawful contract, which one promptly repudiated, and which has been either fully executed or nullified, according to the contention accepted; and, having thus labeled a corpse, the decree would solemnly restrain every defendant from doing again what they have violently quarreled over, because it was once done. If this is not a moot point, the meaning of that ancient phrase has escaped me; to make decree would be exactly that "autopsy" which this court performed in the Prince Line litigation and was reproved for by the Supreme Court.

But, as indicated above, there is before me a mass of evidence, and I am assured it is the "government's case." The original moving defendants have also introduced their evidence. Without waiting for the testimony of the Reguladora party, there is enough at hand to test the intent of Wexler and Dinkins in doing what they confessedly did.

It is held as too plain for argument that the paper writings evidencing the ultimate contractual relations of the Reguladora (as represented by Rendon) and Wexler et al. do not per se prove any unlawful intent, or any intent other than one to make money by charging a reasonable rate for a large service.

Every pound of sisal was or might be burdened with a loan or charge that may be stated thus: 3.6 cents plus 112.5 cents, divided by 375 equals the Pan-American Company's maximum interest in every or any pound of that to which the alleged conspiracy relates. Having regard to sisal prices before or since Reguladora formation, such a charge or burden could not in its nature affect the price at all.

The claim of conspiracy rests on one of two propositions; at least I can discover no other even suggested by the government. Either any one who lends money to a monopolist becomes a partner or conspirator with him by the act of loan, or the conspiracy depends on some spiritual

or sympathetic emotion actuating the loan.

The first proposition is not, I apprehend, relied on, and is bad law anyhow. As to the second, it seems to me no more than a decent regard for citizens accused of wrongdoing to record my opinion that this record contains no evidence whatever of any sympathy with or desire to assist anybody who wished to raise the price of sisal in the United States over November, 1915, price, on the part of Messrs. Wexler and Dinkins.

It is natural to inquire, why and how did the price-raising efforts of the Reguladora succeed? Here, as was done by the Supreme Court, we can and must take judicial notice of the present war, and its more notorious results. Not much judicial notice need be taken, for the evidence shows the movement and use of manilla hemp, which is what really controls the price of sisal. The inferior fiber must find its own level, with reference to manilla prices and supply.

In my opinion the one thing (except Alvarado's iron hand) that has put up the price of sisal is the lack of shipping to move manilla and the enormous demand for manilla for marine rope. This is just as much the result of a war, of the war in which we are now engaged, as the situations recognized as "staying the hand of the court," in the

cases first above cited.

Motion granted, and bill dismissed without prejudice.

ROCKHILL, IRON & COAL CO. v. CITY OF TAUNTON.

(District Court, D. Massachusetts. September 8, 1919.)

No. 626.

MUNICIPAL CORPORATIONS \$\infty\$ 123—Manager of utility not "public officer."

Persons who manage business activities undertaken by municipalities for profit or for the accommodation of their citizens are not public officers, but business agents.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Officer.]

2. PRINCIPAL AND AGENT \$\sim 99\$—IMPLIED POWERS OF GENERAL AGENT.

Where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation.

The powers of a manager of a publicly owned lighting plant, appointed under a statute (St. Mass. 1914, c. 742) giving him general authority, subject to control of the mayor, are not greater than those of the manager of a privately owned plant.

 MUNICIPAL CORPORATIONS €==232—AUTHORITY OF MANAGER OF LIGHTING PLANT.

The manager of a municipal lighting plant held not to have authority to bind the city by a contract for the entire coal supply for the plant for $2\frac{1}{2}$ years ahead, and extending $1\frac{1}{2}$ years beyond his term of office.

5. MUNICIPAL CORPORATIONS \$\infty 248(3)\rightharpoonup Ratification of contract.

Where manager of municipal lighting plant contracted for purchase of coal supply for term long beyond his tenure of office, the mere acceptance by his successor of deliveries for some weeks after he became manager was not a ratification of the contract in the absence of corporate action by the city.

6. LICENSES €=16(1/2)-FOREIGN CORPORATION SELLING COAL.

A foreign corporation, which contracted to furnish coal to a Massachusetts city, the contract being signed on behalf of the city in Massachusetts, and afterwards by the company in another state, and which had not previously solicited orders in the state, held not subject to the Massachusetts statute (St. 1903, c. 484) requiring coal dealers to obtain licenses.

7. Sales \$\isim 384(1)\$—Breach of contract; seller's measure of damages.

Measure of damages for breach of contract by a city to buy the coal required by its lighting plant for a term from plaintiff at a stated price held to be the difference between the contract price of the coal refused and what plaintiff could have sold it for to others.

At Law. Action by the Rockhill Iron & Coal Company against the City of Taunton. Trial to court. Judgment for defendant.

Asa P. French, of Boston, Mass., and Louis Swig, of Taunton, Mass., for plaintiff.

Albert R. White, 2d, and John B. Tracy, both of Taunton, Mass., and Harvey H. Pratt, of Boston, Mass., for defendant.

MORTON, District Judge. In this action a jury was waived. It was submitted to the court upon an agreed statement of facts, and, in addition thereto, upon oral testimony bearing on three issues defined in the agreed statement, as to which issues the parties were unable to agree upon the facts. The case is to be decided upon the agreed statement and the court's findings of fact on the issues stated.

As to the first issue: The testimony of Mr. Livingston, treasurer of the plaintiff company, and of Dr. Golden, formerly manager for the defendant, and of Mr. Swig, who acted as counsel for Dr. Golden in the transaction, is in substantial agreement, and is not controverted. In accordance therewith, I find that the contract upon which this suit is brought was signed first by the defendant's manager in Massachusetts; that it was then sent in duplicate to the plaintiff's treasurer in Pennsylvania and was signed by him there; and that one copy of it was then returned to the defendant's manager, or to Mr. Swig for him.

As to the second issue: There is no evidence that the plaintiff, prior to the execution of said contract, ever solicited business by agents or representatives within this commonwealth, and I find that it had never done so.

The third issue relates to damages.

The contract sued on was made by Dr. Golden, as manager of the Taunton municipal lighting plant, in June, 1913. It was for the purchase of the entire coal supply for the lighting plant for the rest of that year, and for the full calendar years of 1914 and 1915. Dr. Golden's term of office expired on July 1, 1914, and he was not reappointed. A new manager came in on that date, and on August 7, 1914, he disaffirmed the contract as to the coal remaining to be delivered under it. Up to that date there had been delivered and paid for 7,866 tons, of which 2,336 tons were accepted and paid for after Dr. Golden ceased to be manager of the plant.

The defendant contends that the contract, by reason of the length of time which it covered, was not within Dr. Golden's authority to make, as manager of its lighting plant, and that it is not bound thereby. No express authority to enter into this contract was conferred upon Dr. Golden, either by the mayor or by the city council of Taunton, and the contract was never ratified by them. The power to make it was conferred, if at all, by the statute under which the defendant

operated its municipal lighting plant. St. Mass. 1914, c. 742. It provides (section 113) for the appointment, by the mayor, of a "manager" who—

"shall, under the direction and control of the mayor, * * * and subject to the provisions of this act, have full charge of the operation and management of the plant, the manufacture and distribution of gas or electricity, the purchase of supplies, the employment of agents and servants, the method, time, price, quantity and quality of the supply, the collection of bills, and the keeping of accounts."

[1, 2] The principal question is whether, under the statute referred to, and upon the facts agreed and found, it was impliedly within the power of the manager of a municipal lighting plant to make a single contract for the entire coal supply required by the plant for $2\frac{1}{2}$ years

ahead, and extending 1½ years beyond his term of office.

A "public officer," in the strict use of the words, cannot, generally speaking, bind the public beyond his term of office, without express authority to do so; but there is no such limitation on ordinary agents. Manley v. Scott, 108 Minn. 142, 121 N. W. 628, 29 L. R. A. (N. S.) 652. Persons who manage business activities undertaken by municipalities for profit, or for the accommodation of their citizens, are not public officers, but business agents. Dillon on Municipal Corporations (5th Ed.) §§ 39, 109, 131, 1303; Abbott, Municipal Corporations, § 257. Their powers, where not defined or limited by statute, or by the terms of appointment, are determined by the ordinary principles of agency. So far as such powers rest on implication, they depend largely on the character of the business intrusted to the agents, and presumably include all that may be reasonably necessary for the full accomplishment of that business, in the ordinary way, under such conditions as ordinarily arise.

"The general rule is, 'where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation." Cullen, J., Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 329, 58 N. E. 44, 45, quoting Huffcut on Agency, p. 112, § 107.

"The question in this case is whether this authorized McCoy to make a contract binding upon the defendant for the issue of a policy of insurance. In determining this question the prevailing usage in transacting such business must be regarded; as it is an elementary principle that the delegation of an authority to transact any business includes an authority to transact it in the usual way, and to do the acts usual in its accomplishment." Grover, J., Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402, 406 (10 Am. Rep. 495).

"Municipal officers, acting under general authority, cannot bind the municipality for a longer time than is reasonable in view of the nature of the subject matter." Munson, J., Barre v. Perry, 82 Vt. 301, 309, 73 Atl. 574, 577.

See, too, Sheldon v. Fox, 16 L. R. A. 257, note.

[3] The general powers of the manager of a publicly owned plant under the statute referred to (St. Mass. 1914, c. 742) are certainly not greater than those of the manager (under whatever name designated, treasurer, agent, etc.) of a privately owned one. The city might rightly assume that, in designating a manager thereunder, it authorized him to run its lighting plant in the ordinary business way. Persons dealing with him were bound to take notice of this limitation on his authority.

Washington Gaslight Co. v. Lansden, 172 U. S. 534, 547, 19 Sup. Ct.

296, 43 L. Ed. 543; Mechem on Agency (2d Ed.) § 980.

[4] The facts before the court contain nothing from which it can be inferred that contracts as long as this are ordinarily made for lighting plants; and the contract does not relate to something, as to which the court can see that a long term was necessary or advantageous, as, for instance, to real estate, or to arrangements for the supply or purchase of water, light, or other service, involving an extensive plant or preparation. See McQuillin on Municipal Corporations, § 1253; Columbus Water Co. v. Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354, and note. No circumstances appear from which it can be seen that the contract was necessary or advantageous to the defendant, or might fairly be so considered.

The burden being upon the plaintiff to establish its case, unless the court can say, as a matter of common knowledge, that the contract was "reasonable in view of the nature of the subject-matter" (Munson, J., supra), the plaintiff must fail. The precise extent to which courts take judicial notice of the way in which any particular kind of business is usually carried on, is not easy to state. Obviously they cannot go beyond the point to which usage is so generally established and well recognized as not to be open to fair difference of opinion. It would hardly be denied, for instance, that the manager of a lighting plant had presumptive authority to contract for six months' coal supply; but it would hardly be contended that he had such authority to contract for six years' supply. As was said in Dunton v. Derby Desk

Co., the powers of a general manager "may be a question of fact"

(Lothrop, J., 186 Mass. 37, 71 N. E. 92); but they are not unlimited. Upon all the evidence the contract in question does not appear to have been within the actual or apparent powers of the defendant's manager. If I took judicial notice of what I suppose to be the usual business practice in such matters, I should hold that the contract was clearly outside it, and that, for the manager of a public plant to buy at a single time, and by a single contract, and from a single seller, without any emergency, and without calling for public bids, all the coal needed by the plant for a period of $2\frac{1}{2}$ years, extending $1\frac{1}{2}$ years beyond his own term of office, was a transaction so far out of the ordinary course of business that it did not lie within his actual or implied authority. Good business management requires an electric plant to make provisions for a reasonable time in advance for its coal supply, but contracts going beyond such a period become essentially and unnecessarily speculative.

[5] Upon the facts, agreed and found, with such inferences as may properly be drawn, it is not established that the contract sued upon was actually or impliedly authorized by the defendant. The mere acceptance by the new manager of deliveries under the contract

See Fay v. Noble, 12 Cush. (Mass.) 1, 6-7; England v. Dearborn, 141 Mass.
 590, 6 N. E. 837; Merchants' Bank v. Citizens' Gaslight Co., 159 Mass.
 305, 34 N. E. 1083, 38 Am. St. Rep. 453; Dunton v. Derby Desk Co., 186 Mass.
 317, 71 N. E. 91; Millikin v. Edgar County, 142 Ill.
 328, 32 N. E. 493, 18 L. R. A. 447.

for a few weeks after he came into office, unaccompanied by corporate action on the part of the defendant, was not a ratification of the contract for the balance of the term.²

I therefore, on all the facts and evidence, find and rule that the defendant rightfully terminated the contract on August 7, 1914, and is not liable for its refusal to accept subsequent deliveries thereunder.

[6] This is sufficient to dispose of the case, but, in view of the possibility of an appeal, further findings and rulings ought perhaps to be made covering the entire case. I rule that the statute of 1903 (St. Mass. 1903, c. 484) requiring coal dealers to take licenses did not apply to the plaintiff, and that the contract in question was not illegal or invalid by reason of the plaintiff's noncompliance with said statute.

[7] As to the measure of damages, the plaintiff has introduced evidence showing what its profits would have been on the undelivered portion of the contract. The amount of coal on which this computation is based is the amount actually used by the plant during the remainder of the period covered by the contract. The measure of damages is not the profit which the plaintiff would have made upon the undelivered portion of the coal, but the difference between the contract price and what the plaintiff could have sold the coal for to other persons. For aught that appears, the plaintiff may have resuld to other persons all the coal contracted for and not taken by the defendant, at a price equal to that specified in the contract. If so, it suffered no loss.

On all the facts I find and rule that the plaintiff, if entitled to recover, is entitled to recover only nominal damages. I give such of the requests as are consistent with this memorandum; the others I refuse. Judgment for defendant.

2 The evidence as to ratification appears rather incomplete; but after it became apparent to me that the point would have to be considered, the parties were so informed by the court, and were afforded an opportunity to submit further testimony or agreed facts bearing upon it. After considering the matter for some time, neither desired to do so. A large part of the delay in decision was so caused.

SEAVER v. HINES, Director General of Railroads.

(District Court, D. New Hampshire. November 1, 1919.)
No. 274.

COURTS =274—FEDERAL COURT; JUBISDICTION OF ACTION AGAINST DIBECTOR GENERAL.

Neither the Federal Control Act (Comp. St. 1918, §§ 3115¾a-3115¾p), nor any executive regulation thereunder enlarges the jurisdiction of a federal court, so as to give it jurisdiction of an action against the Director General on a cause arising in the operation of a railroad entirely foreign to the district, by service on a federal agent employed in operation of a different road within the district.

At Law. Action by George H. Seaver against W. D. Hines, Director General of Railroads. On motion to dismiss. Motion granted.

Robert W. Upton and John M. Stark, both of Concord, N. H., for plaintiff.

Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., for

defendant.

ALDRICH, District Judge. In this case there is a plea and a motion to dismiss on the ground of lack of jurisdiction. The motion was granted, and the question raised is being considered upon rehearing. The plea and motion are grounded upon the idea that there was no proper service.

The plaintiff relies upon a cause of action alleged to have been created in the government operation of the Rutland Railroad, a railroad foreign to the district of New Hampshire, and at a place outside

this district, namely, Malone, in the state of New York.

In the briefs counsel have cited the cases of Wainwright v. Pennsylvania Railroad (D. C.) 253 Fed. 459, Freisen v. Chicago, R. I. & P. Ry. Co. (D. C.) 254 Fed. 875, and Rutherford v. Union Pacific Railroad (D. C.) 254 Fed. 880.

But it must be observed that the first two of these cases deal with the question as to the authority of the Director General of Railroads to order that all suits must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, it being a controverted question whether the Director General of Railroads could limit rights or remedies existing prior to the act of Congress (Act March 21, 1918, c. 25, 40 Stat. 451 [Comp. St. 1918, §§ 31153/4a-31153/4p]) providing for federal control of railroads. But we have no occasion to deal with any such question here, because the plaintiff, it must be assumed, resided within this district at the time of the cause of action, and at the time the suit was brought. And the third case cited, that of Rutherford v. Union Pacific Railroad, relates to the authority of the order or regulation which requires all suits to be brought against the Director General, but no such question as that is raised here, and therefore we have no occasion to consider it.

If I understand the position of the plaintiff correctly, the question here is whether the government management and control of the railroads of the country as a war measure, and under the war powers of Congress, so far consolidated or merged the various railroads of the United States into one system as to create a situation which would make it reasonable and proper to assume jurisdiction over a cause of action, and a railroad management, foreign to the district where the suit is sought to be prosecuted, under a kind of service which would not have been effective to that end prior to the assumption of federal control.

It is understood that prior to federal control jurisdiction might be created in a given district over a foreign corporation, and an outside cause of action, through service based upon an attachment of the property of the railroad, or through trustee process, within the jurisdiction. It does not seem at all apparent, or even probable, that the government, through the act of Congress or the orders of the Director General, intended to enlarge the modes of service or the rights in respect to the venue for civil procedure. Indeed, in the act of Congress (section 10) it is provided that actions at law or suits in equity may be brought and judgment rendered "as now provided by law." And likewise the order of the Director General (50a) provides that:

"Service of process in any action, suit, or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company."

Thus it would seem that in this respect the idea was to leave the rights, remedies, and the methods of procedure to go along according to the general course of law and equity existing prior to federal control, with the limitations that no process shall be levied against property under federal control (section 10, Act of Gongress March 21, 1918), and that suits shall be instituted against the Director General.

But the position is taken by the plaintiff that, since the federal control of railroad transportation systems as effectuated by the orders of the Director General, causes of action are not prosecuted against the individual carriers, but against the Director General as the representa-

tive of all the systems operated by the government.

This position is true in a fictional sense, but not in any general or substantial sense. It is only to be accepted in an exceptional sense. The order requiring suits to be brought against the Director General, and this without regard to the question whether the Director General had authority to make it, was based upon the idea that, while government control exists as a war measure, the government is, in a certain sense, the owner of funds resulting from the operation of the lines, or at least in control of them, to be used to pay operating expenses and liabilities, subject ultimately to reasonable adjustment as between the government and the owners, and is responsible for the management of the various railroads, and therefore, as a matter of convenience and of reasonable precaution, might so far regulate court procedure as to require actions to be brought against the Director General. But this, so far as concerns

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procedure, aside from the name, is, in a very large sense, nominal, and it is against reason to contend that the purpose of such an order was, in a substantial sense, to consolidate and merge the various individual interests, or, in other words, the various individual railroads of the country into a single system, to the end that new remedies should be had and jurisdiction created upon a kind of service not theretofore known in legal or equitable procedure.

The service in this case was upon the "ticket agent of the withinnamed defendant at the station of the Boston & Maine Railroad at Concord, New Hampshire," and on "William R. Mooney, division superintendent of the Southern division of the Boston & Maine Railroad, one of the railroads now under the operation and control of the within-named defendant and agent of the within-named defendant having charge of the property of the within-named defendant in said state

and district of New Hampshire."

All the agencies and the properties referred to in the return upon the writ are in every substantial and essential sense, so far as judicial procedure goes, the agencies and properties of the Boston & Maine Railroad, because there has been no substantial or permanent taking over of the properties, and as such they are quite independent of the Rutland Railroad of Vermont and New York, unless affected by the act of Congress, the order of the President, or the orders and regulations of the Director General.

It would hardly be contended, it is supposed, that such a service prior to government control of the railroads would have been even a hint in the direction of creating jurisdiction over the rights of a foreign railroad like that of the Rutland, and I do not think there is anything in the act of Congress, or the executive orders in question, or in the character of the management and control which could reasonably be accepted as fairly intended to enlarge the modes of procedure, or to increase rights and remedies in respect to jurisdiction beyond those common to law and equity proceedings existing prior to government

management based upon war necessity.

While as a matter of form, and as a matter of convenience and precaution, it may, perhaps, be well enough to assume that the requirement that all proceedings against the railroads under government control shall, in name, be drawn against the Director General, is a reasonable one, it would be quite another and a different thing to say that, by virtue of this formal and measurably fictional requirement, all individual railroads have lost their identity, and that their interests have been so far consolidated and merged into a system with a single entity, that service, for instance, upon a station agent of a railroad in the extreme Eastern district of Maine would be service upon a railroad in the extreme Western district of California.

Viewing the service as inadequate, it follows that the case must be dismissed.

Dismissed.

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In re DUANE.

(District Court, D. Massachusetts. September 16, 1919.)

No. 2462.

 Removal of causes \$\infty\$-79(11)—Time for application; actions against United States officers.

Under Judicial Code, § 33, as amended by Act Aug. 23, 1916 (Comp. St. § 1015), providing for removal into a federal court by certiorari, "at any time before trial or final hearing thereof," of a prosecution in a state court against any officer of a court of the United States for or on account of any act done under the color of his office, a petition for such removal is seasonable, although filed after judgment in the state court, where an appeal has been taken, which under the state law vacates such judgment and removes the case into the appellate court for a retrial.

2. Removal of causes ⇔≈85½, New, vol. 9A Key-No. Series—Actions against United States officers; procedure.

On petition of a federal officer for a writ of certiorari, under Judicial Code, § 33, as amended by Act Aug. 23, 1916 (Comp. St. § 1015), to remove a criminal prosecution against him from a state court, where the allegations of the petition are denied by the state authorities, the better practice is to hear and determine the jurisdictional question in a preliminary way before granting the writ, unless it appears to the court that an emergency exists requiring its immediate issuance.

At Law. Petition by Patrick J. Duane for writ of certiorari. Held for preliminary hearing.

Patrick J. Duane, of Waltham, Mass., pro se.

MORTON, District Judge. [1] The district court of the state had jurisdiction of the complaint for disturbing the peace (Rev. Laws Mass. c. 160, § 27); but its decision was vacated by the appeal, the effect of which was, in substance, to remove the entire controversy into the superior court for retrial.

This application for certiorari—it is in effect a removal proceeding, quite different from the common-law writ of certiorari—is made under section 33 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1097), as amended by Act Aug. 23, 1916, c. 399, 39 Stats. 532 (U. S. Compiled Stats. § 1015). It is not controverted that the petitioner was an "officer of the courts of the United States," within the meaning of the Act. It has been several times decided, under language like this section, that a petition for removal was not too late if filed after a disagreement of the jury, or after a judgment had been rendered in the trial court, which had been vacated on appeal, and the case sent back for retrial. That is substantially the situation of the present controversy. There is at present no judgment or sentence outstanding

¹ See Dart v. Walker, 4 Daly (N. Y.) 188; Clark v. D. & H. Canal Co., 11 R. I. 36; Burson et al. v. Nat. Park Bank, 40 Ind. 173, 13 Am. Rep. 285; Rosenfield v. J. E. Condict Co., 44 Tex. 464; Brayley v. Hedges, 53 Iowa, 582, 5 N. W. 748. Unless the words "final trial or hearing" in the act of 1866 be given a different meaning from the words "trial or final hearing" in the act of 1867, Insurance Co. v. Dunn, 19 Wall. 214, 226, 22 L. Ed. 68, is conclusive for the petitioner.

against the petitioner. I therefore rule that the petition for certiorari is seasonably filed.

[2] On the allegations of the petition, the petitioner is entitled to the writ; but those statements are disputed by the state authorities, who contend that the petitioner was not acting as a federal officer. An issue of fact is thus presented, and on the determination of it depends the petitioner's right to the writ for which he prays.

There appears to be considerable uncertainty both as to substantive rights and proper practice under this statute. The petitioner's first contention, viz. that the mere filing of a petition for removal good on its face brings the case within the jurisdiction of this court, has been

held to be unsound:

"To my mind it is a condition precedent to the right of the federal court to try the case on its merits that it be made to appear that the essential allegations of the petition for removal are true." McDowell, J., in State of Virginia v. Felts (C. C.) 133 Fed. 85, 89.

The petitioner next contends that upon the filing of a proper petition the writ should issue, and the case be taken from the state court without any hearing on the truth of the allegations in the petition. This would be analogous to the practice in the removal of civil causes for diversity of citizenship; and cases are conceivable in which it would be necessary for the federal court to act at once in order to protect a petitioner's rights. If the procedure in civil cases be followed, the state could come in and move to remand; and on that motion the facts would be heard. There is, however, an important distinction between civil cases and criminal ones, to which the state itself is a party. A state ought not to be interfered with by the federal courts in the enforcement of its criminal law, unless such action is unavoidable in the protection of established rights.

It seems to me that the best practice will be for this court, upon the filing of such a petition as is here presented, to the granting of which objection is seasonably made by the state authorities, to proceed to hear and determine the jurisdictional facts as far as necessary for the purpose of determining whether the case probably ought to be removed from the state court, unless the emergency appears so great that, in order to protect the petitioner's rights, the writ should issue at once. Which course should be pursued in a given case is, I think, a matter for the discretion of the court to which the application for certiorari is made.

In the present case the petitioner is not in confinement and is suffering no hardship from delay. I will therefore hear the issues of fact presented by the answer of the state authorities, for the purpose of determining in a preliminary way whether the petitioner probably has a good case for removal. If that question be determined in his favor, the writ will thereupon issue, and the trial will take place in this court; if otherwise, the petition will be denied although without prejudice to the right to bring another, and the case left in the state court for trial.

TALBOTT v. HILL et al.

(Court of Appeals of District of Columbia. Submitted October 9, 1919. Decided November 3, 1919.)

No. 3243.

1. Mortgages €=345-Sale under power; limitations.

Code of Law, § 1265, providing that no action shall be brought for recovery of lands after 15 years from accrual of right to maintain it, does not apply to exercise of power of sale conferred on trustee by deed of trust.

- 2. Limitation of actions € 165—Statute bars remedy, but not debt.

 A statute of limitations is a bar to the remedy, and does not extinguish or impair the obligation of the debtor.
- 3. Equity \$\infty 66-Seeking equity without doing equity.

Even if the statute of limitations applied to and barred exercise of power of sale under deed of trust, yet, the debt not being extinguished by the statute, the landowner's suit to have the land freed from the lien, without paying or offering to pay the debt, would be open to the objection that he who seeks equity must do equity.

4. LIMITATION OF ACTIONS \$\instruction 165\to Bar not available as cause of action.

The statute of limitations is available only as a defense, and never as a cause of action; and so a suit to cancel lien of deed of trust cannot be based on the ground that exercise of the power of sale under the trust deed was barred by statute.

Appeal from the Supreme Court of the District of Columbia.

Suit by Henry Maurice Talbott against William C. Hill, surviving trustee, and another. Bill dismissed, and plaintiff appeals. Affirmed.

E. L. Wilson, of Washington, D. C., for appellant.

W. C. Clephane, J. W. Latimer, and Gilbert L. Hall, all of Washington, D. C., for appellees.

SMYTH, Chief Justice. From a decree dismissing his bill in equity on the motion of the defendants, Hill and Claytor, Talbott appeals. According to the allegations of the bill, Talbott is the owner of two parcels of land in the District of Columbia. In 1896 one Bradley, who then owned the property, conveyed it to Hill and Deeble by deed of trust, which was duly recorded, to secure the payment of \$8,000, represented by two notes, each payable in four years after date, with interest. The deed gave the usual power of sale in case of default. Deeble is dead, and Hill is the surviving trustee. By reason of the lapse of more than 15 years since the date of the deed, it is asserted that the right to enforce the same by sale of the property is barred by the statute of limitations, and that the deed constitutes a cloud upon the owner's title which he seeks to have removed by this proceeding. Recently the representative of the holder of the notes, Helen A. Claytor, announced her purpose to order the surviving trustee to sell the real estate under the provisions of the deed for the purpose of paying the The sale, it is said, would inflict serious loss, not only upon the holder of the notes, but upon Talbott, who would thereby be subject to expense; that in any event the validity of the deed of trust is so greatly in doubt that no effective sale could be made otherwise than under a decree of court; and that because of the inclusion of a third parcel of land in the trust a situation has arisen requiring the marshaling of securities. Plaintiff prays, in the alternative, that the deed may be declared inoperative because of the running of the statute, and that Hill be enjoined from attempting to sell, and Claytor from ordering a sale, under the trust deed, or that the court, if it deems that the equities of the case require it, shall foreclose the trust deed and direct that the property be sold by a trustee appointed by the court. There is also a prayer for general relief.

The court entered a decree dismissing the bill unless the plaintiff obtained leave within a time limited to file an amended and supplemental bill. This he did not do, and the decree of dismissal was made final. After it had been entered, plaintiff filed a "proposed amended and supplemental bill," accompanied by a petition for rehearing. The petition was denied, and leave to file the bill refused. The supplemental bill contained no new statement of material facts, except that the interest on the notes secured by the deed of trust was paid by the plaintiff up to July 2, 1918, about a month before the bill was filed, which

was on August 5th of that year.

[1] There are 13 assignments of error, but appellant concedes that the controlling question is as to "whether the deed of trust mentioned in these proceedings is barred by lapse of time." In his brief he admits that the payment of the interest upon the notes kept them alive as simple debts, but denies that this had the effect of tolling the statute of limitations with respect to the trust deed. He contends that the trust is barred, and hence that his title is sound. In other words, he bottoms his right to have the deed declared invalid and unenforceable upon the statute of limitations. But has that statute any application to this case? It says that "no action shall be brought for the recovery * * * after fifteen years from the time the right to maintain such action shall have accrued. * * * " Code of Law, § 1265. The action there referred to "is the form of a suit given by law for the recovery of that which is one's due." Coke on Littleton, 285, 285a. It "does not apply to a power of sale contained in a mortgage or deed of trust, when the deed is foreclosed, not in an action brought for that purpose, but simply by the mortgagee or trustee executing the power of sale." Cone v. Hyatt, 132 N. C. 810, 812, 44 S. E. 678. See, also, Menzel v. Hinton, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647; Stevens v. Osgood, 18 S. D. 247, 249, 100 N. W. 161; Kammann v. Barton, 26 S. D. 371, 373, 128 N. W. 329; Williams v. Armistead, 41 Tex. Civ. App. 35, 90 S. W. 925; Roberts v. True, 7 Cal. App. 379, 381, 94 Pac. 392; Rowe v. Mulvane, 25 Colo. App. 502, 139 Pac. 1041.

Hill and Claytor have brought no action. Therefore there is no action for the statute to operate against. They are simply seeking to exercise the power conferred upon the trustee, Hill, by the deed of trust. We do not think the statute of limitations controls them in any respect. To say that it did would be to read into it something

which the Legislature did not place there.

[2, 3] Moreover, the statute of limitations, as construed by this

court (Hall v. District of Columbia, 47 App. D. C. 552), "is a statute of repose, and not one of payment or cancellation. It is a bar to the remedy only, and does not extinguish or even impair the obligation of the debtor." Consequently, if the statute of limitations did prohibit the appellees from acting, it would still leave the debt unsatisfied. The question would then arise as to whether or not Talbott could invoke the aid of equity for the purpose of discharging the security of his creditor while the debt remains unpaid. It is a maxim of equity that he who seeks equity must do equity. Knox v. Gaddis, 1 App. D. C. 341; Buchanan v. Macfarland, 31 App. D. C. 6, 21; Thomas v. Brownsville, etc., R. R. Co., 109 U. S. 522, 526, 3 Sup. Ct. 315, 27 L. Ed. 1018; Neblett v. Macfarland, 92 U. S. 101, 103, 23 L. Ed. 471. In the Thomas Case the company gave a mortgage to secure the payment of bonds which it had issued to certain persons who had contracted to build its road. The bonds not having been paid when they became due foreclosure was commenced. A defense was made on the ground that the contract on account of which the bonds were issued was fraudulent and void, foreclosure was resisted, and the court was asked to set aside the mortgage. It appeared that those claiming under the mortgage had done a certain amount of construction work for the company. The court, applying the principle that he who seeks the aid of equity must do equity, held that the company was bound to pay the value of the work done before it could have the relief prayed. To the same effect are Driver, Adm'r, v. Hudspeth, 16 Ala. 348; Merriam v. Goodlett et al., 36 Neb. 384, 54 N. W. 686; Booth et al. v. Hoskins, 75 Cal. 271, 17 Pac. 225; Gage v. Riverside Trust Co. (C. C.) 86 Fed. 984. Talbott, in praying the court to free his property from the lien, without first paying or offering to pay the debt justly due, is certainly not doing equity, but rather seeking its aid in the perpetration of a wrong. Manifestly his request must be denied.

[4] Another objection to the position taken by appellant is that the statute of limitations "is available only as a defense, and can never be asserted as a cause of action on behalf of the debtor, or for conferring upon him a right of action." Hall v. District of Columbia, supra. It may be used as a shield, but not as a sword. Cassell v. Lowry, 164 Ind. 1, 72 N. E. 640, is quite apposite. Lowry brought action to quiet his title to two lots, alleging that he was the owner of them in fee, and that the defendant claimed an adverse interest therein, which claim, he said, was unfounded and a cloud on his title. Cassell answered that he had conveyed the property to Lowry, who had paid all the purchase money except \$100, for which he gave his note, and that he (Cassell) reserved his vendor's lien against the property, but took no other security. This lien constituted the adverse interest which the plaintiff said was a cloud on his title and which he sought to have removed. The note was not paid when it became due. No action was brought on it before the statute of limitations had run against the lien, and plaintiff insisted that under those circumstances he was entitled to have the lien removed. The court held that, since he based his right to recover upon the proposition that the statute of limitations robbed the lien of its effectiveness, he could not succeed, as the statute never confers a right of action up-

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on any one. Talbott's whole claim is based on the assumption that the statute of limitations prevents enforcement of the trust deed; hence he rests his right to recover on the statute, but this, as we have

just seen, he may not do.

The deed of trust covers three lots. Only two are affected by the suit. Talbott claims that there ought to be a marshaling of assets, for the purpose of determining what proportion of the debt the two lots should bear. He says that one note is secured on each lot, "but inartificially." Whether done inartificially or otherwise, matters not so long as it is done. Each lot must respond for the note fastened on it, and for no more. There is no merit in this contention.

We have carefully considered the many decisions cited by appellant in support of the different points relied upon by him, but find none that militates in any wise against the views we have here expressed.

The decision of the lower court is right, and is affirmed, with costs.

Affirmed.

ELLISON v. SPLAIN, U. S. Marshal.

(Court of Appeals of District of Columbia. Submitted October 6, 1919. Decided November 3, 1919.)

No. 3258.

1. Habeas corpus €==85(2), 92(2)—Issue in extradition case; burden of proof.

The only issue, on application for habeas corpus by one arrested on extradition papers in proper form, and so making a prima facie case, is whether accused was in the demanding state when the crime is alleged to have been committed; and on this accused has the burden of proof, and the evidence is to be regarded liberally in favor of the demanding state.

- 2. Habeas corpus \$\iiint \text{85(2)}\$—Sufficiency of evidence in extradition case. Evidence, on application for habeas corpus by one arrested on extradition papers, held sufficient to sustain finding against accused, on the issue of his having been in the demanding state when the crime is alleged to have been committed.
- 3. Habeas corpus &=113(12)—Appeal; review of finding of fact.

 The finding on hearing of application for habeas corpus by one ar-

The finding on hearing of application for habeas corpus by one arrested on extradition papers, on the issue of his having been in the demanding state when the crime is alleged to have been committed, must be accepted on appeal, unless clearly and manifestly wrong.

Appeal from the Supreme Court of the District of Columbia. Habeas corpus proceedings by Edward Ellison against Maurice Splain, United States Marshal in and for the District of Columbia. Application denied, and petitioner appeals. Affirmed.

Henry E. Davis and J. B. Stein, both of Washington, D. C., for appellant.

J. E. Laskey, U. S. Atty., and Morgan H. Beach, Asst. U. S. Atty., both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Ellison was arrested upon a warrant issued out of the Supreme Court of the District of Columbia upon a

requisition of the Governor of Virginia based on an indictment by the grand jurors of the county of Alexandria, Va., charging that he on September 21, 1916, broke into a certain railroad car with intent to steal goods therein, and that he stole and carried away three cases of shoes, the property of the railway company. Ellison claimed that he was not in Virginia on September 21, 1916; that he did not on that day, or at any other time, commit any offense in Virginia as charged against him; and that he was not a fugitive from the justice of Virginia. He applied to the Supreme Court of the District for a writ of habeas corpus to test the right of the marshal to hold him for the purpose of being delivered to the demanding state. From a judgment denying his application, he appeals.

[1] The Supreme Court of the United States, speaking through Mr. Justice Clarke, in a similar case recently decided, said, after reviewing many prior holdings of the court upon the subject that—

"When the extradition papers required by the statute are in the proper form, the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed." Biddinger v. Commissioner of Police, 245 U. S. 128, 135, 38 Sup. Ct. 41, 48 (62 L. Ed. 193).

Where, then, the requisition papers are regular, they constitute prima facie evidence that the accused was in the state requesting his return at the time alleged and the burden of showing the contrary is on him, for it is said that the only evidence admissible is such as tends to show he was not in the state at that time. Not only that, but it has been ruled by the same court in Hyatt v. State of New York, 188 U. S. 691, 711, 23 Sup. Ct. 456, 458 (47 L. Ed. 657), that the prima facie case must stand unless the accused overturns it "by admissions, * * * or by other conclusive evidence. * * * " To the same effect are Hayes v. Palmer, 21 App. D. C. 450, 459.

It is not denied in this court that the extradition papers are in proper form, and therefore the only question which we have to determine is whether or not the evidence is sufficient to sustain the finding of the lower court that the appellant was in the state of Virginia on the date laid in the indictment. In construing the evidence we are not to be governed by technical rules as in the case of a trial for a crime, but to regard it liberally in favor of the demanding state, "because in delivering up an accused person to the authorities of a sister state" we "are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the federal Constitution, but in the manner provided by the state against the laws of which it is charged that he has offended." Biddinger v. Commissioner of Police, supra.

[2, 3] What does the evidence show? The witness Latham, a special officer of the railway company, refreshing his recollection from his record, testified that on September 21, 1916, he was employed at the Potomac yards, Alexandria county, Va., and on that day at 12:20 p. m. the yard conductor [Calnan] turned over to him two cases of shoes, which he identified at the hearing in the court below. Calnan

said that the two boxes in court resembled very much the two which he helped to take off his engine on September 21, 1916, about 12 o'clock, and about which he talked to Latham at that time. Another witness. Powell, testified that he was employed as a brakeman in the Potomac vards in September; that he knew Ellison, and remembered meeting him and a man by the name of Ballinger one morning, and going with them to the Potomac yards, but he could not say whether it was in the springtime or not. He knew, however, that he went with them only once to the Potomac vards. When he arrived at the yards, Ballinger and Ellison left him on the main road, asking him to wait there until their return. They returned in about half an hour, when something was said about going back empty-handed. Ballinger said. "If you will wait, I will see if I can go over and get anything," and Ellison said he would wait, and did so. At Ballinger's request witness accompanied him into the Potomac yards, where they found three boxes of shoes, put two of them in a gondola car, and took the other one back to the buggy. After this the three drove up the road a little way. Ballinger and the witness took the shoes out of the box and put them in a bag, left the box in the road behind the bushes, then placed the bag in the buggy, and the three came to Washington: Ellison doing the driving. Ellison, the witness said, gave Ballinger and him his buggy, and they went back for the other boxes, but did not find them. He identified in court the two boxes as the ones which he and Ballinger put in the gondola car on the date mentioned.

Ballinger said that he remembered going across the bridge to Virginia with Ellison once, but did not recall whether it was in the spring or in the fall; that on the trip over they met Powell. He corroborated Powell with respect to their getting the shoes, putting the two boxes in the gondola car, and taking the contents of the other box in the bag to Washington. He could not definitely identify the boxes in court, but said they looked something like the ones which he and Powell had placed in the car. He repeated that he was never in the Potomac railroad vards with Powell on any other occasion.

There was testimony tending to show that Ellison was not in Virginia on the 21st of September. We think, however, that the testimony which we have related, and which tends to show that he was there on that day and participated in the robbery amply sustains the judgment. The facts were found by the trial justice. It is our duty to accept his finding, "unless clearly and manifestly wrong." Lawson v. United States Mining Co., 207 U. S. 1, 12, 28 Sup. Ct. 15, 19 (52 L. Ed. 65); Butte & Superior Copper Co., Ltd., v. Clark-Montana Realty Co. and Elm Orlu Mining Co., 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. 447. Here the court's finding that Ellison was in Virginia on the date alleged rests on the prima facie case made by the extradition papers and the testimony we have recited, which is enough.

This is not a case for the application of the rule that all doubts must be resolved in favor of the accused and against the accuser. As we have seen, the burden of establishing that he was not in Virginia on the date charged rested on the accused. The question of innocence or guilt is not involved. There is only one inquiry, and that is as to whether or not Ellison was in the state of Virginia at the time of the crime alleged.

While counsel for Ellison in their brief concede that the only question involved is the one with reference to their client's presence in Virginia on September 21, 1916, still they intimate, if they do not argue, that the testimony adduced does not disclose an actual trespass, but shows that the crime committed by Ellison, if any, was in aiding and abetting the principal offender, and hence that the evidence does not support the charge in the indictment. If this be true, it is a matter of defense, and we have nothing to do with it. Biddinger v. Commissioner, supra. But we may say in passing that under the statute of Virginia "accessories either before or after the fact are indictable as principals and with principals or separately." Code Va. 1904, § 3887. So that, under the indictment charging Ellison as a principal, he may be convicted on evidence establishing that he was only an accessory.

Because the judgment of the lower court is right, it is affirmed, with

costs.

Affirmed.

ROLLER v. WEIGLE et al.

(Court of Appeals of District of Columbia. Submitted October 10, 1919. Decided November 3, 1919.)

No. 3250.

- 1. Specific performance =10(1)—Enforcing part of contract.
 - If an essential part of a contract cannot be specifically enforced, specific performance will not be granted of the remainder.
- 2. Specific performance \Leftrightarrow 10(1)—Enforcing part of contract; essential part.

Relative to whether there can be specific performance of the part of a contract that defendant should transfer to plaintiff part of the stock of a corporation, all of which was to be bought by defendant, the provision requiring the personal services of plaintiff, the only one with practical experience in the business, as managing director and secretary-treasurer, is an essential part of the contract.

3. Specific performance \$\infty 73\to Contract for personal services.

The provision of a contract requiring personal services by one of the parties cannot be specifically enforced.

4. Specific performance \$\sim 6-Mutuality of remedy.

Specific performance will not be decreed, where the remedy is not mutual; that is, where defendant could not have enforced the part of contract for personal services by plaintiff, because of its nature, plaintiff cannot have enforced the part for transfer of stock, unless he has performed the services; it not being enough that he alleges that he has always been ready and now tenders performance.

5. Account \$==12-Equity jurisdiction; remedy at law.

The prayer, in suit for specific performance, for accounting, because of plaintiff being deprived of his salary under the contract, will not be granted; an action at law for damages furnishing ample remedy, and the prayer erroneously presupposing the contract could be specifically enforced.

Appeal from the Supreme Court of the District of Columbia. Suit by Harry Roller against William E. Weigle and another. Bill dismissed, and plaintiff appeals. Affirmed.

E. A. Jones, of Washington, D. C., for appellant. Paul E. Lesh, of Washington, D. C. (Wilson, Huidekoper & Lesh, of Washington, D. C., on the brief), for appellees.

SMYTH, Chief Justice. This is an appeal from a decree of the lower court, dismissing a bill filed by the appellant for a specific performance of a contract between himself, Weigle, and one Schumacher (who is not a party to the suit), for an accounting, and other relief. The material parts of the contract are: That the owners of the capital stock of the appellee corporation offered to sell the same; that the parties to the contract agreed amongst themselves that they would purchase it; that Weigle was to receive 50 shares, Roller 40 shares, and Schumacher 10 shares of the stock; that Weigle, if necessary, was to lend to Roller and Schumacher the money required to pay for their respective shares; that Roller, as managing director of the corporation, was to receive a weekly drawing account of \$50, and Weigle, as supervising director, was to receive \$25 a week; that the parties to the contract were to be directors of the corporation; that Weigle was to be president. Schumacher vice president, and Roller secretarytreasurer; and that the salary of each was to be fixed at each meeting of the corporation before the dividends should be declared.

The bill alleges that Weigle refused to be bound by the contract, and had secretly acquired, either solely or jointly with others, the control of the capital stock, and that the appellant is ready and willing to

perform his part of the agreement. The bill prays:

"That a decree be passed herein directing the defendant G. L. Huske Optical Company to transfer on the books of the defendant company, out of the stock standing in the name of the defendant William E. Weigle, or otherwise held by him, forty (40) shares thereof to the plaintiff, the said forty (40) shares, when so transferred, to be held by the said William E. Weigle in accordance with the terms of said agreement, * * as collateral security for the repayment to the said William E. Weigle out of the dividends accruing on said stock of the amount or sum of money paid by the said William E. Weigle for said forty (40) shares, and in the decree so passed the plaintiff be declared to be the owner of said forty (40) shares of stock as of the date of the acquisition thereof by the said William E. Weigle."

It further prays that Weigle be required to account to the plaintiff for all damages sustained by him by reason of having been deprived of the office and salary secured to him by the terms of the agreement, and that a money decree for the amount thereof be entered.

[1, 2] The contract does not specifically provide that Roller was to be managing director of the corporation, but it is clear from its terms that it was the intention of the parties that he should be, since it says that "as managing director of the corporation" he "shall receive a weekly drawing account of \$50." He was also to be secretary-treasurer, and was to receive a salary which was to be fixed at each

meeting of the corporation before the dividends should be declared. According to the allegations of the bill, he was an experienced and successful optometrist. It does not appear that either of the other parties to the contract had any experience in that line. He, then, was to be the practical man in charge of the business, and his performance of the duty of managing director, as well as that of secretary-treasurer, was manifestly an important consideration for the contract made by Weigle. It is part of the contract, and cannot be separated from the rest without changing the agreement in an essential particular, and equity "will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder." Marble Co. v. Ripley, 10 Wall. 339, 359 (19 L. Ed. 955); Pantages v. Grauman et al., 191 Fed. 317, 323, 112 C. C. A. 61. In determining, therefore, whether or not this contract can be specifically enforced, we must consider as an essential part of it the provisions requiring the personal services of Roller as managing director and secretary-treasurer.

[3, 4] If Weigle was here asking for a specific performance by Roller of that part of the contract which requires his personal services,
we could not grant him relief, because equity will not decree specific
performance of a contract for such services. "It would be intolerable
if a man could be compelled by a court of equity to serve another
against his will; * * * courts of equity exercise no such power
and grant no such relief." Boyer v. Western Union Telegraph Co.
(C. C.) 124 Fed. 246, 249. See, also, Shubert v. Woodward, 167 Fed.
47, 59, 92 C. C. A. 509; H. W. Gossard Co. v. Crosby, 132 Iowa, 155,

109 N. W. 483, 6 L. R. A. (N. S.) 1115, and note.

Since we could not compel Roller to perform that part of the contract we are not permitted to direct a specific performance of Weigle's part, for the remedy must be mutual. This is a fundamental principle of specific performance. In Lipscomb v. Watrous, 3 App. D. C. 1, 7, this court said that in cases of specific performance "the familiar principle applies that a court of equity will never decree a specific performance where the remedy is not mutual. * * " "The remedy," says the Supreme Court of California, "must be mutual as well as the obligation, and where the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other." Cooper v. Pena, 21 Cal. 404, 411. See, also, Deitz v. Stephenson, 51 Or. 597, 606, 95 Pac. 803; Pantages v. Grauman et al., supra; Marble Co. v. Ripley, supra.

Roller alleges that he "has ever been, and still is, and now tenders himself, ready and willing to perform every agreement and undertaking on his part to be performed." But a tender of performance is not enough. Of course, where a person has performed the personal services required of him, and the other party refuses to discharge his obligations under the contract, the rule is different. But a "mere offer to perform or tender of performance of personal services, the performance of which could not be compelled in equity," is not "sufficient to relieve the case of the lack of mutuality as to remedy." Deitz v.

Stephenson, supra.

(261 F.)

[5] With respect to appellant's prayer for an accounting, it cannot be granted. He asks only for such damages as he might be entitled to because of having been deprived of his salary under the agreement. This of itself does not give equity jurisdiction on the ground that an accounting is necessary. An action for damages on the law side of the court would furnish him an ample remedy for any loss which he has sustained. United States v. Bitter Root Co., 200 U. S. 451, 478, 26 Sup. Ct. 318, 50 L. Ed. 550. Moreover, the prayer for an accounting presupposes the existence of a contract which equity will specifically perform, but since we cannot grant that relief there is no basis for an accounting.

Even if the contract was otherwise enforceable in a suit of this character, it may well be doubted that a decree of specific performance could be entered in the absence of Schumacher, one of the parties to the contract. He was to purchase some of the stock, and be a member of the board of directors and vice president of the corporation. To compel Weigle to perform his part, without also requiring Schumacher to do what the contract required of him, would have the effect of making a new contract, to which Weigle and Roller only would be parties; but as the point was not pressed we do not decide it.

By holding, as we must, that the decree of the lower court should be affirmed, it does not mean that the appellant is without remedy. If his rights have been ignored, the doors of the law court are still open

to him, where he may prosecute an action for damages.

The decree is affirmed, with costs. Affirmed.

BOSS v. HAGAN et al.

(Court of Appeals of District of Columbia. Submitted October 14, 1919. Decided November 3, 1919.)

No. 3264.

- 1. Courts \$\insigma\$ 189(5)—Municipal court; general appearance after special.

 Right to insist on compliance with Code of Law 1901, \\$ 11, providing that nonresidents shall not commence suit in municipal court without first giving security for costs, which goes to the jurisdiction over defendant, is a personal privilege, which defendant waives, and may not renew on appeal to the Supreme Court, where, after his motion, on special appearance, to dismiss, is overruled, he enters a general appearance and defends on the merits.
- 2. Landlobd and tenant €==285(3)—Dispossession proceeding; variance between complaint and affidavit.

There is no variance between allegation of complaint, in action to recover possession of premises, that defendant was "a monthly tenant," and allegation of plaintiff's affidavit, with respect to the character of the tenancy, that defendant held "as a monthly tenant."

3. Landlord and tenant \Leftrightarrow 115(2)—Monthly tenant; estate by sufferance.

Though Code of Law 1901, § 1034, declares that verbal hirings by the month shall be deemed estates by sufferance, the tenant is a monthly tenant, as he holds "by the month."

4. LANDLORD AND TENANT € 116(5)—Notice to quit; LENGTH of TIME.

A notice to tenant from month to month to quit is not bad because giving him a day more than the 30 days required by the Code in which to surrender.

Appeal from the Supreme Court of the District of Columbia. Action by Harlan W. Hagan and another against Charles F. Boss, Sr. From a judgment for plaintiffs on appeal from the municipal court, defendant appeals. Affirmed.

P. H. Marshall and C. H. Merillat, both of Washington, D. C., for appellant.

Charles Linkins, of Washington, D. C., for appellees.

SMYTH, Chief Justice. The Hagans brought action in the municipal court against Boss to recover possession of certain premises, alleging that their vendor had rented the premises to Boss as a monthly tenant, that the premises had been purchased by them for their home and were necessary for that purpose, that one of them was a war worker, and that the tenancy had been terminated by a due notice to quit.

Boss appeared specially and asserted that the Hagans were nonresidents of the District of Columbia and moved to dismiss the complaint because they had failed to give security for costs. The motion was overruled, and he entered a general appearance and defended on the merits. There was a judgment for the plaintiffs, and Boss appealed to the Supreme Court of the District.

The Hagans filed in that court an affidavit of merit under rule 19

and asked for judgment. To this Boss responded with an answering affidavit in which he renewed his claim that the Hagans were nonresidents of the District at the time of commencing the action in the lower court, and denied the jurisdiction of that court to try the case, because of their failure to give security for costs. He also challenged the sufficiency of the notice to quit, asserted that there was a material variance between the tenancy as alleged in the complaint and the one disclosed in the Hagan affidavit, and attacked the sufficiency of the affidavit under rule 19. The Supreme Court held that his affidavit was insufficient to raise any question of fact and gave judgment for the Hagans.

[1] The first question presented relates to the jurisdiction of the

municipal court. Section 11 of the Code provides that—

"Nonresidents shall not commence a suit before a justice of the peace [now municipal court] without first giving security for costs."

This goes to the jurisdiction of the court over the person of the defendant, and he has a right to insist upon it; but it is a personal privilege, which may be waived by him, and this Boss did by pleading to the merits. "The defendant had a right," said this court in Savings & Loan Co. v. Pendleton, 14 App. D. C. 387, "to appear specially to take the objection to the proceeding of the justice without the condition precedent having been complied with by the plaintiff. But, having interposed that objection, he could not go farther and plead to the merits of the case without thereby waiving compliance by the plaintiff with the condition which required him to give security for costs before bringing his suit." See, also, Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; Central Trust Co. v. McGeorge, 151 U. S. 129, 133, 14 Sup. Ct. 286, 38 L. Ed. 98; Costello v. Palmer, 20 App. D. C. 210.

In many jurisdictions it is the law that a person who in proper time challenges the jurisdiction of the court over his person, and after the challenge has been overruled preserves the objection in his answer, does not waive it by answering over and going to trial on the merits. Arroyo Ditch Co. v. Superior Court of Los Angeles County, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91; 7 R. C. L. 78; Lower v. Wilson, 9 S. D. 252, 68 N. W. 545, and note 62 Am. St. Rep. 865. But this is not the federal rule, as is pointed out by Mr. Chief Justice Alvey in the Pendleton Case, supra. It was there urged that, since the objection was renewed and preserved in the subsequent proceeding, the defendant had not waived it by defending on the merits. The learned Chief Justice said that the defendant, by appearing and contesting the case on the merits, lost "his right to contest the ruling of the court below on his objection to the jurisdiction on appeal."

If the defendant desired to have the ruling of the court reviewed, he should have applied to the Supreme Court for a writ of certiorari. Degge v. Hitchcock, 35 App. D. C. 218; United States v. West, 34 App. D. C. 12; Bond v. Hardware Co., 15 App. D. C. 72.

[2,3] Nor do we think that there is any merit in the contention

that there is a variance between the allegations of the complaint and those of the Hagan affidavit with respect to the character of the tenancy. The complaint alleges that Boss was "a monthly tenant," while the affidavit asserts that he held the property "as a monthly tenant." Boss, on the other hand, says that, while he entered into the occupancy of the premises under a written agreement as a monthly tenant, the agreement was subsequently changed, and an oral arrangement was made by which the amount of his rent was increased \$2 a month, and that by virtue of this he became a tenant by sufferance. If we concede his claim, he could still be described with accuracy as a monthly tenant, for section 1034 of the Code provides that "all verbal hirings by the month, or at any specified rate per month, shall be deemed estates by sufferance." But the tenant is nevertheless a monthly tenant, for he holds "by the month."

[4] The argument with respect to the alleged insufficiency of the notice is based on the fact that it gave Boss a longer time than the reguired 30 days. The tenancy, it was conceded, commenced on the 1st day of the month, and the notice to quit expired on the 1st day of the following month, instead of the last day of the month in which it was given, thus allowing the tenant one day more than the law required. We have held that a notice which gave the tenant more than 30 days (the time required by the Code) to surrender the premises was valid. Bliss v. Duncan, 44 App. D. C. 93, 96. The giving of the additional day was an advantage to the defendant; of this he has no

just cause for complaint.

The judgment must be affirmed, with costs.

Affirmed.

OREAR et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 25, 1919.)

No. 3354.

- 1. Conspiracy &=38—Effect of abandonment of seditious conspiracy.

 Where a conspiracy has been fully formed to oppose by force the authority of the United States, its subsequent abandonment does not relieve the conspirators from criminal liability, under Criminal Code, § 6 (Comp. St. § 10170).
- 2. Criminal law \$\iff 780(3)\$—Instructions as to testimony of accomplices.

 Instructions on a trial for criminal conspiracy held to sufficiently caution the jury with respect to the testimony of defendants, who pleaded guilty and were witnesses for the government.

In Error to the District Court of the United States for the Eastern District of Texas; Duval West, Judge.

Criminal prosecution by the United States against Will Orear and others. Judgment of conviction, and defendants bring error. Affirmed.

C. Nugent, of Eastland, Tex., T. N. Jones, of Tyler, Tex., and W. W. Berzett, of Emory, Tex., for plaintiffs in error.

R. C. Merritt, U. S. Atty., of McKinney, Tex., and J. B. Dailey, Asst. U. S. Atty., of Beaumont, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. The plaintiffs in error were tried and convicted in the District Court for the Eastern District of Texas for conspiracy. The indictment contained three counts. The plaintiffs in error were convicted only on the counts numbered 1 and 2. These counts charged an offense under section 6 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]), while the third count charged an offense under section 37 of the Penal Code (section 10201). Under counts 1 and 2, proof of an overt act was not required to convict. These counts charged the plaintiffs in error, together with others, some of whom pleaded guilty, and three of whom were acquitted, with conspiracy to resist the enforcement of a law of the United States, viz. the Selective Service Act, approved May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2019a, 2019b, 2044a-2044k]), by resisting by force the calling of registrants, in Rains County, Tex., and by resisting state or government officers who might attempt to arrest such persons for failing to comply with the law, and by procuring arms and ammunition necessary to prevent by force the drafting of persons of said county, who had registered, into the military service of the United States.

There are 22 errors assigned. The questions presented by them are three: First, whether there was evidence in the record sufficient to show a conspiracy on the part of the 17 plaintiffs in error of the

kind charged in the first counts of the indictment; second, whether the plaintiffs in error abandoned any conspiracy they may have formed, before guilt attached to them; third, whether the District Judge

charged correctly upon the law of accomplice evidence.

The evidence is voluminous. It related to what happened at two meetings—one at New Home schoolhouse on a Sunday night, and the other at Sandy Eddy on the following Monday afternoon—and to the subsequent purchase of weapons by some of the plaintiffs in error. The holding of the meetings was not in dispute, nor the presence of the plaintiffs in error at one or both of them. The purpose of the meetings, the extent of participation of the various plaintiffs in the error in them, and the abandonment of the project at the second meeting, as claimed by plaintiffs in error, and the purpose for which some of the plaintiffs in error procured guns after the two meetings, were the disputed questions of fact. The government offered substantial evidence tending to show that the plaintiffs in error were at the New Home schoolhouse meeting, and that at that meeting inflammatory speeches were made, directed against the drafting of young men who had registered and the sending of them to France to fight Germany, and that two votes were taken at that meeting—one in which the younger men within the draft age participated, to the effect that they would prefer to die at home to dying in France, and the other, in which the older men, who were over the draft age, alone participated, to the effect that they would stand behind the younger men in the carrying out of their resolve.

In connection with the seditious remarks testified to have been made at the first meeting preceding the taking of the two votes and the evidence tending to show a guilty sense of having violated the law, and the suspicion of the presence of a spy, the jury might well have found from the government's evidence that a conspiracy to forcibly resist the Selective Service Act was there intended and formed. It is true that the witnesses for the defendants, if believed, gave an entirely different and an innocent complexion to the meeting. The defendants' evidence tended to show that the meeting was open and public, and not secret. Its purpose, according to the defendants' evidence, was merely to discuss a supposed overdraft in Rains county, and to take steps to secure a contribution to pay the expenses of a committee, which had gone to Austin the preceding day to attempt to secure an adjustment of the overdraft, and it was claimed by defendants that nothing seditious was spoken at the meeting; the discussion being confined to the question of the overdraft and the expense attending its adjustment. The determination of the correct version of the purpose of and of what happened at the New Home schoolhouse meeting was for the jury, and they determined it upon substantial evidence adversely to the contentions of the plaintiffs in error.

The New Home schoolhouse meeting adjourned to meet the next afternoon at the place of the plaintiff in error, Will Orear, at Sandy Eddy. The plaintiffs in error assert that the record fails to show that a completed conspiracy was formed at the first meeting, and contend that tentative discussion does not constitute a conspiracy in law.

We are of the opinion that the votes taken at the first meeting might have been interpreted by the jury as an agreement on the part of those present and voting to resist the draft law by those subject to draft, and to aid those subject to draft in forcibly resisting it by those who were beyond the draft age. The conspiracy may have been smaller in numbers than the attendance at either of the meetings, and yet the inner conspiracy would fasten guilt upon the conspirators, though others who attended the meetings were innocent. We think it was open to the jury to find that plaintiffs in error were parties to the conspiracy, because of what the government's evidence tended to show transpired at the New Home schoolhouse.

The District Judge charged the jury that, in order to convict the defendants, they must believe from the evidence that the conspiracy was complete, and not merely tentative. It is true that at the subsequent meeting at Sandy Eddy little was added to the government's case. The meeting assembled at the place designated at the first meeting, and was addressed by a lawyer named Berzette, who advised them, according to the government's contention, that their assembly might be held to be a violation of the law, and on this advice the meeting dispersed, without doing anything further. The defendants' contention was that Berzett advised the meeting that the committee that went to Austin had returned with the report that Rains County had been treated fairly in the draft, and, upon receipt of this information, the people dispersed and went home satisfied.

[1] The government's evidence tended to show that the plaintiff in error John Trumble, after Berzett had spoken, called an informal meeting and with some of the plaintiffs in error renewed the design of resisting the draft by force, if it became necessary. If the government established a conspiracy in which the plaintiffs in error participated, by what took place at the New Home schoolhouse meeting, the crime was then completed and the guilt of the plaintiffs in error was then fixed beyond repentance, and a subsequent dissolution of the conspiracy and an abandonment of the project at the Sandy Eddy meeting, if it had occurred, would not have relieved plaintiffs in error

from criminal responsibility.

Section 6 of the Penal Code does not base conspiracy on the doing of an overt act, as does section 37 of the Penal Code. It is, in this respect, like the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]). Under that act the Supreme Court held that common-law conspiracies were made punishable, and that it did not make "the doing of any act other than the act of conspiring a condition of liability." Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232. Withdrawal from the conspiracy after its formation would not exculpate from guilt, under the charge made in the only counts upon which the plaintiffs in error were found guilty. We are not to be understood as holding that the evidence as to what transpired at the Sandy Eddy meeting indicated an abandonment of the project upon the part of the plaintiffs in error, though it may as to some of those who attended.

The evidence of the government as to what happened after the Sandy

Eddy meeting had broken up, and in the group around the defendant John Trumble, is corroborated by the evidence, which shows the subsequent procuring of high-power guns by some of the plaintiffs in error. The sufficiency of the explanation of the purposes for which these guns were procured, given by the plaintiffs in error, who were concerned in procuring them, was for the jury. The coincidence of so many of them having procured rifles immediately after the meeting and having made two trips to Dallas, 80 miles distant, in the automobile of the plaintiff in error Pffer Orear, and the subsequent hiding of the guns by the plaintiff in error Will Orear, in connection with the explanations given by him and by his father of the purpose for which he hid them, left plenty of room for the jury to have inferred that they were procured for the purpose charged by the government, and testified to by those of the defendants who entered pleas of guilty and who testified for the government.

We think there was sufficient evidence introduced on the trial to justify the jury in finding that an illegal conspiracy to forcibly resist the draft had been consummated; that it had not been abandoned, at least by the plaintiffs in error (if that were necessary to be shown), but had been carried out by some of the plaintiffs in error to the

extent of getting guns to that end.

[2] The court charged the jury that—

"In weighing the evidence of those defendants who are testifying for the government, you should have due regard to the fact that they have each pleaded guilty to the indictment, as well as to the fact of their being defendants, though not on trial. You are directed to weigh carefully their testimony, and cautioned against placing too firm a reliance upon it, unless the same should be corroborated by testimony of witnesses other than principals, or by other facts and circumstances that verify their testimony in material particulars."

In the federal courts, the testimony of accomplices may be sufficient to convict, in the absence of corroboration. Diggs and Caminetti v. United States, 242 U. S. 471, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168. In this case there was in fact corroboration of facts proven by witnesses other than participants in the conspiracy. The charge of the District Judge was all that the plaintiffs in error were entitled to upon the subject of accomplice testimony. It pointed out with sufficient clearness what witnesses were to be treated as accomplices—those who testified for the government and who had either entered pleas of guilty to the indictment, or who were shown to have been principals in the conspiracy by the evidence. We find no error in the record, and the judgment is affirmed.

GREAT LAKES TOWING CO. v. ALVA S. S. CO. et al. GREAT LAKES DREDGE & DOCK CO. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.) Nos. 2655, 2676.

1. Towage \$\infty\$11(1)-Relation and duties of tug to tow.

The master of a tug, undertaking to tow a vessel in a home port, is bound to know the proper and accustomed waterways and channels, the depth of water, and natural formation of the bottom, whether in its natural state or as changed by permanent excavation, and is chargeable with notice of recently changed conditions, either in channels or harbors, if means of knowledge exist and are available to him.

2. Towage \$\infty 11(5)-Liability of tug for grounding of tow.

Two tugs held liable for injury to a steamer and cargo from boulders on the bottom of Calumet river, through which it was being towed, where the steamer was strange to the locality and loaded within what it was assured by the towing company was a safe limit, and where the company by proper inquiry should have known the depth of the channel.

3. NAVIGABLE WATERS \$\ightharpoonup 8\$—OBSTRUCTION BY BOULDERS IN CHANNEL; LIABILITY OF DREDGING COMPANY.

A dredging company, under contract with the government to dredge a river channel and whose work was uncompleted, held not liable for the grounding on boulders of a steamer passing through, where it did not appear that it was in fault for the presence of the boulders, or that its work had lessened the depth of the channel.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Alva Steamship Company and the Bartlett-Frazier Company against the Great Lakes Dredge & Dock Company, in personam, and in rem against the tugs W. A. Field and North Harbor; the Great Lakes Towing Company, claimant. Decree for libelants against both respondents, and they separately appeal. Affirmed in part, and reversed in part.

Appellee the Alva Steamship Company, as owner of the steamer Bradley, and appellee Bartlett-Frazier Company, as owner of the cargo of 285,000 bushels of corn, each filed its libel against the Great Lakes Dredge & Dock Company in personam and against the tugs W. A. Field and North Harbor in rem, to collect damages suffered while the Bradley was being towed through the rock section of the Calumet river, on the morning of December 27, 1914. The Bradley was to be moved from an elevator in South Chicago up the Calumet river to its winter's berth.

Various acts of negligence, resulting in damages to appellees, were charged, and a decree entered against both appellants, which, however, because of the limited liability proceedings instituted by the owner of the tugs, was by stipulation restricted to \$35,000 as against them. Damages to the steamer were fixed at \$25,845.88 and to the cargo at \$17,963.70.

Herman A. Kelly, of Cleveland, Ohio, and Chas. E. Kremer, of Chicago, Ill., for appellants.

Oscar D. Danson, of New York City, and Francis S. Laws, of Philadelphia, Pa., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Was the evidence sufficient to establish the liability of either appellant to either or both appellees? This is the sole question for determination. Each appellant answers it in the negative, although admitting liability to both claimants, if any exists at all.

Very obviously the question presented by one appellant is quite different from that raised by the other. The owner of the tugs might be held, and the Great Lakes Dredge & Dock Company relieved from liability, or vice versa, the tugs might be entirely free from fault, and the dredging company guilty of negligence. The alleged negligent acts with which appellees charge the one are not necessarily connected with the facts upon which liability against the other is predicated. The claim of each appellant will therefore be separately considered.

[1] As to the appellant the Great Lakes Towing Company:

The Bradley was a large and valuable steel steamer, 460 feet long, with 52-foot beam, in strange waters, seeking a berth for the winter. The towing company furnished the tugs and assumed the liability of a tug owner in a home port. The rule of liability in such a situation is too well recognized to require elaborate exposition. Winslow v. Thompson, 134 Fed. 546, 67 C. C. A. 470; Baltimore & Boston Barge Co. v. Eastern Coal Co., 195 Fed. 483, 115 C. C. A. 393; same case in District Court (The Murrell), 200 Fed. 826; Davidson Steamship Co. v. United States, 205 U. S. 287, 27 Sup. Ct. 480, 51 L. Ed. 764; The Margaret, 94 U. S. 494, 24 L. Ed. 146.

From these and other cases the rule is deducible that a master of a tug, undertaking to tow a vessel in a home port, is bound to know the proper and accustomed waterways and channels, the depth of water, and natural formation of the bottom, whether in its natural state or as changed by permanent excavation, and he is chargeable with notice of recently changed conditions, either in channels or harbors, if means of knowledge exist and are available to him.

[2] Guided by the rule thus announced, our inquiry into the towing

company's liability becomes a mere quest for the facts.

After reaching the elevator the Bradley was loaded with corn. Desirous of "putting up" for the winter, the largest possible tonnage was sought. To ascertain what load it might safely carry, inquiry was made of the towing company, and the advice given that it could be loaded to a depth of from 18.2 to 18.3 feet. The vessel was thereupon filled until it settled in the water 17.2 feet forward and 18.1 feet aft. The channel of the river at the so-called rock section was not wide; its greatest width being 200 feet. On the day in question, which was clear and calm, two steamers were moored in this channel on the west bank.

The tugs proceeded with their load to a point opposite these steamers, when the Bradley was towed slightly to the east and her bow was run into the mud. The tugs then pulled her back, and she was again moved forward. Just as she passed the second steamer, her shipkeeper heard a grinding noise and saw dust blow out of her air wells. She was moved but a short distance when the tugs, upon signal, ceased pulling. Shortly thereafter the Bradley settled to the bottom, and it was found she had three large holes on the port side of her bottom, as well

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as minor injuries; the largest hole having a diameter of 4 or 5 feet, the bottom being shoved up 2 feet. Divers testified that in the channel various boulders were found, some few months later; one being 16.6 feet from the surface. Another round and smooth one, 4 feet in diameter, stuck well out of the mud, while still another projected 5 feet above the mud. There was evidence tending to show that in the spring of the succeeding year at least 30 boulders or loose rocks were found; the top of each one being less than 21 feet from the water's surface. The river at this section had not been used by large boats prior to this time; the largest one drawing not more than 12 feet of water. On the day in question the water was approximately 1 foot below normal.

The District Judge, in locating the cause of the steamer's injury found "that the stranding was caused, as claimed by libelants, viz. by a movable boulder or boulders or rocks, and I reject the claim of respondents that it was caused by a projection of ledge rock." Our examination of the evidence causes us to reach the same conclusion. These facts appearing, and this finding having been reached, the burden was cast upon the towing company to overcome this prima facie case so made out against it. Consolidated Coal Co. v. Knickerbocker Steam Towage Co. (D. C.) 200 Fed. 840; The Mason, 249 Fed. 718, 161 C. C. A. 628; Burr v. Knickerbocker Towing Co., 132 Fed. 248, 65 C. C. A.

554.

Appellant attempted to meet its burden by introducing the government bulletins and charts running back for several years and showing the state of navigation at this point. It appears therefrom that extensive improvements were made by the government in 1908, when considerable dredging took place, with the result that in its bulletin No. 23 the government announced that "from 106th street to a point 660 feet above Torrence avenue there is a 22.7-foot depth and 200-foot width," etc. Admittedly this announcement covered the "rock section" of the river where the accident occurred, and the towing company confidently relied on this information thus appearing in the government's report.

But the government bulletin was in error. Not only was there less than 22 feet of water at this point, but the government was aware of it, and in the summer of 1914 contracted with the Great Lakes Dredge & Dock Company, the other appellant herein, to excavate mud and rock to a depth of 21 feet below Chicago city datum. The dredge company, pursuant to this contract, had been excavating in this rock section for several months prior to December 27th, and the towing company either knew or clearly should have known that the excavation work was in this narrow rock cut or rock section. Had the towing company made inquiry, it would have learned of the terms of this contract, which, made in the summer of 1914, expressly recited that the average depth of the water at this point was from 19 to 19.5 feet (from which 1 foot should be subtracted because of low water levels on this day); that the river was being redredged to get the 21 feet of water; that boulders were to be removed, and payment was specifically provided for those exceeding in size one cubic yard. In other words, the contract referred to and the action of the dredge company furnished conclusive proof that the bulletin information was inaccurate in 1914.

It further appears that the barges of the dredge company daily passed the office of the towing company loaded with the material that had been excavated from the rock section. Appellant's excuse is that it understood the excavation work was being conducted farther up the river. But it could meet its duty when, and only when, it knew that which was ascertainable upon reasonable inquiry. Engaged in the important task of towing valuable boats, freighted with cargoes representing so large a sum, it was the duty of the master of the tug to know the condition of the river, its depth, the condition of the bottom, and all other facts reasonably ascertainable bearing upon the safety of navigation.

Nor was this all of the proof bearing on appellant's liability. It appears that the presence of boulders in the bottom of this part of the river some years before had been a matter of common knowledge, and well known to the master of one of the tugboats; that these boulders were at the bottom of the river on December 27th, unless they had been taken out when the river was previously dredged. Likewise the fact that no boat carrying more than 12 feet of water had ever passed this

point prior to this date is most significant.

But it is unnecessary to pursue the discussion further. We agree with the District Court that the towing company is liable to the extent of the value of the tugs, to wit, \$35,000, with interest.

[3] As to the Great Lakes Dredge & Dock Company:

Quite different are the facts and the rules governing liability applicable to this appellant. It contracted with the government to reexcavate the river bottom, and began its work in the fall of 1914, and completed its contract May 27, 1915. Its liability was predicated upon the claim that boulders were by it rolled in or turned over into the channel, and left in a position where resulting damage would occur to passing steamers, or that it was negligent in not removing the boulders before it suspended its work for the winter.

We find no evidence to support either theory. A finding that the dredge company left the bottom of the river more unsafe than when it began work must rest upon pure speculation. The written contract inferentially negatives such a conclusion, for it assumes that boulders larger than one cubic yard were at the bottom of the river, and that the average depth of the river was on the day in question from 18 to

18½ feet.

It appears from the testimony that there were various ways of determining the depth of the river after the dredging was completed, or as the work progressed. Some were obviously more reliable than others. The representative of the government and the dredge company adopted one that suited their purpose, which was to measure the cubic capacity of the material excavated. Another method was provided in the contract to determine the depth of the water, but it was to be applied when the contract was fully completed.

Some claim is made by appellee that, because the dredge company did not locate these boulders, liability is established; but we cannot

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adopt such a test of liability in a case where the work is not completed. Had the dredge company by its operation reduced the water at any point or turned up the boulders, so as to make them more dangerous to navigation, liability would have been established. Huntley v. Empire Engineering Corporation, 211 Fed. 959, 128 C. C. A. 457; Consolidated Coal Co. v. Knickerbocker Steam Towage Co. (D. C.) 200 Fed. 840.

Such, however, is not the case at bar. Here the dredge company excavated some material, but, with its task uncompleted, suspended for the winter, leaving the river in no worse condition than when the work was begun.

In their libel as filed appellees charge the dredging company with liability because of five acts of negligence, herewith set forth in their

own language.

"A. As to respondent the Great Lakes Dredge & Dock Company:

"1. In that they carelessly and negligently carried out their work in connection with the dredging and river improvement, in such a manner as to obstruct the channel.

"2. In that they failed to 'sweep' the channel and keep it free of boulders

and obstructions.

"3. In that they negligently dropped and left in the channel boulders and other obstructions.

"4. In that they did not give notice to vessels of obstructions left and caused by the dredging operation.

"5. In that they did not promptly remove boulders and other material left in the channel."

As to charges 1, 3, and 4 there was, as we have heretofore stated, admittedly, a total failure of proof. As to the second and fifth allegations the liability of this appellant was affected, if not controlled, by its contract with the government. In fact, the pleader, appreciating the bearing which the contract had upon appellant's liability, especially called attention to the parts requiring care and precaution upon the part of the dredging company, by quoting various provisions therefrom. No contention is made, however, that appellant failed to meet each of the requirements thus enumerated. Its liability, therefore, must depend upon its alleged failure to re-excavate a strip in the rocky section sufficient for boats to travel, before suspending its work for the winter.

As bearing on this phase of the case, it is apparent that the amount of material removed before the season closed depended upon the weather. Obviously the work could not be completed in a week, nor in a month; nor could this "rock section" work be done by piecemeal. The contract called for an expeditious performance of the work, but we find nothing therein that required any part of the work to be completed before the winter weather caused a suspension of operations. Under the circumstances disclosed in this case, we conclude that negligence on the part of the dredging company has not been established,

and the libel as to it should have been dismissed.

The decree is reversed, with costs, as to the Great Lakes Dredge & Dock Company, and with directions to dismiss the libel as to this appellant. As to the Great Lakes Towing Company, the decree is affirmed, with costs.

CHICAGO BONDING & SURETY CO. v. UNITED STATES, for Use of FRANK ADAMS ELECTRIC CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2658.

1. Trial \Leftrightarrow 408—Waiver of objections to transfer of cause from equity to law.

Where the court had general jurisdiction of a cause, a defendant, which objected to its transfer from the equity to the law side on plaintiff's motion, and consented to and participated in its trial in equity, *held* estopped to challenge thereafter the jurisdiction in equity.

In a suit by the United States on the bond of a contractor for public work, brought under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. § 6923), the right to recover on behalf of a subcontractor is not affected by the fact that it is represented by a receiver, who could not sue in that jurisdiction.

3. Receivers \$\infty 167-Authority to sue in foreign jurisdiction.

A receiver for a corporation, although without authority to sue in a foreign jurisdiction for a debt due the corporation, may maintain such a suit to recover for property sold by him as receiver.

4. APPEAL AND ERROR \$== 1054(1)—HARMLESS ERROR IN ADMISSION OF INCOMPETENT EVIDENCE.

In an equity suit tried to the court, where there was competent evidence on an issue, uncontradicted, the fact that incompetent evidence to me same effect was admitted is not reversible error.

5. APPEAL AND EBBOR \$\iiii 187(3)\$\to Objection to nonjoinder of party in lower court.

In a suit to which a bankrupt is made defendant, the objection that his trustee is not joined cannot be raised for the first time in the appellate court.

6. United States €==67(2)—Rights of subcontractor under bond of contractor for public work.

That material or labor was supplied to a contractor for public work under a subcontract does not exclude the one supplying it from the protection of the contractor's bond, given under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. § 6923).

 United States €==67(3)—Evidence in action on bond of contractor for public work.

Where material or labor is supplied to a contractor for public work under a subcontract which fixes the price, evidence of its market value is not required in an action on the contractor's bond for the benefit of the subcontractor, in the absence of any showing by the defendant surety of collusion or mutual mistake between the contractor and subcontractor in fixing the contract price.

Appeal from the District Court of the United States for the Eastern District of Illinois.

Suit in equity by the United States, for the use of the Frank Adams Electric Company and others, against the Chicago Bonding & Surety Company. Decree for complainant, and defendant appeals. Affirmed.

Charles B. Stafford, of Chicago, Ill., for appellant. Walter C. Lindley, of Danville, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellant signed as surety the bond of Contractor Shields to assure the erection of a post office building. Shields failed to pay his bills in full. Appellant attacks the decree

which directs it to pay the unsatisfied labor and material claims.

[1] Citing Illinois Surety Co. v. United States, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, appellant insists that only an action at law is permissible and therefore we should reverse the decree, with direction to dismiss the bill for want of jurisdiction or want of equity. The United States, for the use of claimants, began its pursuit of appellant by an action in debt. But, conceiving that a suit in equity was necessary or at least more adequate, plaintiff moved to transfer the cause to the chancery side. Transfer was made without objection. After appellant had answered the bill and intervening petitions without raising any objection to a trial in chancery, counsel for plaintiff noticed the then recent decision above cited, and moved to transfer the cause back to the law side. In opposing the motion appellant made the following record:

"Chicago Bonding & Surety Company, being present in court by its solicitor, objects to said transfer and now consents to this cause remaining on the equity side of the court."

Whereupon plaintiff's motion was denied. Without moving for a transfer to the law side, appellant participated in the trial before the master, and then objected to the report on the ground that plaintiff had an adequate remedy at law. Plainly the assignment of error based on the overruling of that objection is unavailable. The District Court, on one side or the other, had jurisdiction of the subject-matter, and the parties were before it. Appellant was heard by the court without a jury, as its solicitor insisted it should be heard. If the recited entry is not formally sufficient as a waiver of jury trial, at least that entry and appellant's conduct thereunder suffice to stop appellant from blowing hot and cold. Sanders v. Riverside, 118 Fed. 720, 55 C. C. A. 240; Illinois Surety Co. v. United States, 215 Fed. 334, 131 C. C. A. 476; United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934.

[2] One of the claims, based on a contract between Shields and United States Safe Company, was filed by the United States for the use of that company. During the trial it appeared that the common pleas court of Allegheny county, Pa., had appointed a receiver, and thereupon the bill was amended to show that the United States was prosecuting that claim for the use of the receiver. Appellant contends that the decree as to that claim must be reversed, because in federal jurisprudence a chancery receiver's authority is confined to the jurisdiction in which he was appointed. Booth v. Clark, 17 How. 322,

15 L. Ed. 164.

1. Shields's contract was with the United States. One of his promises to the United States, secured by his bond, was to make prompt payments for materials and labor. This suit was by the United States itself, and in its own interest as well as that of the claimants, to enforce that specific obligation. United States F. & G. Co. v. United States, 204 U. S. 349, 27 Sup. Ct. 381, 51 L. Ed. 516. Assuredly the United

States had authority to sue in the federal courts in Illinois. And assuredly the receiver has authority to accept payment from the United States in Pennsylvania.

[3] 2. The receiver was appointed before anything had been furnished by the company. Thereafter all correspondence and transactions were between Shields and the receiver. So, even if this be regarded as the receiver's suit, it is seen that he is suing as the owner of an obligation for goods sold and delivered by him, and not as receiver of a chose in action belonging to the company. High on Receivers, p. 161; Alderson on Receivers, p. 760.

Several assignments are based on alleged errors in the admission of evidence. As the strongest example, appellant selects the following in plaintiff's examination of Shields as a witness:

"Q. You may state whether or not, after the writing of these letters, the Frank Adams Electric Company did furnish the electric fixtures and equipment complete for the Harrisburg, Illinois, post office? A. Yes, sir."

The letters show the company's agreement with Shields to install the electric fixtures and equipment in accordance with the government's plans and specifications which were the basis of the correspondence. One line of objection was that the witness should have been asked specifically, item by item, what the electric company put into the building. Inasmuch as the witness was the contractor, who was familiar with the specifications and with his contract with the electric company, it was proper to allow the question, leaving appellant to cross-examine respecting any items supposed to be omitted or other deviation from the contract.

- [4] The remaining objection is that the cross-examination disclosed that the witness had no personal knowledge of the installation and was relying on the report of his superintendent. Passing appellant's failure to move to strike out the question and answer when the answer was found to be hearsay, and also passing appellant's failure to follow any of the objections with exceptions, we find that appellant was not harmed, because the master and the court had before them the testimony of Shields's superintendent, based on his personal knowledge, and the fact of the government's acceptance of the installation as complete; and presumptively the master and the court acted on the competent evidence and disregarded the hearsay. Appellant introduced no evidence whatever.
- [5] One section of appellant's brief is devoted to a contention that the decree should be reversed because Shields's trustee in bankruptcy was not made a party. We have checked up appellant's 25 assignments of error, and none of them even suggests this question. Our examination of the record has failed to disclose that such a question was ever made before the master or the court. No showing. No motion. Nothing but the unsupported contention in the brief which has led us to an extended examination of the assignments and the voluminous record.
- [6] Claimants in this case were subcontractors under Shields. Relying on People v. Cotteral, 119 Mich. 27, 77 N. W. 312 and People v. Banhagel, 151 Mich. 40, 114 N. W. 669, appellant asserts that the claimants are beyond the protection of the federal statute. But those

cases were construing a Michigan statute, and the Supreme Court of Michigan, in United States v. Jack, 124 Mich. 210, 82 N. W. 1049, held that its local precedents were not applicable to the federal statute, whose "language could not well be more comprehensive," and whose plain purpose was to protect "all persons supplying the contractor labor and materials provided for in such contract." Appellant must have been aware of this intervening Michigan decision, and must have known that, while no one had heretofore presumed to contend in a federal court that a subcontractor is outside the wording and intent of the federal statute, the federal courts sub silentio had uniformly included subcontractors within the benefits of the statute. This is shown in many cases, notably in Illinois Surety Co. v. United States, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, cited by appellant in support of its first assignment of error.

[7] Appellant's final urge for reversal is that plaintiff introduced no evidence of the fair cash market value of the labor and materials furnished by the claimants. But Shields had covered the matter of price by contracts. Prima facie the contract price was the fair cash market value. Foster v. Swaback, 58 Ill. App. 581. Appellant made no attempt to show that Shields and the claimants had collusively or otherwise agreed upon more than the true market value.

We have now followed through the assignments which were presented in argument. None casts even a shadow of doubt upon the decree. Most of the assignments were not argued. A very large part of the record of the evidence is taken up with statements of objections which appellant has not thought worthy of so much as a waived assignment of error. We have treated the case thus fully in order to justify our conviction that a clear case, with no defense, has been obstructed in order to delay payment. Seven claims are involved. Five of them run from \$200 to \$800; one is for \$1,300; one for \$2,200. Taxable costs cannot be made to reimburse the claimants for the expenses for briefs and oral arguments on appeal. Paragraph 3 of rule 28 (235 Fed. xii, 148 C. C. A. xii) should be applied.

The decree is affirmed, with interest and costs, and with damages in the sum of 10 per cent. of the face of the claims.

PENNSYLVANIA R. CO. et al. v. NAAM LOOZE VENNOOT SCHAP, S. S. WILLEM VAN DRIEL, SR.*

THE WILLEM VAN DRIEL, SR.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)
No. 1722.

- 1. AdmiraLty &==117—De novo hearing on appeal.

 An admiralty case is heard de novo on appeal.
- 2. Admiralty @==119-Effect of determination on appeal.

Where, on appeal from a decree on a libel filed by shipowners against an elevator company, whose elevator exploded, and a railroad company, a decree in favor of the railroad company was reversed on the ground that the elevator company was a mere instrumentality of the railroad company, held that, despite reversal, the decree was not an adjudication that the railroad company was liable for the amount of damages fixed by stipulation between the libelants and the elevator company; the two corporations being separate parties,

8. Admiralty \$\sim 88\$—Moiety rule.

Where an elevator exploded and injured vessels, and the elevator company was found liable, as was a railroad company which owned the elevator, etc., held, that the moiety rule applicable in tort cases in admiralty should not be applied; the railroad company being primarily liable, because a principal.

4. Admiralty @=118-Allowance of interest discretionary.

Allowance of interest in damages for torts in admiralty is within the discretion of the trial court, and usually that discretion will not be disturbed on appeal.

The owner of a vessel may sue and recover in his own name for the benefit of the insurer, and hence, as the insurers have nothing more than an equity of subrogation, and a recovery by the owner would preclude recovery by them, defendants cannot defeat recovery by the owner on the ground that the decree did not apportion the recovery between the owner and the insurers, etc., on whose behalf the libel was filed.

Appeal from the District Court of the United States for the Dis-

trict of Maryland, at Baltimore; John C. Rose, Judge.

Libel by the Naam Looze Vennoot Schap, S. S. Willem Van Driel, Sr., a corporation, against the Pennsylvania Railroad Company and another. From a decree for libelant, defendants appeal. Reversed and remanded.

See, also, 252 Fed. 35, 164 C. C. A. 147.

Shirley Carter, of Baltimore, Md. (Bernard Carter & Sons, of Bal-

timore, Md., on the brief), for appellants.

John M. Woolsey, of New York City (Ritchie, Janney & Stuart, of Baltimore, Md., and Kirlin, Woolsey & Hickox, of New York City, on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Grain elevator No. 3, with the capacity of about 1,000,000 bushels, was located on a wharf in the Canton district of the port of Baltimore. On June 13, 1916, the ship Welbeck Hall, on its east side, and the ship Willem Van Driel, on its west side, were loading grain. About 2 o'clock in the afternoon, after a large part of the cargo of each ship had been loaded, a great explosion occurred in the elevator, which was immediately followed by a fire. Both ships were seriously injured and a number of persons killed.

On the 22d of January, 1917, a libel was filed on behalf of the ship Willem Van Driel and its owner against the elevator company and the Pennsylvania Railroad Company alleging: (1) Damages from the fire to the ship and cargo in the aggregate sum of \$379,142.25, and disbursements for salvage services of tugs. (2) Negligence in the operation of the elevator, which caused the fire. (3) Liability of the elevator company, and also of the Pennsylvania Railroad Company as

the real owner and operator of the elevator, for the damages, and for such sums as the ship was liable for to the owners of tugs for salvage services rendered at the time of the fire.

The District Court, finding that the explosion and fire was the result of negligence in the operation of the elevator, held the elevator company liable, and the railroad company not liable, and accordingly entered a decree adjudging that the elevator company pay as damages \$393,000, with interest thereon from May 5, 1917, and upon default for 10 days that execution issue, and dismissing the libel against the railroad company. The amount of damages was fixed in a stipulation signed by counsel on behalf of libelant and the elevator company. There was no stipulation by the railroad company as to the amount of the damages. Although depositions were taken on that subject, they were not filed in the District Court until after its decree was entered, and there was no adjudication of the amount of damages as against the railroad company.

[1, 2] On appeal this court agreed with the District Court that the explosion and fire was due to negligence in operating the elevator, but held the railroad company as well as the elevator company liable, on the ground that the latter corporation was the agency or instrumentality of the former in the operation of the elevator. 242 Fed. 285; 252 Fed. 35, 164 C. C. A. 147. Accordingly the decree of this court was made and its mandate issued, in which, after reciting in full the decree of the District Court, it was adjudged:

"That the decree of the said District Court in this case be and the same is hereby affirmed as to the liability of the Central Elevator Company, and reversed as to the liability of the Pennsylvania Railroad Company."

It is true that the hearing of the appeal in this court was a trial de novo. The Charles Morgan, 115 U. S. 69, 74, 5 Sup. Ct. 1172, 29 L. Ed. 316; Irvine v. The Hesper, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175; Reid v. American Express Co., 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156. But the decree and mandate of this court, affirming the decree of the District Court "as to the liability of the Central Elevator Company," clearly meant the adoption of the decree of the District Court and an order for its re-entry as to the fact of the liability of that corporation and its amount. The reversal of the District Court decree as to the liability of the railroad company meant adjudication by this court that the railroad company was also liable for the damages, and that a decree should be entered accordingly.

Thereafter the railroad company filed its petition in the District Court, reciting its unwillingness to accept the stipulation as to damages to which it was not a party, and asking that a master be appointed to ascertain the amount of damages to be assessed against it. Libelant, answering the petition, submitted that the reference should not be ordered for the reasons: (1) The railroad company, in a petition to the Supreme Court for certiorari, had alleged the judgment against it to be final, and could not now allege that the amount of it was unascertained. (2) The Circuit Court of Appeals having held the railroad company liable for the acts of the elevator company, it

must be liable for the same amount of damages. (3) The railroad company would gain nothing by opening the question of damages, because the liability of the elevator company is fixed at \$393,000 and interest, and it is practically certain that, after applying its assets to the decree, the balance unpaid would be less than the smallest reduced damages which the railroad company could hope to prove. The District Court refused to appoint a master to ascertain the damages as against the railroad company, and entered a decree against the elevator company and the railroad company for \$393,000 and interest from May 5, 1917.

By the decree and mandate of this court the liability of the elevator company for the full sum of \$393,000, with interest from May 5, 1917, and the right of the libelant to execution therefor, was finally adjudged, and that adjudication cannot be reviewed in this appeal. The serious question is on the assigned error in entering judgment against the railroad company for the amount stated in the stipulation between the

elevator company and the libelant.

The direction that the cause be remanded to the District Court "for further proceeding in accordance with the opinion of this court" required the District Court to ascertain the amount of the liability of the railroad company. Since the railroad company was not a party to the stipulation, we think it follows that it was not bound by it, and had the right to have the amount of the damages to be entered in the decree against it judicially ascertained. The holding by this court that the railroad company was in fact using the elevator company as its agency or instrumentality in the operation of the elevator did not connote that the two corporations were not separate as parties to the cause, with the right of each to make its separate defense, either in conjunction with the other or in opposition to the other.

[3] Both corporations contend that, in entering its final decree under the mandate of this court, the District Court should have applied the moiety rule, decreeing that each corporation should pay one-half of the recovery, and that, if the libelant should be unable to collect from either, it should recover the deficiency from the other. The rule of equal division of loss has been adopted in collisions, and also in other torts in admiralty, when the reason for it applies; that is, when the damages have been due to the mutual fault of independent wrongdoers or instrumentalities. The Atlas, 93 U. S. 302, 23 L. Ed. 863; The Alabama and the Gamecock, 92 U. S. 695, 23 L. Ed. 763; The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600. In Great Lakes T. Co. v. Masaba S. S. Co., 237 Fed. 577, 150 C. C. A. 459, the rule was applied to a tug and a bridge company, where, owing to the fault of both, the vessel in tow was injured by striking the draw.

The reason of the moiety rule has no application to suits against principal and agent for torts to third persons founded on the actual negligence of the agent alone, imputed to the principal under the rule of respondeat superior. In such cases both principal and agent are liable to the person injured, but as between themselves the liability of the agent is primary, and he is liable to his principal for any amount which the principal justly pays as compensation for the tort. Story

(261 F.)

on Agency (9th Ed.) p. 259, § 217c; Gaffner v. Johnson, 39 Wash. 437, 81 Pac. 859; Georgia S. & F. Ry. Co. v. Jossey, 105 Ga. 271, 31 S. E. 179; Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124; 18 R. C. L. 502, § 13, and cases cited. No case has been cited, and we find none, where an admiralty court has departed from this established rule based upon the clearest principle of justice.

- [4] The allowance of interest on damages for torts in admiralty is within the discretion of the trial court, and usually that discretion will not be disturbed on appeal. The Maggie J. Smith, 123 U. S. 349–356, 8 Sup. Ct. 159, 31 L. Ed. 175; The Scotland, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153. The reasons why interest is not allowed as a matter of right are set out in Hemmenway v. Fisher, 61 U. S. (20 How.) 255, 15 L. Ed. 799. As to the elevator company the interest has been finally adjudicated to begin May 5, 1917. There is no ground of complaint by either appellant of allowance of interest from that date, although the District Judge did not indicate his reason for fixing it. The injury occurred June 13, 1916, and demurrage charges ended September 26, 1916. Either the libelant or the underwriters have been deprived of the use of money due as damages from that date.
- [5] The libel was filed by Naam Looze Vennoot Schap, S. S. Willem Van Driel, Sr., a corporation, in behalf of itself and the underwriters, the kingdom of the Netherlands as owner of the cargo, and others. The point is made in this appeal for the first time that the decree is erroneous, "in not apportioning by its final decree, dated February 8, 1919, the total amount stated in said decree among the libelant and those persons on whose behalf the libel herein was filed, as their interest might have been made to appear, especially as respects the underwriters of the ship and cargo, to whose rights the owners herein were subrogated." The owner may sue and recover in his own name for the benefit of the insurer. Newell v. Norton, 3 Wall. 257, 18 L. Ed. 271; Fretz v. Bull, 12 How. 466, 13 L. Ed. 1068. The authority of the owner to sue in its own name for the benefit of the insurers should appear.

As no point of this kind was made in the first appeal, it must be presumed that the respondents and the court were satisfied with the evidence of authorization on the trial. Besides, the insurers have nothing more than an equity of subrogation. In The Propeller Monticello v. Mollison, 58 U. S. (17 How.) 152–154 (15 L. Ed. 68), the court says:

"The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit, at the instance of any merely equitable claimant. If notified of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured. If others claim a right to stand in his place, they must intervene in proper time, or lose their recourse to the respondent."

The anomalous condition that the amount of damages was stipulated for by the elevator company and that they are unascertained as 261 F.—18

against the railroad company makes necessary the entry of separate decrees to enforce justly libelant's demand. The cause is therefore remanded to the District Court, with the following instructions:

1. Enter a separate decree in favor of the libelant against the Central Elevator Company for \$393,000, with interest from May 5, 1917, and the costs of this appeal, and one-half of all the costs heretofore accrued, with leave to the respondent to enforce payment by execution, and provide in the decree that all payments made on the decree against the Pennsylvania Railroad Company hereinafter provided for shall operate as a credit on the decree against the Central Elevator Company until it is fully paid.

2. Take testimony and adjudge thereon as against the railroad company the amount of the damages suffered by the libelant from the ex-

plosion and fire of June 13, 1916, mentioned in the libel.

3. Enter a separate decree in favor of libelant against the Pennsylvania Railroad Company for the sum so ascertained, with interest from May 5, 1917, and one-half of all costs accrued before this appeal, with leave to the libelant to enforce payment by execution, and provide in the decree that all payments made on the decree against the Central Elevator Company hereinbefore provided for shall operate as a credit on the decree against the Pennsylvania Railroad Company until it is fully paid.

Reversed and remanded.

PENNSYLVANIA R. CO. et al. v. DYASON. *

THE WELBECK HALL.

(Circuit Court of Appeals, Fourth Circuit. July 1, 1919.)

No. 1723.

Appeal from the District Court of the United States for the District of

Maryland, at Baltimore; John C. Rose, Judge.

Libel by Edwin Dyason, master of the steamship Welbeck Hall and bailee of her cargo, against the Pennsylvania Railroad Company, a corporation, and the Central Elevator Company of Baltimore City, a corporation. From a decree for libelant, defendants appeal. Reversed and remanded, with instructions.

See, also, 252 Fed. 978, 164 C. C. A. 486.

Shirley Carter, of Baltimore, Md. (Bernard Carter & Sons, of Baltimore, Md.,

on the brief), for appellants.

Dallas S. Townsend, of New York City (James K. Symmers, of New York City, and Harry N. Abercrombie, of Baltimore, Md., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This appeal is controlled by the opinion this day filed in Pennsylvania Railroad Company, a corporation, and Central Elevator Company of Baltimore City, a corporation, v. Naam Looze Vennoot Schap, S. S. Willem Van Driel, Sr., a corporation, as owner of S. S. Willem Van Driel, Sr. 261 Fed. 269, — C. C. A. —. Accordingly the cause is remanded to the District Court, with the following instructions:

1. Enter a separate decree in favor of the libelant against the Central Elevator Company for \$274,212.21, with interest from May 5, 1917, until paid, and

^{*}Certiorari denied 251 U.S. --, 40 Sup. Ct. 394, 64 L. Ed. --.

the costs of this appeal, and one-half of all the costs heretofore accrued, with leave to the respondent to enforce payment by execution, and provide in the decree that all payments made on the decree against the Pennsylvania Railroad Company hereinafter provided for shall operate as a credit on the decree against the Central Elevator Company until it is fully paid.

2. Take testimony and adjudge thereon as against the railroad company the amount of the damages suffered by the libelant from the explosion and fire of

June 13, 1916, mentioned in the libel.

3. Enter a separate decree in favor of libelant against the Pennsylvania Railroad Company for the sum so ascertained, with interest from May 5, 1917, and one-half of all costs accrued before this appeal, with leave to the libelant to enforce payment by execution, and provide in the decree that all payments made on the decree against the Central Elevator Company hereinbefore provided for shall operate as a credit on the decree against the Pennsylvania Railroad Company until it is fully paid.

Reversed and remanded.

GREAT LAKES S. S. CO. v. GEIGER.

(Circuit Court of Appeals, Sixth Circuit. November 5, 1919.)

No. 3313.

1. SEAMEN @=11-INJURY IN SERVICE; LIABILITY OF SHIP.

An action for injury to a seaman while in the service of a ship is maritime in nature and within the admiralty jurisdiction, and where the injury was due solely to negligence of the crew the vessel owner is liable only for maintenance, cure, and wages of the seaman.

2. SEAMEN \$==16-RIGHT TO WAGES AFTER INJURY IN SERVICE.

Where a vessel was not in fault for injury to a seaman, nor remiss in its duty to furnish cure and maintenance thereafter, wages are recoverable only to the end of the voyage, where the contract of employment does not extend beyond that time.

 SEAMEN @==11—INJURY IN SERVICE; INTEREST ON RECOVERY FOR MAINTE-NANCE.

On recovery from a ship for maintenance during disability of a seaman from injury in the service, libelant hcld entitled to interest from the time payment was due.

Appeal from the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in admiralty by Charles E. Geiger against the Great Lakes Steamship Company. Decree for libelant, and respondent appeals. Reversed with directions.

Thomas H. Garry, of Cleveland, Ohio, for appellant. John A. Lombard, of Cleveland, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. Libelant sued for injuries received while a member of the crew of respondent's steamer engaged in commercial navigation of the Great Lakes. The case, including the facts stipulated for purposes of this review, may be thus sufficiently summarized:

Libelant had been employed under a maritime contract, signing regular articles as a seaman, and shipping at a Lake Erie port for a round

trip to the head of Lake Superior and return. In the course of this voyage, while the steamer was unloading cargo in a harbor, and while libelant and other members of the crew were closing the hatches, libelant's finger was caught in the operating mechanism and so crushed that it had to be amputated. The sole cause of the accident was the negligence of other members of the crew working with libelant, but not including the master; the equipment and machinery being sufficient and in good repair and the ship seaworthy. Libelant was immediately taken to a hospital, where the injured finger was amputated and treated, and was then taken to his home in Cleveland on the steamer, being given further medical treatment en route, all at the steamer's cost, his entire expense in perfecting a cure, so far as such was possible, having been paid by respondent. Libelant was paid his wages to the end of the voyage; that is, until the return of the steamer to Lake Erie. He was disabled for 13 weeks, which period would expire during the shipping season and while the steamer was still in operation. His expense of maintenance was \$10 per week. At the end of this period he obtained other employment at a higher wage than he was earning at the time of the accident. The trial court held that libelant was not entitled to full compensatory damages, but only wages and expenses of "maintenance and cure." The allowance was \$377.14, being three months' wages at the rate libelant was receiving at the time of the accident and maintenance for 13 weeks at \$10 per week, with interest from the time when payable. The only issues raised here are whether libelant is entitled to allowance for wages after the end of the voyage and whether interest should be allowed.

[1, 2] It is settled that injuries suffered under circumstances such as here presented are maritime in their nature and within the jurisdiction of admiralty, and that under general admiralty law the vessel owner is, broadly speaking, liable only for maintenance, cure, and the wages of a seaman injured in the service of his ship through the sole negligence of members of the crew. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Chelentis v. Luckenback S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171. In neither of these cases did the issues require a determination of the period for which wages are recoverable. The question is one of general admiralty law; the right of recovery for maintenance and cure and wages not being created by federal statute.

In the earlier decisions in the United States the extent of the indemnity was not always clearly or completely defined as respects either wages or maintenance and cure. In Harden v. Gordon (1823) 2 Mason, 540, Fed. Cas. No. 6,047, Mr. Justice Story held that by the maritime law the expense of curing a sick seaman in the course of the voyage is a charge on the ship. In Reed v. Canfield (1832) 1 Sumn. 195, Fed. Cas. No. 11,641, the same justice again held an injured seaman entitled to be cured at the ship's expense, but it does not clearly appear whether cure was to be extended beyond the end of the voyage. In Nevitt v.

¹ At Cleveland his finger was dressed at the Marine Hospital, presumably without expense to libelant.

Clarke (1846) Olcott, 316, Fed. Cas. No. 10,138, Judge Betts held that the right, as to both wages and cure, terminated with the voyage. However, in The Atlantic (1849) 1 Abb. Adm. 451, 480, Fed. Cas. No. 620, the same judge suggested a qualification with respect to cure, where either it had been commenced and "is in a course of favorable termination," or the ship had not given due attention to the seaman's necessities, or the case had been improperly treated. In The Ben Flint (1867) 1 Biss. 562, 569, 1 Abbott's U. S. 126, 134, Fed. Cas. No. 1299, Judge Miller held that—

"In the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for a disabled or sick seaman should only be coextensive in duration to that of the seaman to the vessel."

In the City of Alexandria (D. C. 1883) 17 Fed. 390, Judge Addison Brown, upon a consideration of the continental codes and numerous decisions, announced the conclusion, as summarized in the headnote, that—

"By the maritime law, ancient and modern, a seaman, in case of any accident received in the service of the ship, is entitled to medical care, nursing, and attendance, and to cure, so far as cure is possible, at the expense of the ship, and to wages to the end of the voyage, and no more."

The case did not involve the question of cure. In The Natchez, 73 Fed. 267, 19 C. C. A. 500, the Circuit Court of Appeals for the Fifth Circuit seems to have held that the right to wages terminated with the voyage. These references, which by no means exhaust the subject, are sufficient by way of illustration for present purposes.

In The Osceola (1902) 189 U. S. 158, 175, 23 Sup. Ct. 483, 487 (47 L. Ed. 760), Mr. Justice Brown, upon an elaborate review of the English and American authorities, announced the proposition, among others, that—

"The vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

In view of the words "at least," and considering other decisions, libelant contends that there is no settled rule as to the period of wage recovery, and thus that courts of admiralty should, "in the exercise of a sound discretion, give or withhold damages according to principles of equity and justice, considering all the circumstances of the case." Respondent insists that under well-settled rules recovery after the termination of the voyage is absolutely forbidden. The District Court, without expressing "final or definite opinion * * * as to the period during which a lake seaman is entitled to wages after an injury," concluded that an award of three months' wages was reasonable "in view of all the circumstances." We are accordingly urged to declare the applicable rule.

The phrase "at least," in the extract quoted from the opinion in the Osceola Case, was doubtless meant to apply both to liability for maintenance and cure (see The Bouker No. 2 [C. C. A. 2] 241 Fed. at page 833, 154 C. C. A. 533) and to wages; but it was not, in our opinion, intended to suggest that wages beyond the termination of the voyage

are recoverable in a case where the ship was not at fault in respect to the accident, nor remiss in its duty to furnish cure and maintenance thereafter, unless possibly where the term of shipment extends beyond the termination of the voyage.² The proposition quoted states a minimum, not a maximum, of liability. It is not without significance, as bearing upon the use of the phrase "at least," that in The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955 (about a year after the decision in The Osceola), in an opinion also by Mr. Justice Brown, a substantial recovery of damages for failure to perform the ship's full duty with respect to surgical treatment was affirmed, although the ship was not responsible for the accident itself. In such recovery wages lost would naturally be a proper element of damages.

Since the Osceola decision it has been held in several cases that an unfulfilled obligation to furnish cure and maintenance extends beyond the termination of the voyage. See The Mars (C. C. A. 3) 149 Fed. 729, 79 C. C. A. 435; The Bouker No. 2, supra, 241 Fed. 831, 154 C. C. A. 533; The Henry B. Fiske (Dodge, D. J.) 141 Fed. 188. The Circuit Court of Appeals for the Ninth Circuit has, also since the decision in the Osceola Case, held the shipowner liable for wages during a 4½ months' disability after discharge from the ship, on account of the latter's failure to provide proper medical attention. No. Alaska Co. v. Larsen, 220 Fed. 93, 135 C. C. A. 661. And in The M. E. Luckenbach (D. C.) 174 Fed. 265, affirmed (C. C. A. 4) 178 Fed. 1004, 101 C. C. A. 663, the seaman was likewise held entitled to recover damages for the ship's failure to perform its duty with respect to medical aid. And see The Fullerton (C. C. A. 9) 167 Fed. 1, 92 C. C. A. 463.

But, so far as we have seen, the decision in The Osceola has not been distinctly construed as extending to liability for wages beyond the termination of the voyage, except in case of the fault of the ship in the performance of some duty, or unless the seaman's contract extended beyond the end of the voyage. On the contrary, the Circuit Court of Appeals of the Seventh Circuit, apparently construes the Osceola Case as allowing wages only to the end of the voyage (The Nyack, 199 Fed. 383, 389, 118 C. C. A. 67), and the Circuit Court of Appeals of the Second Circuit, in Chelentis v. Luckenbach S. S. Co., 243 Fed. 536, 538, 156 C. C. A. 234, L. R. A. 1913F, 991, states the rule that the recovery by a seaman injured in the service of the ship is limited to his wages to the end of the voyage and the expense of his maintenance and cure. While this conclusion was not, strictly speaking, necessary to the decision—for the reason that on the trial of the action, which was at common law, the plaintiff declined to make claim for wages to the end of the voyage and expenses of cure and maintenance for a reasonable

² In The J. F. Card (D. C. 1890) 43 Fed. 92, Mr. Justice Brown (then District Judge) included in his award wages to the end of the seaman's contract, viz. about 14 days after the accident. In McCarron v. Dominion Co. (D. C.) 134 Fed. 762, decided since the case of The Osceola, Judge Lowell held that the seaman injured in the service of the ship is entitled to wages for the term of his shipment, where that extends beyond the termination of the voyage.

⁸ We have not overlooked the fact that in Dougherty v. Thompson, etc., Co. (D. C., McPherson, C. J.) 211 Fed. 224, 227, the award may have included something for wages after the end of the voyage.

time thereafter, by reason of his claim that he was entitled to full indemnity—yet the quotation from the considered opinion of the Circuit Court of Appeals made by the Supreme Court in its decision of affirmance (247 U. S. 372, 379, 38 Sup. Ct. 501, 62 L. Ed. 1171), and without apparent disapproval, seems more or less significant. The record in the instant case contains no statement that libelant's shipment contract extended beyond the termination of the voyage in question, and the contrary has been, in brief and argument, at least impliedly assumed.

Our conclusion is that, upon the record presented, libelant's right to wages is, as matter of law, confined to the end of the voyage, and that the award below was in this respect unwarranted. We do not decide what the rule would be had the contract of employment extended beyond the end of the voyage.

[3] The award for maintenance was proper; and, this being so, we think libelant plainly entitled to interest from the time its payment was

due, as a part of the damages, if on no other ground.

The decree of the District Court is accordingly reversed, with directions to enter a new decree in favor of libelant for \$130, plus interest thereon. In view of the nature of this case, no costs will be awarded in this court. Respondent, in fact, does not so ask.

INTERNATIONAL AGRICULTURAL CORPORATION v. SLAPPEY.

(Circuit Court of Appeals, Fifth Circuit. October 25, 1919.)

No. 3427.

- 1. Appeal and error \$\sim 927(7)\$—Presumption as to truth of evidence.

 Assumption of the truth of plaintiff's evidence is justified on review of refusal to direct verdict for defendant.
- 2. MASTER AND SERVANT \$\iiii 321\to OWNER'S DUTY TO EMPLOYÉ OF INDEPENDENT CONTRACTOR.

The owner of property on which an independent contractor was to do work, under contract requiring the contractor to furnish his own appliances, owed no duty to the contractor's employés in gratuitously furnishing an appliance to the contractor, except not to knowingly furnish an improper or defective appliance.

3. MASTER AND SERVANT €=332(3)—INJURY TO EMPLOYÉ OF INDEPENDENT CONTRACTOR; EVIDENCE OF OWNER'S KNOWLEDGE OF DEFECT.

Relative to liability for the killing of employé of independent contractor for painting building, by breaking of rope for suspending the scaffold gratuitously furnished by owner's superintendent, who knew the weakening effect on such rope of the acid in the building, held, the evidence made his knowledge of it being an improper rope for such use one for the jury; the fact of it being taken from a pile of ropes stored in the corner authorizing inference that it had been there an appreciable time, and a showing of knowledge of exact percentage of impairment not being necessary.

4. MASTER AND SERVANT €=302(2)—INJURY TO EMPLOYÉ OF INDEPENDENT CONTRACTOR: IMPLIED AUTHORITY OF OWNER'S LOCAL SUPERINTENDENT.

From the fact that a building of defendant corporation was being painted under a contract signed by its local superintendent, and that he had no local superior, it can be found that he was acting within his im-

plied authority, when objecting to the method of swinging the scaffold, as injurious to the building, and suggesting another method, he gratuitously furnished to the independent contractor a rope therefor, which by reason of defect therein broke, killing contractor's employé.

5. MASTER AND SERVANT €==318(1)—INTERFERENCE BY OWNER WITH INDEPENDENT CONTRACTOR.

Under Civ. Code Ga. 1910, § 4415, subsec. 5, an independent contractor and his employés become employés of the owner by interference of the owner with the method or means of doing the work, resulting in injury to an employé of the contractor.

6. MASTER AND SERVANT \$\infty\$=189(2)—VICE PRINCIPAL AND NOT FELLOW SERVANT.

A corporation's local superintendent of its plant, with no local superior, is not a fellow servant of an employé painting the building, but a vice principal, for whose fault, resulting in injury to the employé, the employer is liable.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Action by Mrs. Eva Slappey against the International Agricultural Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Marion Smith, of Atlanta, Ga., M. D. Jones, of Macon, Ga., Miller & Jones, of Macon, Ga., R. L. Maynard of Americus, Ga., and Little, Powell, Smith & Goldstein, of Atlanta, Ga., for plaintiff in error.

Hixon & Pace, Shipp & Sheppard and J. E. Sheppard, all of Americus, Ga., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. The plaintiff (defendant in error) is the widow of Ernest Slappey, and brings this suit to recover damages for his death, which occurred July 3, 1917, at Americus, Ga. The plaintiff recovered a judgment against the defendant in the District Court, and from that judgment this writ of error is taken.

The decedent at the time of his injury and death, was an employé of one Gammage, who was painting the plant of defendant, under a contract by the terms of which Gammage was to furnish "all tools and tackle necessary to the satisfactory completion of said work," and agreed "to assume all liability for injury to himself, his workmen, or damage to property." It is conceded that Gammage occupied the relation of an independent contractor to defendant, under the terms of the contract. The local superintendent, during the progress of the work, objected to Gammage's act in fastening a scaffold to the roof of the defendant's plant, and suggested that he arrange the scaffold in another manner, which required the use of a rope. Gammage told Parker, the defendant's superintendent that he did not have a rope. The superintendent then agreed to and did furnish Gammage a rope. Gammage used the rope, so furnished, to rig up the scaffold, as suggested by Parker. Gammage and the deceased worked on the scaffold after it had been rigged up during the morning. After the lunch hour they again went back to work on it, and shortly thereafter the rope broke, precipitating both a distance of 80 feet to the ground, and the decedent was killed. It was conceded that the accident was due to a defect in the rope, and that the method of rigging was safe, if the rope had been sufficient. The rope had been weakened by the action of acid to which it had been subjected in the defendant's plant. There was an issue of fact as to whether or not Parker furnished the rope to Gammage, which was resolved against the defendant by the jury.

[1] The only error assigned and relied upon here is the refusal of the District Judge to direct a verdict for the defendant. We are therefore justified in assuming the truth of the evidence of the plaintiff. The plaintiff in error supports its contention that a verdict should have

been directed in this way:

(1) That the defendant was under no duty to the employés of an independent contractor, charged with the duty of furnishing his own appliances, and to whom an appliance was gratuitously furnished, except that of not knowingly or intentionally furnishing a defective appliance.

(2) That there was no evidence in the record to show that the defendant's superintendent, Parker, when he furnished Gammage the

rope, if he did so, knew of its defective condition.

(3) If Parker did furnish the rope, his act in doing so must be regarded as his individual act, and not one done within the scope of his employment as an agent of the defendant, and hence not the act of the defendant.

(4) If Parker furnished a defective rope to Gammage, to be used by him and decedent, and if his act in doing so was within the scope of his employment, still he was a mere fellow servant of decedent, if decedent was a servant of defendant, for whose negligence defendant was

not responsible.

[2, 3] 1 and 2. The duty of one to the employés of another, who occupies the relation of independent contractor to the first, under a contract which imposes the duty upon the contractor to furnish his own working appliances, is, in case the first gratuitously furnishes appliances to the contractor, only not to knowingly furnish improper or defective appliances. Unless there is evidence in the record tending to impute knowledge of the defect in the rope to Parker, when, if at all, he furnished it to Gammage, the plaintiff was not entitled to go to the jury. if Gammage was an independent contractor. The plaintiff in error insists that the record contains no evidence tending to fasten knowledge on Parker of the weakened condition of the rope. There is evidence in the record tending to show that Parker got the rope from a pile of ropes in the corner of one of the buildings of defendant's plant, when he got it for Gammage, and that he knew it must have been exposed to the action of acid. Parker himself testified that he knew of the weakening effect of acid on rope of this character. It also appeared that the weakness was not discernible from the appearance of the rope. The contention of the plaintiff in error is that the record fails to show how long the rope had been subjected to acid before Parker got it and gave it to Gammage, within the knowledge of Parker, and how long it would take the acid to weaken the rope after exposure to it, and whether or not Parker knew this necessary time of exposure.

The plaintiff in error contends that, the burden being on the plaintiff to show knowledge, she was required to show all these facts. From the way in which the rope was testified to have been stored in the corner of the building, in a pile with other ropes, the jury might have presumed that it was taken from an accustomed place of storage of rope and that the defective rope had been there for an appreciable time before Parker got it. The jury might have inferred its continuance in that position long enough for it have been weakened by the acid, and that Parker, knowing these facts, also knew of its weakened condition. It should require very little proof to sustain the burden, in view of the fact that the evidence tended to show that Parker knew the rope had been exposed to the acid, and of its effect, and of the impossibility of telling, from its appearance, the extent of injury done by the acid, and in view of the dangerous use to which he knew the rope was to be devoted. Knowledge that it had been exposed to an acid, which would likely weaken it, was knowledge that it was an improper rope for use for the support of men 80 feet above the ground. A showing of knowledge of the exact percentage of impairment was not necessary. His knowledge that it had been exposed to a weakening agency was enough. His knowledge or want of knowledge was therefore a question for the iury.

[4] 3. Plaintiff in error also contends that Parker's act was not the defendant's; that it amounted to a modification of the contract, because the contract required the contractor to furnish his own appliances, which Parker was not authorized to make. Parker signed the written contract for the defendant. That may not of itself have given him authority to change its terms. It was a circumstance tending to show the extent of his authority. He was the only person in charge of the defendant's plant on the ground. His nearest superior was in Atlanta, the plant being at Americus. As he was in sole charge of the premises, he had authority to prevent injury to them. This gave him the right to object to the method of swinging the scaffold to the roof. It is contended that, when he went a step further, and suggested a different method, and furnished the rope necessary to do the work in the way he suggested, he exceeded his authority. However, it was in the line of his duty to see that the painting was done, and done in a way not to deface the building. This gave him the implied authority to suggest an alternative way of doing the work, with that end in view, and he acted for the defendant in making the suggestion and in furnishing the rope, or it was open to the jury to so find. If this were not true, then no one nearer than Atlanta could have acted for the defendant in so minor a detail of conducting the work under the contract. It is inconceivable that this should be the law. If Parker knowingly furnished a defective rope, his doing so imposed liability on the defendant, and this without requiring a change in the contract, since even under it the defendant, though under no duty to furnish the rope, was legally responsible if it gratuitously furnished a defective one with knowledge.

[5] 4. Section 4415 of the Code of Georgia (fifth subsection) sets

forth the instances in which the employés of an independent contractor become employés of the owner. It imposes liability on the employer "if the employer retains the right to direct or control the time and manner of executing the work, or interferes and assumes control, so as to create the relation of master and servant, or so that an injury results, which is traceable to his interference." The interference is not required to be with the contractor's employés directly, but may also concern the method or means of doing the work, and may be brought about by directions given by the owner to the contractor, as well as to his men. The section is only declaratory of the common-law principle that the reservation in the contract of a right to control the means and details of the work makes the contractor and his men employés of the owner. If the jury believed the plaintiff's evidence, they were authorized to find from it that Parker interfered with the means and method of doing the painting in a way that would establish the relation of employer and employés between the defendant and Gammage and his men, at least to the extent of the interference, and notwithstanding the terms of the written contract, and that to this interference the accident that killed decedent was traceable.

[6] If the decedent was an employé of the defendant, Parker was not a mere fellow servant. He was a superintendent of its local plant, with no superior in Americus. The department of the defendant represented by the Americus plant was under his supervision exclusively, except for absentee supervision at Atlanta. Of necessity, all matters requiring instant decision were for Parker to decide. Parker was either vice principal of the defendant at Americus or it had none there. It is not conceivable that it could operate a plant without a resident vice principal. Parker, having been placed by the defendant in complete local charge of the department represented by its Americus plant, was a vice principal of the defendant, for whose fault it would be liable to the decedent, if the decedent was an employé of the defendant. Moss v. Gulf Compress Co., 202 Fed. 657, 121 C. C. A. 67.

The case was properly submitted to the jury for decision, and the judgment is affirmed.

KNOXVILLE GAS CO. v. CITY OF KNOXVILLE et al.

(Circuit Court of Appeals, Sixth Circuit. November 5, 1919.)

No. 3249.

1. GAS \$\infty\$=14(1)—CHARGES FIXED BY FRANCHISE CONTRACT CANNOT BE INCREASED, UNLESS UNREMUNERATIVE FOR ENTIRE FRANCHISE PERIOD.

Where a franchise contract was made between a city and a gas company for a definite term of years, and a maximum rate in form agreed upon, if it be assumed that both parties were expressly empowered so to agree, the company cannot subsequently have the rate changed to meet changing conditions, on the ground that the rate has become confiscatory, in the absence of proof that performance of the contract, taking all the years of the term together, will prove unremunerative.

- 2. Gas € 14(2)—Power to fix rates resides in state until surrendered.

 'The power to fix rates to be charged by public service corporations, as gas companies, is governmental, and resides primarily in the state, and municipalities cannot exercise such power, unless the state has in fact surrendered its power in that behalf.
- 3. Gas &==14(2)—State's surrender of power to fix bates must be unequivocal.

It is the settled federal rule that a state's surrender to a municipality of power irrevocably to fix rates for a public service corporation must appear in explicit and convincing terms, and all doubtful expressions are to be resolved in favor of the state and against surrender of the power.

4. Gas \$==14(2)—State's surrender of power to fix rates not shown.

Neither the Knoxville Charter, which gives the mayor and board of aldermen control of the streets, nor the Tennessee General Corporation Act of 1875, under which complainant gas company was incorporated, section 25 of which, as amended by Acts 1887, p. 302, provides that no streets of a city shall be used by gas company for laying pipes and mains until consent of the municipal authorities shall have been obtained, nor the further amendatory act of 1889 (Acts 1889, p. 97), delegated to the city of Knoxville the power of the state to regulate rates to be charged by a public utility, as a gas company, and hence a franchise contract entered into between the complainant and the city of Knoxville fixing the rate could not in that respect be enforced by the city when by reason of changed conditions the rate fixed was not compensatory.

5. Gas \Longrightarrow 14(2)—Subrender by state of power to fix rates must be shown by explicit statute.

The rule of decision of the court of last resort of Tennessee *held* to require surrender by the state to municipalities, of its power to fix rates of public utilities to be shown by explicit statutory language.

6. Injunction €==85(2)—Enforcement of invalid ordinance fixing rates may be restrained.

Where a municipality attempted by penal ordinances and otherwise to force a gas company to sell its product at a rate fixed in the franchise ordinance, though the franchise contract was not binding in that respect, because of the municipality's want of power irrevocably to fix the rates of public utilities, held, that the gas company is entitled to injunctive relief.

Appeal from the District Court of the United States for the Eastern District of Tennessee; John E. McCall, Judge.

Suit by the Knoxville Gas Company against the City of Knoxville and others. From a decree denying it an injunction, or other relief (253 Fed. 217), complainant appeals. Reversed and remanded, with directions.

The Knoxville Gas Company appeals from a final decree denying it an injunction or other relief to prevent the city of Knoxville from interfering with the company's exaction of an increase in price of gas. The case was disposed of upon the pleadings, with certain exhibits and affidavits presented by the respective parties, and upon certain agreed facts appearing in recitals of the decree. The bill was dismissed at plaintiff's costs, and for reasons appearing in the reported opinion below. 253 Fed. 217. In view of the facts there stated, it cannot be necessary to set out the details here. The salient facts and resulting issues are these:

(1) In March 1903, pursuant to Tennessee statute, plaintiff was organized as a corporation under its present name to establish and construct gasworks at Knoxville, subject to the duty to build and equip a gas manufactory sufficient to supply with gas the corporate authorities and inhabitants of the city; to lay down pipes and extend conductors through the streets, lanes,

and alleys of the city, provided that none of the streets or alleys should be "entered upon or used" by the company "for laying pipes or conductors until the consent of the municipal authorities shall have been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done"; to manufacture and vend gas and to exact a reasonable price therefor, but never "more than one cent per every cubic foot of gas used," nor more from the city than is received "at the same time from the people."

(2) The city adopted an ordinance September 8, 1903, in terms granting to plaintiff the right to construct and operate gasworks within the city, and the right of way in the streets, etc., to place and maintain gas mains, etc., "for furnishing gas for lighting, power and fuel," and "consent" was "given for the entry upon and the use of all the streets * * * for the aforesaid purpose"; also, in lieu of the foregoing, granting permission to the company "to acquire by consolidation, purchase, lease, or otherwise, the gasworks, mains, pipes, conductors, or other property of the Knoxville Gaslight Company, now located and carrying on operations" in the city, "and to maintain, carry on, operate, enlarge, and continue the same" in the city, "and that approval and consent thereto be and the same is hereby granted." This was subject, however, to certain requirements imposed on the company, among which were (section 7) to pay the city a graduated percentage of the gross sales of gas, which at the time this suit was brought had reached the maximum, 5 per cent.; also to furnish gas of a given candle power to consumers within the city at a price not more than \$1.10 per thousand cubic feet, less 10 cents per thousand, if paid by the 10th of each succeeding month of supply. The rights and consent so given were to continue for a period of 50 years from date of ordinance. Provision was made that any violation of the restrictions imposed should work a forfeiture, and that doing anything forbidden or failure to do anything required by the ordinance should be a "misdemeanor and punishable as other like offenses against said municipality"; and, further, that unless the company should within 20 days accept the ordinance all rights should be forfeited. Later in the same month, September 28th, the city adopted another ordinance, amending the first one by fixing times for payment of percentages on gross sales, providing that intentional violation of the conditions or restrictions set forth in section 7 of the first ordinance should work a forfeiture of the rights granted, and also constitute a misdemeanor, and be punishable as other like offenses against the municipality. This ordinance, like the other, required acceptance within 20 days; and the company notified the city, in writing, on the date of passage of the last ordinance, of its acceptance of the first ordinance. and its terms and provisions, as amended by the second one.

(3) The plaintiff availed itself of the "in lieu" provision of the ordinance of September 8, 1903, giving the city's permission and consent to acquire the property of the old Knoxville Gaslight Company, secured a transfer thereof by deed of October 1, 1903, and thereafter and until the filing of the present bill, June 27, 1918, the company "conformed its rates and charges to the maximum limit prescribed," and paid to the city "the franchise taxes as provided," by the ordinances; but in 1917, the date not being stated, the company petitioned the city to be "allowed an increased rate" for its gas, and proposed that the city employ an expert accountant to examine the company's books "with a view of ascertaining the net income of the company," and whether it was "entitled to charge a higher rate for gas by reason of the greatly increased cost of operation." The city selected an accountant, who, under date of February 4, 1918, made an elaborate report to the city officials, purporting to show, among other things, the assets and liabilities and the profit and loss of the company for the year 1917, also its profit and loss from 1904 to 1916, inclusive, and cost of fuel from 1913 to 1917, inclusive, together with bond and stock accounts.

(4) Precisely what the city did in respect of this report does not appear; but on March 5, 1918, the city adopted an ordinance forbidding, under penalty of "not less than five dollars nor more than fifty dollars," a son or corporation "supplying any article of public utility * * *

consumer or patron, intentionally to demand, accept, or charge any unlawful rate or charge, for the public utility article or service rendered or required to be rendered under its contract or franchise with the city of Knoxville to a consumer or patron."

(5) The present litigation followed, and attention may now be turned to the issues. According to the bill, the price fixed for gas in September, 1903, has never produced income adequate to meet expenses of operation, current depreciation, and necessary renewals of the gas plant, and yield a reasonable return upon the investment; and in substance it is alleged that, under the conditions occasioned by the World War, the cost of materials and labor had been so greatly increased as to impose actual loss in the operation of the gas plant; that the value of the plant is \$1,400,000; that it is necessary, and plaintiff intends, to increase the charge for gas to \$1.50 per 1,000 cubic feet, less the present rate of discount, in order to secure a fair and reasonable return on the value of the property "during the present prevailing high prices of labor and materials"; that any interference with the collection of such increased price will be to deprive plaintiff of its property without due process of law and to take it for public use without just compensation, in violation of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States. The prayer is for an injunction or other proper relief, to prevent the city, through enforcement of its ordinances of September, 1903, and March 5, 1918, or otherwise, to interfere with the company's collection of the proposed increase in price.

In the opinion of the company's general manager, whose affidavit was used as evidence at the hearing, "it would cost \$1,000,000 or more to replace" the plant. Plaintiff introduced the report of the city's expert accountant, showing that the book value of the gas property on October 1, 1903, was \$617,116.17; that additions have since been made, so as to bring up the total value (apparently book value) on January 1, 1918, to \$947.443.59; that the cost of fuel in 1917 was more than 100 per cent. in excess of the cost in 1916; that the average profit of the company "for 13 years, 1904 to 1916," was \$14,031.31, or 4.67 per cent. on the common stock, and for the year 1917 it was 1.63 per cent. The expert states in his affidavit that the existing rate of \$1.10, less the 10-cent discount, "will not yield sufficient income to meet the operating expenses and fixed charges" of the company, and so will not "render any return whatsoever to the company upon the value of its gas plant and property and capital invested" in Knoxville.

The answer, in addition to matters of formal character, contains allegations and denials in varying forms designed to refute the averments of the bill respecting the claimed value of the gas property and privileges, the claimed increase in cost of materials and labor involved in the manufacture, supply, and distribution of gas, and the alleged inadequacy of the price of gas as fixed by the ordinances of September, 1903, and at last challenges the jurisdiction of the court. In support of the answer, and in contradiction of plaintiff's proofs, defendants presented at the hearing two affidavits of the mayor of Knoxville.

The evidential weight of the respective showings so made does not appear to have been considered below; indeed, it appears in the decree that, "assuming the facts be as stated in the bill and exhibits thereto and in the affidavits" of the company's general manager and the city's expert, plaintiff was not entitled to the relief sought, because it was bound "by its contract with the defendants." See, also, last paragraph of opinion, 253 Fed. at page 224.

H. B. Lindsay, of Knoxville, Tenn., for appellant. Charles T. Cates, Jr., of Knoxville, Tenn., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] The controlling question is whether in 1903 the city of Knoxville

possessed the power by contract irrevocably to fix the maximum price of gas for a term of 50 years. If the city in reality had the power, the decree must be affirmed; for, in the first place, the rights and obligations in terms created under the ordinances of September, 1903, will not expire for over 30 years, and, in the next place, despite the complaint made of the World War conditions, it is not shown that performance of the ordinance provisions, taking all the years in contemplation together, "will prove unremunerative." Columbus Railway, Power & Light Co. v. City of Columbus, 249 U. S. 399, 414, 39 Sup. Ct. 349, 354 (63 L. Ed. 669), opinion by Mr. Justice Day.

We assume that the passage of the ordinances by the city and their acceptance by the company in 1903 amounted to a binding contract between the parties as to all matters falling clearly within their respective corporate powers. In view, however, of the issue touching the pricefixing feature, it is necessary to consider whether the city could by contract of substantial duration and providing a maximum price for the supply of gas, bind the gas company, on the one hand, to accept this price in the face of intervening changes in conditions fairly calling for distinct increase in price, and commit the inhabitants of Knoxville and the municipality itself, on the other hand, to pay the price (for such quantities of gas as they might use) in spite of conditions obviously justifying material reduction in price. This is what the power claimed means; and the far-reaching consequences that well might attend its execution, as respects both the consumer and the company, certainly demand the closest scrutiny into the disputed existence of the power.

[2, 3] The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by contract, resides primarily in the state—here, the state of Tennessee. Admittedly it is capable of being delegated by the legislative branch of a state to its municipalities. Efforts to define the power with precision, and to differentiate it from other municipal powers, have often been made under questions of whether it had in reality been delegated and rightly exercised; but they have failed to establish any rule of uniform acceptance and application. It is enough for present purposes to say that the character of the power is governmental, and that the consequent importance of conserving it is manifest; indeed, in the absence of specific provision to the contrary, it is to be interpreted as a power continuing in nature and incapable of being bartered away. Can it be safely said, then, that the state of Tennessee has both surrendered part of its own power and, in effect, authorized the city of Knoxville to exercise it by contract? The settled federal rule in respect of both these features is exacting, and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state.

Mr. Justice Moody said, in Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 52 (53 L. Ed. 176):

"It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to

be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. * * * But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Later, in applying the rule as thus expressed to the power to fix street railway rates, in Milwaukee Elec. Ry. v. Wisconsin R. R. Comm., 238 U. S. 174, 180, 35 Sup. Ct. 820, 822 (59 L. Ed. 1254), Mr. Justice Day said:

- "* * It has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."
- [4] The certainty thus required, in language claimed to authorize a municipal corporation to barter away sovereign power, is exacted also by a number of adjudications pointed out in these two decisions. Further, the same rule has been laid down in Tennessee. In Knoxville v. Knoxville Water Co., 107 Tenn. 647, 672-674, 64 S. W. 1075, 61 L. R. A. 888, it appears that in 1882 a contract was made between the city and the water company, under which the company was to erect waterworks and for 30 years to supply water to the city and its inhabitants; that the company afterwards secured assignments of contracts which had been made by others for the supply of water in North Knoxville and West Knoxville, and, after their annexation to the city of Knoxville, the city in 1899 sanctioned these assignments. Provision was made in all the contracts for supplying water at specified maximum rates. However, in 1901 the city of Knoxville passed an ordinance reducing rates, and, the company declining to accept them, the city brought an action to recover penalty for charging and collecting water rates in excess of those fixed by the ordinance of 1901. This involved the question whether the old rates could rightfully be reduced. Recovery of the penalty was permitted, and in the course of the opinion, after stating in substance that the authorities were not in harmony as to the power of a municipality to enter into an irrevocable contract with a water company in effect removing it "from the supervision of the police power of the municipality," it was said (107 Tenn. 685, 64 S. W. 1085, 61 L. R. A. 888):

"Yet we think there is no question but that, in order to do so, the legislative grant must be unquestionable and admit of no other construction, but must be plain, positive, and unequivocal."

The decision was affirmed in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 438, 23 Sup. Ct. 531, 47 L. Ed. 887. Further reference to these decisions is necessary, but we wish first to point out the statutory provisions of Tennessee, which are here relied on to sustain the contention that the city was clothed with power to bind itself by contract as to the price of gas.

No legislative provision has come to our attention which expressly grants this power to the city of Knoxville specially or to the munici-

palities generally. What is claimed is that, in virtue of certain charter and statutory provisions, the city was invested with power to control the streets, to grant franchises therein to public utility corporations, and to give consent to occupy the streets for gas purposes, either through original construction of a plant, or acquisition and use of an existing plant, upon such terms and conditions (not violative of any law) as it might impose, and that the right thus to make or refuse a grant, or to give or withhold consent, necessarily implies power to prescribe by ordinance as a condition, among others, of the grant or consent, a maximum price for a distinct term, which price and term upon the company's acceptance of the ordinance become part of a binding contract. It will be convenient, even at the expense of space, to set out the apposite portions of the statutes upon which the insistence of counsel is based; accordingly they are shown in the margin.\(^1\) It is to be observed

¹ Special charter powers of Knoxville—Acts 1885 (Extra Session) p. 54: "Sec. 18. The mayor and board of aldermen shall have the following powers by ordinance: * * * [Art. 8] To make appropriations to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve, clean, and keep in repair streets, alleys and sidewalks * * * and * * * for lighting the streets. * * * " (See, also, section 38 as to certain exclusive power in the board of public works, though of no importance here, as to construction, etc., of streets and lighting public places. Id. p. 62.) "To grant the right of way through the streets * * * for the purpose of street or other railroads, and for such other purposes as the board of aldermen may provide by ordinance." Id. p. 57, art. 29.

Prior to date of Knoxville charter, and in accordance with the Constitution of 1870, art. 11, § 8, the General Assembly enacted what is called the General Corporation Act (Acts 1875, p. 232), providing (section 25, at pages 261, 262) form of charter for a gas company, directing insertion therein of names of incorporators, name of corporation and of city in or near which it was proposed to establish and construct gasworks, and expressly authorizing and empowering the company so incorporated "to lay down pipes and extend conductors through the streets, lanes, and alleys" of the city named, "in such manner, however, as to produce the least possible inconvenience" to the city, its inhabitants, or to travelers, and "to charge a reasonable price for said gas, not higher than the price allowed by existing charters to gas companies heretofore chartered in this state: Provided, that said company shall never charge more than one cent per every cubic foot of gas used * * * nor shall they ever charge the authorities of said town, city, or village more per cubic foot than they are getting at the same time from the people."

This section (25) of the act was amended in 1887 (Acts Tenn. p. 302), by adding the following: "And provided further, that no one of the streets or alleys of said city shall be entered upon or used by said company for laying pipes and conductors, or otherwise, until the consent of the municipal authorities shall have been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done."

It was in pursuance of the foregoing statute of 1875, as amended in 1887, that the Knoxville Gas Company secured its charter in 1903, as above pointed out in the statement. In 1889, however, Acts Tenn. pp. 97, 98, a statute was passed providing: "Sec. 1. That hereafter it shall not be lawful for any corporation chartered * * * to manufacture or furnish, or furnishing gas * * * for the lighting of the streets * * of any town or city, or for the use or consumption of the inhabitants of such town or city, nor any corporation chartered to supply or supplying any town or city or the inhabitants thereof with water to acquire the franchises or property of any other similar corporation located or carrying on its operations with-

of these provisions that, although the General Assembly itself expressly authorized chartered gas companies to charge a reasonable price for gas, not exceeding the price allowed by existing charters or a maximum price therein definitely named, yet nothing distinctly reciprocal to this was vested in the cities. Authority to make prices by contract, or even by way of regulation, touching the supply of gas, is nowhere expressed among the municipal powers. Thus the claim of power in the city to agree upon a price for gas supplied throughout the life of the ordinances of 1903, must at last rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon language specifically authorizing it either to regulate prices or to agree upon a price. The effect of such a claim is to ask that there be read into the statutes language which the Legislature did not see fit to enact.

True, as counsel point out, in Detroit v. Detroit City Str. Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, when speaking of section 34 of the Tram Railway Act of 1861 (Acts Mich. 1861, No. 14), providing that a railway corporation organized under the act "could not construct a railway through the streets of a city without the consent of the municipal authorities, 'and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe,' "Mr. Justice Peckham expressed views favorable to the right of the city thereunder to enter into contracts as to rates. 184 U. S. 383, 384, 22 Sup. Ct. 410, 417 (46 L. Ed. 592). That statute and the views so expressed, however, were not relied on as the basis of the power to contract, the learned Justice saying it was "unnecessary to conclusively determine the question"; and, on the contrary, the ruling that the rates could be fixed by contract was rested on express power created by sections 20 and 29 of the Street Railway Act of 1867 (Acts 1867,

"By the twentieth section of the latter act it was provided that the rates of toll or fare, which any street railway may charge for the transportation of persons or passengers over its road, should be established by agreement 2 between the company and the corporate authorities of the city or village where the road is located, and should not be increased without the consent of such authorities."

No. 35). 184 U. S. 385, 22 Sup. Ct. 417, 46 L. Ed. 592:

In Knoxville Water Co. v. Knoxville, supra, 189 U. S. at page 437, 23 Sup. Ct. 531, 47 L. Ed. 887, Mr. Justice Holmes, when distinctly referring to the ordinance involved in the Detroit case, said:

"* * * The ordinance was under a statute which declared that the rates should be established by agreement 3 between the city and the railway company."

in any city or town in this state, or partly in such city or town, and in the territory adjacent to the same, by consolidation, purchase, lease, or in any other way or mode, except only by and with the permission and by and with the approval and consent expressed officially in writing of the municipal government of the city or town in which such corporations respectively are located, or carry on their business wholly or in part, and then only upon such terms and conditions as the said municipal governments may respectively prescribe; provided, that such terms and conditions shall not violate any law."

² Italics ours.

Again, the basis of the decision as to contractual rates in Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, was likewise an express, and not an implied statutory power. This was pointed out by the present Mr. Chief Justice White through reference (194 U. S. at pages 532, 533, 24 Sup. Ct. 756, 48 L. Ed. 1102) to section 2502 of the Ohio Statutes, which section—after reciting certain preliminary requisites contained therein and in section 2501, such as written application for leave to construct and operate a proposed street railroad, publication and competitive bidding—provided that no street railroad grant should be made "except to the corporation that will agree to carry passengers upon such proposed railroad at the lowest rates of fare," * for a period of 25 years. This section of the statute, with others set out in the margin of the opinion, was there referred to as embracing all the statutes pertinent to the period involved, and as vesting "the municipal council of Cleveland with power to regulate or to contract in respect to the rates of fare to be charged by street railways." 5

Further, in Home Telephone Co. v. Los Angeles, supra, 211 U. S. at pages 274, 276, 277, 29 Sup. Ct. 50, 53 L. Ed. 176, Mr. Justice Moody treated the decisions in both the Detroit and Cleveland Cases, supra, as based on statutes explicitly authorizing the cities to agree upon rates for a definite period. Similarly Mr. Justice Day relied on the Cleveland Case in the very recent decision of the Supreme Court in Columbus Ry., Power & Light Co. v. Columbus, before cited, and stated in effect that this last decision is founded on statutory authority equally explicit.

[5] The dominating principle of these decisions is that municipalities will not be regarded as possessed of the right to bind themselves to a specified public service rate and term, except only under statutes granting to them express power to contract or agree as to such rates and time, and the uniform reliance placed upon this principle in the decisions of the Supreme Court is controlling, unless a settled course of decision in the court of last resort of Tennessee requires a different conclusion. It is urged that the rule thus established as to the necessity of explicit statutory language does not prevail in the courts of Tennessee. We cannot think this accords with the decision in Knoxville Water Co. v. Knoxville, supra, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888. The charter of the water company was secured under a general act. Acts Tenn. 1877, p. 127. Section 2 forbade the grant of a proposed charter until after "leave to operate" thereunder had been obtained from the particular city in which it was proposed to maintain waterworks—in this instance, Knoxville—and provided also that the

"in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company." Id. p. 129.

By section 1 of the act (Id. p. 128) companies so obtaining leave to operate were expressly empowered "to contract" with the inhabitants

and the corporate authorities of the city for the use of water, and to charge such price therefor as might be "agreed upon between the said company and said parties." It is clear enough that the city gave to the company "leave to operate" under, and so sanctioned a grant of, the charter, and also that it in terms entered into a contract with the company to supply water at a named maximum price for a specified time (107 Tenn. 672, 64 S. W. 1075, 61 L. R. A. 888), but in spite of the company's power thus to agree upon a price, the city's right to give or withhold "leave to operate" was evidently not regarded as implying reciprocal power in the city so to agree, and yet, according to the theory of counsel that a valid contract as to price exists in the instant case the right so to give or to withhold "leave" should have been treated in the waterworks case as implying authority in the city to submit a price for the company's acceptance as a condition of giving, instead of refusing, leave. Such a theory, however, found no recognition in the decision of that case. This lack of recognition may be seen, for example, in the way the court dealt with the absence of express authority to make an irrevocable contract as to price and with the presence of distinct power by ordinance to regulate the price. In the course of the opinion, after reviewing a number of decisions, including that of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886, Judge Wilkes said in the Knoxville Water Case (107 Tenn. 687, 64 S. W. 1085, 61 L. R. A. 888):

"But the difference in that [Los Angeles] case and the present is that by the charter of Los Angeles the city had the express power to make an irrevocable contract, while in this case the city of Knoxville is not by its charter granted such a right, but the proper construction of the charter is, we think, that the city shall have a continuing right to regulate the charges for water, limited only by a condition that such rates shall not be unreasonable and oppressive."

The bearing, then, of that decision upon the instant case, is the effect which was there given to the lack of express power in the city, as here, to agree upon a price. True, it is said the decision has no present relevancy, for the reason that it is only in respect of water companies that the municipalities of Tennessee are distinctly vested with power to regulate prices; but this does not escape the principle in several ways there declared touching the explicitness of language necessary to invest a municipality with power irrevocably to establish a public service price.

Further, counsel for the city rely upon certain decisions of this court in cases originating in Tennessee, and upon several decisions of the Supreme Court of that state, to show that the statutes hereinbefore set out in the margin clothed the city of Knoxville with power to sanction the contested ordinance contract of September, 1903, including the provision respecting the maximum price to be paid for gas, and, by nec-

⁶ The reason for this must have been the fact that the power of the city to agree upon a price in the waterworks case could only have been implied, while the power to regulate was express; for, as we have seen an express power "to regulate or to contract in respect of rates of fare," although alternative in form, was upheld in the Cleveland Street Railway Case.

essary effect, also to show that statutory language expressly authorizing the city to agree upon the price was not necessary. We do not discover that such a question as this was involved in any of the cases thus relied on, certainly so far as they appear in the published reports.⁷ Those cases, except that of the city of La Follette, relate to occupancy of municipal streets for either street railroad or commercial railroad purposes; but none of them presented any issue touching the right of a municipality itself to regulate or to agree upon rates, not even where its consent to such occupancy was necessary. It is particularly to be noticed, however, that in Knoxville v. Africa, Judge Lurton announcing the opinion, it was in substance held that discretionary power vested in the city to consent, or not, to street railway occupation of the public streets could not be extended to the streets generally, but was to be limited to the termini and route described in the street railroad charter. The suit against the city of La Follette was brought by the company to enforce specific performance of a contract for the supply of water and electric light for a period of 30 years. The charter provisions governing the case and the modified relief granted differ so materially from the charter and statutory provisions here involved and the relief sought as to render analysis of that case or discussion in respect of the conclusions reached below and upon appeal unnecessary.

Counsel for the city also call attention to a case decided in September, 1907, by the Supreme Court of Tennessee, Memphis Street Railway Co. v. William G. Byrne, and in which an opinion was prepared and lost, and consequently never published. It is said that the action was to recover damages for refusal of the company to accept fare from Byrne under a certain amendatory ordinance, and that this resulted in his expulsion from a car of the company. The action was sustained in the circuit court of Shelby county and judgment entered for \$50; but upon a proceeding in error the Supreme Court reversed the judgment and dismissed the cause. It appears from what is said in the brief for the city, and without denial, that the record of the case is in the clerk's office of the Supreme Court of Tennessee at Jackson, and that it discloses facts substantially as follows: That the company was chartered under statute of 1875 (Acts Tenn. p. 250, § 13), which forbade the company to use any of the streets or lay rails therein until consent of the city had been obtained and an ordinance passed "prescribing the terms on which the same may be done"; that an ordinance was passed by the city, and accepted by the company in 1895, imposing conditions among which was one forbidding the company to "charge any passenger exceeding 5 cents for a single fare," but permitting council by ordinance, upon its appearing that "Memphis is entitled to a cheaper

⁷ Knoxville v. Africa, 77 Fed. 501, 507, 23 C. C. A. 252 (C. C. A. 6); Railroad v. Bingham, 87 Tenn. 522, 11 S. W. 705; Smith v. Street Railroad, 87 Tenn. 626, 630, 11 S. W. 709; Railroad v Adams, 3 Head (Tenn.) 598; Railroad Co. v. Memphis, 3 Shan. Cas. (Tenn.) 198; City of La Follette v. La Follette Water, Light & Telephone Co. (D. C.) 252 Fed. 762, affirmed Id. 775, 777, 164 C. C. A. 602 (C. C. A. 6); Iron Mountain Railroad Co. v. Memphis, 96 Fed. 112, 37 C. C. A. 410 (C. C. A. 6); Memphis v. St. Louis & S. F. R. Co., 183 Fed. 529, 540, 541, 106 C. C. A. 75 (C. C. A. 6).

fare," to require the company "to sell 11 tickets for 50 cents"; and that the railroad was constructed and used until November, 1906, when the city adopted an ordinance amendatory of the first one and requiring the company "to sell 6 tickets for 25 cents, 12 tickets for 50 cents, and 25 tickets for \$1"; and further that the railroad company interposed a plea based on its charter and its acceptance of the ordinance of 1895, and insisted that the ordinance and acceptance amounted to a contract. The judgment of reversal states:

"The court is of opinion that in the proceedings and judgment of the court below there is manifest error, as will appear from the opinion of the court filed in this cause."

Counsel urge that this judgment is conclusive of the question involved in the present case. What "manifest error" the opinion disclosed is left to inference, since it is not claimed that any one responsible for the statement contained in the city's brief ever saw the opinion. True, it is said that "the principal assignment of error was predicated upon the effect" of the original ordinance and its acceptance; but this implies, and the judgment shows that there was a plurality of assignments. Presumably questions arose other than the one indicated by the principal assignment; and whether the reversible error found might have grown out of one or more of these other questions becomes an important inquiry. It will be noticed, for example, that the rates prescribed by the amendatory ordinance were lower than either the maximum fare allowed by the original ordinance or the ticket rate specified in the provision thereof reserving a right to reduce the rate. Plaintiff's action must hence have depended in any event upon the reasonableness of the rates contained in the amendatory ordinance; for, apart from any question of power in the city of Memphis to agree irrevocably upon rates of fare for a period of 30 years, it was to be presumed that the rate provided in the original ordinance was reasonable at the time the ordinance was adopted, and that it would so remain until and unless it should be shown through change in conditions either (1) that the right reserved in that ordinance to reduce the rate might justly be exercised, or (2) that still lower rates—indeed, the rates set out in the amendatory ordinance—were fair and reasonable. Whether the petition alleged such a cause of action, and, if so, proof was offered below in its support, or alleged, and, if so, proof was offered below to show, a tender of fare in the form or equivalent of one or another of the classes of tickets described in the amendatory ordinance, does not appear. Thus it well may be that the error requiring reversal was the failure of plaintiff to allege and prove a cause of action under the amendatory ordinance, regardless of any question of contractual rate; as it seeems to us, this is a more natural inference than the one claimed in behalf of the city. Clearly, then, upon such a record as is claimed here, it cannot be concluded that the Supreme Court of Tennessee intended to decide a question like the one presented in the instant case.

Our consideration therefore of the Tennessee cases, particularly the Knoxville Waterworks Case, convinces us that the rule of the Supreme Court of the state is in accord with the federal rule, already pointed out.

This must lead to reversal of the decree in the instant case. However, in reaching this conclusion we do not overlook counsel's claims in respect of decisions in other jurisdictions and views of text-writers which are opposed to the federal rule. The argument supporting the opposed rulings is perhaps nowhere stated more forcefully than it was by Mr. Justice Peckham in the Detroit Case before cited. We need not repeat that these views of the learned justice were not made the basis of that decision. The effect of resting the decision upon express, instead of implied, power derives controlling emphasis from the decision in Milwaukee Elec. R. v. Wisconsin R. R. Comm., supra, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254; for, as respects the applicable statute, pointed out in the opinion at page 179 of 238 U.S. (35 Sup. Ct. 822, 59 L. Ed. 1254), empowering municipal corporations to grant for street railway purposes "the use, upon such terms as the proper authorities shall determine, of any streets" etc., the court declared (238 U. S. 184, 35 Sup. Ct. 824, 59 L. Ed. 1254) its "inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the Legislature of the right to exercise in the future an acknowledged function of great public importance"-the fixing of rates; Mr. Justice Day having previously said, as we have before shown in part (238 U. S. at page 180, 35 Sup. Ct. 822, 59 L. Ed. 1254):

"The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

True, the court gave weight to what it conceived to be a corresponding rule of the state court, but the fact remains that the Supreme Court, as also the state court, declined to construe statutory language, similar to that adduced in the instant case, as sufficient to warrant a municipality to deprive the state of is price-making power. True, also, in the Milwaukee Case the state itself, through its railroad commission, was seeking to exercise this power, while in the Detroit Case the city alone sought to exercise the power; yet these circumstances cannot affect the bearing of either of those decisions upon the instant case, for the rule as respects the necessity for explicit, not simply implied, power in the municipality prevailed in both the Milwaukee and Detroit Cases, while in the instant case this necessity cannot be met because of the total lack of express power in the city of Knoxville.

It should be added that counsel have called attention to a statute passed by the General Assembly of Tennessee since the commencement of this suit, creating a public utilities commission for the state and in terms empowering the commission upon notice and hearing to fix just and reasonable rates to be observed and followed by any utility company, including a gas company, "whenever the commission shall determine" the existing rates "to be unjust, unreasonable, excessive, insufficient, * * * howsoever the same may have heretofore been fixed or established" (Act Tenn. Feb. 21, 1919, p. 143); and also to the

fact that the parties to the present suit have recently commenced and brought to issue a proceeding before the commission, claiming and denying respectively the right of the state, through its commission, directly to change the price in issue here. While these facts signify the existence of conditions which apparently bring the rights of the parties in still closer analogy to the rights adjudicated in the Milwaukee Case as above shown, it is clear that the constitutional validity of the new statute or its effect upon the issues herein can not be passed upon in the present suit.

It has been assumed, as we have before stated, that the accepted ordinances amounted to a contract as to all matters falling clearly within the powers of the respective corporations. This mode of entering into municipal contracts is of long standing and has generally been recognized as sufficient at least in form to bind the parties. Only two features of the claimed contract are complained of; one is the exaction of a graduated percentage of gross sales of gas. It is to be presumed that this exaction was taken into account when the price was fixed and accepted for the gas to be supplied; and naturally this method will recur in any change that may be wrought in the price of gas, if indeed a change shall ultimately be found necessary and justifiable, through either an order of court or, possibly, of the state utilities commission. It need not be said again that the other complaint relates solely to the gas price. We may safely assume that this price was reasonable at the time of its adoption and acceptance. This abundantly appears through the years of acquiescence on the part of the city and the company alike. However, the present record at least in a prima facie sense discloses comparatively recent changes in conditions directly affecting the gas company both as to labor and materials which fairly justify a change, an increase in price during existing conditions. The controlling question, therefore, is, as it is stated at the opening of this opinion, whether in 1903 the city of Knoxville was clothed with power to enter into a contract irrevocably to establish the maximum price of gas for a term of 50 years. If the considerations above given to the subject are at all correct, it is perfectly plain that the question must be answered in the negative. It was consequently error in the court below to treat the provision fixing the price of gas as an irrevocable feature of the accepted ordinances. This was to ascribe to the city a contractual power which the state had not surrendered. After all, the failure of the state to confer such power on its municipalities was purely a matter of legislative policy, and hence must be accepted as conclusive.

[6] It cannot be necessary to dwell upon the question of jurisdiction. The inevitable result of persistence on the part of the city, through penal ordinance and otherwise, to enforce the price under the prima facie showing made as to existing conditions, would be to appropriate property rights of the plaintiff in violation of the constitutional guaranties it invokes for its protection.

The decree is reversed, with costs, and the cause is remanded, with direction to enter an order retaining jurisdiction of the case for further proceedings in accordance with this opinion, but without prejudice to the right of either of the parties to have the question of the price of gas determined by the state utilities commission.

BRISTOL GAS & ELECTRIC CO. v. BOY.

BOY v. BRISTOL GAS & ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. November 5, 1919.)

Nos. 3299, 3307.

1. Appeal and error ⋘927(7)—Review of denial of motion to direct verdict.

In reviewing the denial of defendant's motion for the direction of a verdict, the court will take the view of the evidence most favorable to plaintiff.

2. ELECTRICITY 5-19(9)—NEGLIGENCE QUESTION FOR JURY.

In an action for death of a boy, who took hold of a telegraph wire, which was claimed to be in contact with defendant's uninsulated high power wire, the question of defendant's negligence *held* for the jury, under the rule that, where there is such conflict in the testimony as to support a verdict for either party, the case is peculiarly for the jury.

3. Appeal and error \$\infty 1005(3)\to Review of Denial of New Trial.

Where the evidence was conflicting, the appellate court will not review the exercise of discretion by the trial court in refusing a new trial.

4. DEATH 59-DAMAGES: MENTAL SUFFERING NOT ELEMENT OF RECOVERY.

In an action under the Tennessee statutes for the death of a minor, where the father was the sole beneficiary, under Shannon's Code, § 4172(4), there can be no recovery on account of the suffering or anguish of either of the minor's parents.

5. APPEAL AND ERROR \$\infty\$=1067—HARMLESS ERROR IN FAILURE TO INSTRUCT FATHER WAS SOLE BENEFICIARY IN ACTION FOR DEATH OF CHILD.

Where the declaration in an action for the death of an infant stated that plaintiff, the administrator, sued for the use of the father and mother, who survived, although under Shannon's Code Tenn. § 4172(4), the father was the sole beneficiary, defendant cannot complain, on the theory that sympathy for mother affected verdict, that the court failed to instruct that recovery would be for the father alone, where there was nothing to indicate that the jury knew who was the beneficiary, the form of the verdict negatived the inclusion of punitive damages, and the court commented on the absence of proof that the minor was conscious of any suffering at all.

6. Electricity 5-19(4)—Evidence of defective insulation of high power wires.

In an action for the death of a boy, who came in contact with a telephone wire, which carried a deadly current of electricity from defendant's bigh power wires, *held*, that testimony as to defective insulation, though the condition was shown to have existed for several years before the accident, was properly admitted.

- 7. APPEAL AND ERROR \$\insigma 1050(1)\$—HARMLESS ERROR IN ADMISSION OF EVIDENCE. In an action for death of a boy, who received a fatal shock transmitted from defendant's high power wires by means of a telephone wire, held that, where defendant's witness affirmatively showed the condition of its wires at the time and place of the accident, defendant's complaint that the witness was permitted to testify to wire conditions at other times and places will not be reviewed.
- 8. Electricity \$\infty\$ 19(4)—Evidence as to insulation and inspection of wires.

In an action by the administrator of a boy, who received a fatal shock when the current from defendant's high power wire was transmitted by a telephone wire, *held*, that the trial judge did not exceed the limits of a fair discretion in admitting testimony that the general condition of that

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

portion of defendant's wire lines which included the place of accident had long been bad, and the wires had been in use for many years, for such testimony was peculiarly pertinent as affecting the question of due inspection.

9. Courts \$\sim 356\$—Conformity Act as rendering applicable statute authorizing review of denial of new trial in remittitur.

Where the federal District Court for Tennessee required plaintiff to enter a remittitur as a condition to denying defendant's motion for new trial, held, that the Conformity Act did not make applicable Acts Tenn. 1911, c. 29, Thomp. Shan. Code, §§ 4694a, 4694a1; giving plaintiff the right to review an order of remittitur made under protest, because of the trial court judge's opinion that the verdict was so excessive as to indicate passion, prejudice, etc., for such statutes do not affect a matter of substantive right, and would require a change in the established federal practice.

10. APPEAL AND ERROR € 157—ORDER OF REMITTITUR NOT REVIEWABLE ON WRIT OF ERROR.

In absence of statute providing therefor, the action of the trial judge in ordering a remittitur as a condition to denying a motion for new trial is not reviewable on writ of error.

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by J. C. Boy, administrator of Cureton Boy, deceased, against the Bristol Gas & Electric Company. There was a judgment for plaintiff, defendant's motion for new trial being denied, on condition that plaintiff enter a remittitur, and both plaintiff and defendant bring error. Affirmed.

Robert Burrow, of Bristol, Tenn., for plaintiff. C. J. St. John, of Bristol, Tenn., for defendant.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. The administrator sued the Electric Company for injuries resulting in the death of his decedent, caused by alleged negligence of the Electric Company in failing to keep properly insulated its high-tension power wires. There was trial by jury, and verdict for \$10,000. Defendant's motion for new trial was denied, on condition that plaintiff remit \$5,000 from the verdict. The remittitur was made under protest. Under the writ in No. 3299, the defendant complains of the judgment against it. In No. 3307, the administrator complains that he was required to remit.

The theory on which plaintiff recovered is that decedent, then 7 years of age, while passing along the sidewalk of a public street in Bristol, touched or seized a piece of telephone wire, suspended from a tree, overhanging and terminating within three feet of the sidewalk, the telephone wire being charged with electricity through contact with defendant's wire at a place where the insulation was worn off or was defective, whereby decedent was either killed directly by the shock or, as the result thereof, by being thrown so violently to the sidewalk that he was killed by the breaking of his neck. Defendant assigns several alleged errors.

[1-3]1. The trial judge refused defendant's request, at the close of the evidence for peremptory instruction of verdict in its favor, on the ground that there was no substantial evidence to sustain a recovery. We think the request for directed verdict was properly denied. In considering this question we, of course, take the view of the evidence most favorable to plaintiff. Erie R. R. Co. v. Weber (C. C. A. 6) 207 Fed. 295, 125 C. C. A. 37. There was direct testimony on the part of a small boy tending to show that deceased, while running along on the sidewalk, seized the hanging telephone wire and immediately fell to the ground. The criticisms of this boy's testimony, on account of his youth and alleged contradictory statements, were for the jury's consideration. There was also testimony otherwise that deceased, after uttering a cry, was seen apparently on his knees and then to fall over. He was practically dead when picked up. There was also testimony tending to show that the telephone wire had been hanging in the tree, and near defendant's electric wires, for about four weeks; that the insulation on defendant's wires was worn off in two or more places in the vicinity of the accident, probably caused by their contact with the branches of the tree, especially during wind, the insulation being in one place worn bare for a space of about four feet: that the leaves on the tree in the vicinity of both the telephone wire and defendant's wire were killed, as if by burning; that for several days before the accident more or less sparking was seen along defendant's wire and the hanging telephone wire; that defendant's wires in question had been in the same location 15 or 20 years without renewal; that immediately following the accident the telephone wire was found crossing defendant's electric wire at a point midway between two uninsulated portions of wire, and at a distance of about two feet from the large bare place.

The record would support an inference of negligence in failing to discover and remedy the condition in question. In the briefs here there is no contention to the contrary. The fact that the telephone wire carried no current, except as it came in contact with an uninsulated portion of defendant's electric wire, and that it was not found in contact with the uninsulated spot immediately following the accident, does not necessarily prove that it was not in such contact when seized by the deceased, as a loosely hanging wire would naturally change its position from time to time, especially when seized or touched. The boy's neck was found to be broken, presumably from the fall; but defendant would be liable for the effect of a fall caused by an electric shock, even though not sufficient in itself to cause death. There was testimony on the part of physicians and others that the boy's hand did not show signs of being burned by the wire, opposed to which was testimony having a tendency to the contrary. There was also evidence of a lack of other symptoms normally to be found in case of death by electrocution, also that the telephone wire did not show such a burn as would naturally be caused by contact with defendant's highly charged wire; but such testimony did not necessarily overcome the theory that the child had received shock enough to cause him to fall, although not strong enough to have electrocuted him.

The case was submitted to the jury in a careful charge. In denying motion for new trial the court held that the verdict was not "so clearly and manifestly against the evidence or weight of the evidence" as to justify setting it aside. While there was such conflict in the testimony as to support a verdict for either party, we think the case peculiarly one for a jury (Rochford v. Pennsylvania Co. [C. C. A. 6] 174 Fed. 81, 98 C. C. A. 105), and that there was substantial evidence to support the verdict. We cannot review the exercise of discretion by the court below in refusing a new trial. Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 627, 116 C. C. A. 294.

[4, 5] 2. The declaration states that the plaintiff administrator sued "for the use and benefit of father and mother of his intestate, who survive him." In fact, the father would be the sole beneficiary. Shannon's Tennessee Code, § 4172 (4). We see no merit in the criticism of the court's failure to instruct that the recovery would be for the father alone. Not only does the record fail to show any request to so charge, or any exception which can be identified as aimed at that proposition, but all possibility of error is negatived by the fact that the recovery would be the same, regardless of beneficiary, and the instruction limiting recovery to the present value of what the deceased would have earned during the remainder of his life, plus compensation for his suffering—the court commenting on an absence of proof "that the boy was conscious of suffering at all." The suggestion that the recovery may have been increased by sympathy for the mother is too intangible to be considered. No recovery could be had for the suffering and anguish of either parent. Freeman v. Railroad, 107 Tenn. 340, 348. 64 S. W. 1. There is nothing to indicate that the jury even knew who the beneficiary was. The form of the verdict considered in connection with the charge of the court, negatives the inclusion of punitive damages.

[6] 3. Testimony as to condition of wires:

(a) The accident occurred on Eleventh street. A witness, Kiebel, who lived on Anderson street, the second lot west of Eleventh street, after testifying that he had noticed after the accident (presumably immediately) dead leaves in the trees around the electric wires in question, that the insulation had worn off the inside wire to a great extent, and that the outside wire had some patches of insulation off, was permitted to testify that—

"The insulation was off a large per cent, of the wires along Windsor avenue and Eleventh street and Anderson street in this immediate locality at the time of the accident, and had been in that condition from 10 to 12 years at least."

The objection that the testimony was not confined "to the point of the accident" is without apparent merit. Moreover, under the charge, recovery was not permitted on account of defective insulation elsewhere than at the point where the accident occurred. That the condition was shown to have existed several years did not make it the less pertinent.

[7] (b) The foreman of defendant's electrical department (as a witness for defendant) testified on direct examination that "the trees soon wear the insulation out," and that wires in contact with trees "show

little fireworks:" that while defendant's wire at the place where the telephone wire was "hanging down" was fair (presumably meaning at or immediately after the accident), it was "off at a distance of about four or five feet towards Windsor avenue, and just in spots on the other side of that," and that there was "another place off back five or six feet towards Anderson street"; that "we received no notice that there was a loose wire out there until after the accident; some of our men had been along there not over a week before the accident, and there was no wire then that we could see; we made an examination, we have to watch them all the time." On cross-examination he admitted that at the former trial he had testified to an inspection "30 to 60 days before the accident"; that "sparking in the trees is very common in Bristol. We trim out the trees whenever we can, but the property owners won't always let us do that." In answer to a question, "And that is the condition of the wires all over the city?" he testified, against objection, "Yes, sir; wherever there are trees." The ground of the objection was not stated, nor exception taken to the court's ruling. In view of defendant's affirmative showing of the condition of its wires at the place of the accident, we are not called upon to consider the complaint that the witness was permitted to testify to wire conditions at times and places other than those of the accident. Robinson v. Van Hooser, supra, 196 Fed. 620, 624, 627, 116 C. C. A. 294.

[8] (c) A witness for plaintiff had on cross-examination given testimony tending to show that contact with the telephone wire would not have carried a current unless defendant's electric wire was grounded, and that if it was so grounded at the point in question he did not know it, unless it was in the trees somewhere. Plaintiff thereupon called another witness, apparently to show that the wires were in fact grounded. Against objection that the witness' observation was a month after the accident, he testified that he "saw several places on Windsor avenue and Eleventh street, and I believe on State street, for a short distance, where these primary wires, or 2,300-volt wires, were in contact, or had been in contact, with the twigs or limbs of the trees, and I remember one place on Windsor avenue where one of the wires was in contact with the wood of the pole, where it had rubbed the side of the pole, and rubbed the insulation off the wire." Exception was taken to "proving any other point, except on Eleventh street." Thereafter defendant's counsel disclaimed reliance upon Deulany's testimony as to grounding,

and plaintiff discontinued that line of examination.

We find no error in the court's action. The testimony related to what seems to have been the vicinity of the accident. In view of the previous testimony, it was open to inference (though not to presumption) that a condition found a month later existed at the time of the accident. Upon this record, we have no difficulty in holding that the trial judge did not exceed the limits of a fair discretion in admitting testimony that the general condition of that portion of defendant's wire lines which included the place of the accident had long been bad, and that the wires had been in use for many years. Vicksburg, etc., R. R. Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257. Such testimony was peculiarly pertinent as affecting the question of due

inspection. Texas & Pacific R. R. Co. v. Rosborough, 235 U. S. 429, 35 Sup. Ct. 117, 59 L. Ed. 299.

We have examined the remaining errors assigned by defendant, and find no merit in them. We think defendant not entitled to complain of

the judgment.

[9, 10] The Plaintiff's Cross-Writ. We are clearly of opinion that the trial judge's action in requiring remittitur as a condition of denying motion for a new trial is not reviewable. In the absence of statute providing therefor, such would plainly be the case. Woodworth v. Chesbrough, 244 U. S. 79, 37 Sup. Ct. 583, 61 L. Ed. 1005. The statute of Tennessee, however, gives a plaintiff a right to a review of an order of remittitur (complied with under protest) made because of the trial judge's opinion that the verdict is "so excessive as to indicate passion, prejudice, corruption, partiality, or unaccountable caprice on the part of the jury." Acts Tenn. 1911, c. 29; Thompson's Shannon's Code, §§ 4694a. 4694a1. But were the instant case thought to be within the terms of that statute (although the only finding was that the verdict was "excessive"), the statute itself is inapplicable, because not within the federal Conformity Act. That act does not apply to the personal conduct and administration of the judge in the discharge of his separate functions, nor to motions for new trial nor to proceedings on review. Were this Tennessee statute applicable, it would result, not only in requiring a trial judge, sitting in a federal court, to decide on motion for new trial the question of fact whether the size of the verdict is such as to indicate "passion, prejudice," etc., but also in requiring a federal court of review to determine for itself this same question of fact all contrary to the settled practice in the federal courts. U. P. Ry. Co. v. Hadley, 246 U. S. 330, 334, 38 Sup. Ct. 318, 62 L. Ed. 751.

That a state statute having such effect is not within the Conformity Act appears to us too plain for argument. It seems enough to refer to this court's discussion of the general subject in Knight v. Illinois Central R. R. Co., 180 Fed. 370, 103 C. C. A. 514. The decisions giving effect in the federal courts to state statutes guaranteeing as of absolute right, and as matter of law, a second trial of an action for the recovery of real property within the state (Equator Co. v. Hall, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90) are not analogous. Such statutes are not merely remedial, but are matter of substantive right, like the right to voluntary nonsuit. Barrett v. Virginian Ry. Co., 250 U. S. 473, 478, 39 Sup. Ct. 540, 63 L. Ed. 1092; Knight v. Illinois Central R. R. Co., supra. Simms v. Simms, 175 U. S. 162, 169, 20 Sup. Ct. 58, 44 L. Ed. 115, is not opposed to the conclusion we have reached. So far as of interest here, the point there decided is that the Supreme Court of the United States, on affirming a judgment of the Supreme Court of a Territory, will so modify that judgment as to correct the failure of the territorial Supreme Court to give effect to a right of remittitur while the case is in that court—given by a territorial statute. Inasmuch as we think the court below, in requiring a remittitur as condition of denying motion for new trial, was well within the limits of a proper discretion, the result would be the same, whether the cross-writ is dismissed, or the

action complained of affirmed.

The order will be that the judgment of the District Court is affirmed; the defendants in error under the respective writs to recover his or its costs of this court.

ERIE R. CO. v. CONNORS.*

(Circuit Court of Appeals, Sixth Circuit. October 7, 1919.)

No. 3245.

- MASTER AND SERVANT SERVANT SERVANT; CUMULATIVE REMEDIES.
 Provisions of Metzger Act, relating to liability of railroad companies for injury to employés, are not exclusive; but the rights of action given by that act and by Norris Act, relating generally to employers and employés, are cumulative.
- 2. APPEAL AND ERROR \$\iiiits 1066\to Harmless error; instructions.

 Submission to the jury, in an action for personal injury to a railroad employé, of the issue whether defendant prescribed proper rules for the safety of employés, under Gen. Code Ohio 1910, \(\xi \) 6244, held not reversible error, although there was no evidence on the question where the vital issue, whether plaintiff was warned of the setting of the air brakes, which caused the injury, was properly submitted.
- APPEAL AND ERROR \$\ightharpoonup 1004(1)\$—Review of excessive verdict on writ of error.

The question whether a verdict for damages for a personal injury is excessive is not reviewable on writ of error.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge. Action at law by James B. Connors against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Paul J. Jones, of Youngstown, Ohio, for plaintiff in error.

Wm. J. Kenealy, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. James B. Connors commenced action against the railroad company in the common pleas court of Mahoning county, Ohio, to recover damages for personal injuries alleged to have been sustained while in the employ of the company and through its negligence. On petition of the company the case was removed to the court below, where the company answered, and upon trial before court and jury a verdict of \$22,000 was rendered, and judgment was entered thereon in favor of Connors. The company prosecutes error.

Plaintiff received his injuries in a roundhouse of the company at Cleveland. He is a machinist, and at the time of the injury was in a pit under one of the defendant's passenger engines, and, pursuant to order of his foreman, engaged in tightening certain "engine truck jaw bolts." While plaintiff was thus engaged, and standing between a truck axle and the end of an air brake piston, seemingly "turned side-

ways" with reference to the line of the piston, another employé, an inspector, caused his helper to apply the air through manipulation of a lever in the cab of the engine, and for the purpose of testing the air brakes. It resulted, according to some of the testimony, that plaintiff was caught between the axle and the end of the moving piston, at and about the small of his back, and severely injured. Although the inspector says he knew plaintiff was about the engine shortly before the accident, yet it is reasonably plain that he had no actual knowledge of plaintiff's position at the time he directed the air to be applied, indeed, there is testimony to the effect that he did not select a point from which he could have seen the place of the accident; and the testimony is conflicting as to plaintiff's knowledge that it was then intended to set the air brakes, plaintiff testifying positively that he did not know of any purpose to apply the air, at least until he was caught and injured.

Whether the situation thus in substance described signified negligence, which in view of the pleadings and the law would support the action, depends upon certain statutory conditions which will presently be considered. The applicable features of negligence charged in the petition in substance are: (1) Failure to exercise ordinary care toward ascertaining plaintiff's position and either directly to apprise him or otherwise to give warning of the intent to set the brakes; and (2) failure to prescribe and enforce rules for the safety of employes working in a position about an engine where the setting of the brake would be likely to injure them. The answer denied these charges generally and averred that whatever injury plaintiff sustained was due solely to his own negligence.

[1] It is not claimed by either side that the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]) is applicable to the case. The controversy as to the apposite rule of law arises under two statutes of the state of Ohio; one is called the Metzger Act and the other the Norris Act. The Metzger Act, sometimes called locally the "Railroad Employers' Liability Act," is comprised in sections 9015 to 9018 of the Ohio General Code of 1910 (4 Page & Adams' Ann. Ed. pp. 460-468). The Norris Act is comprised in sections 6242 to 6245—1 of the Ohio General Code of 1910 (3 P. & A. Ann. Ed. pp. 382-384). In attempting

¹ These sections are classified and grouped in Ohio General Code under heading "Employés," and are in substance traceable to earlier statutes of Ohio passed, first, April 2, 1890, entitled "An act for the protection and relief of railroad employés, * * * declaring it unlawful to use cars or locomotives which are defective, or defective machinery or attachments thereto belonging, and declaring such corporation liable, in certain cases, for injuries received by its servants and employés on account of the carelessness or negligence of a fellow servant or employé" (87 O. L. 149); and, second, February 28, 1908, entitled "An act to qualify the liability of railroad companies for injuries to their employés" (99 O. L. 25).

² These sections were classified and grouped in the original General Code passed February 14, 1910, under heading "Labor" (volume 2, p. 1348). Section 6242 of the group was substantially same as Act April 4, 1902, entitled "An act to make employers of workmen liable in damages for injuries caused by negligence in the inspection and repair of machinery, etc." (95 O. L. 114).

to ascertain the legislative intent with respect to these two lines of legislation, it is helpful to consider the common purpose of the original statutes, as just pointed out, to enlarge the rights of employés, and the preservation of this purpose when the statutes were grouped and given ultimate form in the General Code; for the question at last is whether the provisions do not disclose relationship of controlling importance here, in spite of the varying dates of enactment of the prior statutes and their separate grouping later in different chapters of the Code.

Counsel for the company insist that the Metzger Act originated prior to the Norris Act, and is special in the sense that it relates only to railways, while the Norris Act is a general statute, and that the acts are in consequence to be so interpreted as to treat the special statute as an exception to the general statute, relying, for instance, on Gas Co. v. Tiffin, 59 Ohio St. 420, 441, 54 N. E. 77, and Doll v. Bar, 58 Ohio St. 113, 120, 50 N. E. 434. Stated in another way, the insistence is that the Metzger Law is exclusive in operation and affords no relief in a case like the instant one. That law concerns defects in railway rolling stock and tracks, which result in injuries to employés while engaged in operating trains, and also railway liability as respects negligence of fellow servants, assumption of risk, and contributory negligence. A synopsis of the sections comprising the law is set out in the margin.⁸ If, then, it be recalled that plain-

This section (6242) was, with others, amended April 30, 1910, by an act entitled "An act to amend sections * * * of the General Code relating to Hability for wrongful injury or death and the enforcement of actions therefor" (101 O. L. 195), and as thus amended appears in 3 P. & A. Ann. Ed. at p. 383. Sections 6243–6245 of the original General Code, before cited, were same as act passed April 23, 1904, entitled "An act qualifying the risks to be deemed as assumed by employés," subject to exception not important here (97 O. L. 547). These sections, like sections 6242, were amended by the act passed April 30, 1910, before mentioned, and as thus amended appear in 3 P. & A. Ann. Ed. pp. 384, 385. Section 6245—1 was enacted as an addition to the sections above mentioned as amended, and it qualified the old rule as to effect of contributory negligence by a specific rule of comparative negligence (101 O. L. at 197, and also 3 P. & A. Ann. Ed. at pp. 385, 386). And see McMyler Mfg. Co. v. Mebnke, 209 Fed. 5, 126 C. C. A. 147 (C. C. A. 6).

³ The Metzger Act (section 9015) forbids companies knowingly or negligently to use or operate cars or locomotives which are in themselves or their attachments defective; if employe receive injury therefrom the company is charged with knowledge of defect, and if defect shown in employe's action for the injury, such showing is made prima facie evidence of company's negligence. Section 9016 provides that in actions by employes against railways for personal injuries sustained through negligence of the company, "or any of its officers or employés, or in addition to other liability," every employé having authority over another shall be deemed the superior and not the fellow servant of such other employé and also of employés in another branch or department who themselves have no power to direct or control. Section 9017 imposes liability for injury resulting to an employé from a defect in any locomotive, etc., which the company had negligently failed to discover, and provides that the injured employe shall not be deemed to have assumed the risk or contributed to his own injury by continuing in the company's employ after knowledge of the defect, and also makes the company liable for injuries sustained by an employé while engaged in operating trains, engines or cars, where such injuries result through the negligence of another employé. Section 9018 takes tiff's injury was not caused by a defect in rolling stock or track and not received by him while engaged in the operation of a train, it is plain enough—indeed, it is in effect conceded—that he possessed no right to recover at all unless he was within the protection of the Norris Act, and whether he was so protected is a vital question.

It is to be observed that the portion of the Metzger Act which is included in section 9016 of the General Code imposes liability for negligence of a railroad company or any of its officers or employés, "in addition to other liability," thus indicating that it was not the legislative design that this act should be the sole source of a statutory right of recovery, but, on the contrary, that there was other existing statutory provision intended to protect railway employés, as well as employes in other occupations, against negligence of their employers. Responsive provision in this behalf is to be found, we think, in the Norris Act, which in most comprehensive terms authorizes recovery in actions between employés and employers for personal injuries, "in addition to the liability now existing by law." 5 This becomes plain when some of the terms of that act are applied to the facts already stated. Section 6242, as just shown, provides that an employé having control of employés either in the particular department in which an injury occurs or in a separate department, also that an employé whose duty it is to inspect machinery used in the business of the employer or to give warning to or for employés, "shall be held to be the superior and not the fellow servant of such other employés of such employer." To give this language concrete application, it is perfectly plain that Inspector Collins was the superior of Machinist Connors, the plaintiff; for it distinctly appears

from the company the defense of contributory negligence, when such negligence was slight and that of the employer greater, and in such cases provides a rule of comparative negligence, further declaring that all questions of negligence and contributory negligence shall be for the jury.

4 We say this because of the common-law rule respecting the negligence of a fellow servant. The court below ruled, and we agree to the ruling, that independently of the Norris Act the inspector who caused the air brake piston to be set in motion, and consequently the injury, must be regarded as the fellow servant of plaintiff.

5 It is provided by that portion of the Norris Act which is included in section 6242 (3 P. & A. Ann. Ed. O. G. C. p. 383): "That in all actions brought to recover from an employer for personal injuries suffered by his employé * * * while in the employ of such employer, arising from the negligence or such employer or any of such employer's officers, agents, or employés, it shall be held in addition to the liability now existing by law that any person in the employ of such employer, in any way having power or authority in directing or controlling any other employé of such employer, is not the fellow servant, but superior to such other employé; any person in the employ of such employer in any way having charge or control of employés in any separate branch or department, shall be held to be the superior and not fellow servant of all employés in any other branch or department in which they are employed; any person in the employ of such employer whose duty it is to * * * inspect the * * * plant, machinery, appliances, * * * in any way connected with or in any way used in the business of the employer or to * * * give or transmit any signal, instruction, or warning to or for such employés shall be held to be the superior and not fellow servant to such other employés of such employer."

that Collins was an inspector, and, besides, was in control of the helper to whom he gave the order to set the air brake piston in motion; and this is true whether the department in which the inspector was working be regarded as the department in which plaintiff was working, or as a separate department. It is scarcely necessary to add that the statutory provisions just mentioned are distinguishable from the provision of the Metzger Act respecting superior servants, for the latter provision would seem to be inapplicable by reason of the fact that plaintiff himself had a helper (see section 9016). We have, then, statutory provision entitling plaintiff, at least in a prima facie sense, to a right of action; and it hardly is conceivable that it could have been the legislative intent that this right should fail simply because it is found in the Norris Act, and not in the Metzger Act. There is no repugnancy between the two acts; they may well stand together. Employés and the rights intended to be bestowed on them constitute the subject matter of each act; and we are constrained to hold that the Metzger Act is not exclusive, but that the Norris Act is cumulative. This conclusion finds analogy in principle in Daviess v. Fairbairn, 44 U. S. (3 How.) 635, 645, 11 L. Ed. 760.

[2] It appears in the opinion denying a motion of defendant for new trial that the court's view of section 6242 was in accord with the one we have just expressed. In the charge to the jury the court dealt with the issue whether defendant through its inspector either apprised or in any way warned plaintiff of the intent to set the air Testimony had been introduced both in support and denial of this issue; and the court instructed the jury that plaintiff was bound to prove by "a preponderance of the evidence that defendant was negligent and that this negligence of the defendant was the proximate cause of the plaintiff's injury." It must be conceded, however, that this issue of fact was not dwelt upon in the charge as was the other issue which concerned the alleged failure to prescribe and enforce rules for the safety of employés. The latter issue was prominently explained and submitted in the charge; and in the motion for new trial several complaints of error in this behalf were presented as grounds for setting aside the verdict. The basis of the charge as to rules and regulations was the portion of section 6244 which provides that in actions for personal injuries-

"the negligence of a fellow servant of the employé shall not be a defense where the injury * * * was in any way caused or contributed to by * * * the want of necessary and sufficient rules and regulations for the government of such employés and the operation and maintenance of such ways, works, boats, wharves, plant, machinery, appliances or tools."

It appears, in the opinion denying new trial, that defendant urged in support of its motion, as it urges here, that "there was no evidence tending to show a want of necessary and sufficient rules and regulations for the government of such employés." The court, believing that both sections (6242 and 6244) were applicable, concluded that "the verdict should be sustained because substantial justice was done," and that even if it was error to submit the issue as to rules it was not prejudicial to defendant. The questions thus confronting the court

upon the motion must have been (1) whether the evidence justified submitting to the jury the issue as to rules and regulations, and (2) whether the alleged omission on the part of defendant through its inspector, Collins, to warn plaintiff of the intent to set the air brake had been considered by the jury in the sense that the issue was determined by the verdict. We do not discover that plaintiff offered any evidence tending to show the existence or not of rules or regulations according to either the allegations of the petition or the provision of section 6244. Counsel for plaintiff do not even claim that such evidence was offered; indeed, they seem to have been content with introducing testimony as already stated to show that plaintiff was not in fact advised of the purpose to set the air brake. It is not easy, however, to understand why defendant would not have produced the rules and regulations in question, if in truth any had been adopted and sought to be enforced; but, regardless of this, defendant chose as before shown simply to present testimony to the effect that its inspector, Collins, actually notified plaintiff of the purpose to set the air brake. We must therefore conclude in view of the instructions on this subject, as before pointed out, that the case was submitted to the jury not alone upon the issue as to rules and regulations, but also upon the issue concerning notice to plaintiff of the purpose to set the air brake piston in motion and that this issue was decided by the verdict—and especially does this appear because the court particularly instructed the jury that the plaintiff could not recover if he had been warned, since in that event, his own negligence would be the sole proximate cause of the injury.

Was it then reversible error thus to submit both issues to the jury? Although technically there is a difference between the issue as to "want of necessary and sufficient rules and regulations" (section 6244) and the issue as to alleged failure to notify plaintiff of the intent to test the air brake, yet the ultimate object of such rules and regulations must be to provide for giving seasonable notice or warning to protect employés who might otherwise be liable to injury through movement and manipulation of machinery and the like; and this at last is the essence of the issue here as to failure to apprise or otherwise warn plaintiff. It is possible of course that the jury believed that defendant had made no provision through rules and regulations to protect its employés; but this does not signify reversible error, since the effect of the verdict is to show that defendant's inspector failed to notify plaintiff of the danger he was about to create.

[3] It is urged, moreover, that the court committed error in its charge concerning the measure of damages. This is to take only a partial view of the charge; considered as an entirety, we think the instructions bearing upon the amount of recovery were substantially correct. True, the verdict is apparently a large one; but this, like the claim that the verdict is against the weight of the evidence, is met by Herencia v. Guzman, 219 U. S. 44, 45, 31 Sup. Ct. 135, 55 L. Ed. 81, where, in passing upon a contention that the court might "review the evidence as to negligence and as to the damages recoverable," it was said:

(261 F.)

"As there was evidence proper for the consideration of the jury the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered."

Our consideration of the remaining assignments convinces us that reversible error is not shown; and accordingly the judgment will be affirmed.

BLANSET v. CARDIN et al.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1919.)
No. 5390.

1. STATUTES €==219—CONSTRUCTION OF STATUTE BY EXECUTIVE DEPARTMENT OF GREAT WEIGHT.

Where the meaning of a statute is doubtful, great weight is given to the construction placed upon it by the department charged with its execution.

- 2. Indians \$\iffing\$ 15(1)—Administrative regulations have effect of law. Regulations of the Department of the Interior for the protection of Indians and their property, authorized by Congress and not inconsistent with law, have the force of law.
- 3. WILLS \$\ightarrow\$11, 25—RIGHT TO MAKE WILL DISPOSING OF PROPERTY IN DEROGATION OF STATE LAW.

Under Act Cong. Feb. 14, 1913, amending Act June 25, 1910, § 2 (Comp. St. § 4228), allowing persons interested in allotments, held under trust or patent containing restrictions on alienation, to dispose of such property by will, and the regulations thereunder, a will by an Indian married woman, approved by the Secretary of the Interior disposing of all of her allotted lands, is valid, notwithstanding Rev. Laws Okl. 1910, § 8341, providing that no married woman shall bequeath more than two-thirds of her property away from her husband, and that no person prevented by law from alienating real property shall be allowed to dispose of the same by will.

4. Indians €==15(1)—Congressional power to control disposition of allotments.

Congress has the right to pass legislation in the interest of Indians as a dependent people, and may control the disposition of allotments during the periods of restriction on alienation.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Frank A. Youmans, Judge.

Bill by Mike Blanset against Oscar Cardin, as guardian, etc., and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Paul A. Ewert, of Joplin, Mo., and Henry C. Lewis, of Washington, D. C., for appellant.

A. C. Wallace, of Miami, Okl., for appellees.

Before SANBORN and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. This record presents an appeal from a decree of the District Court sustaining a motion to dismiss the plaintiff's bill because the bill failed to state a cause of action. The suit was

brought by plaintiff, as the surviving husband of Fannie Crawfish Blanset, against her three children, two of whom were her issue by a former marriage and one the issue of the marriage between her and the plaintiff.

Plaintiff and Fannie Crawfish were married August 3, 1906, and she died in Oklahoma on February 22, 1916. It is claimed that she was a member of the Quapaw Tribe of Indians, and at the time of her death was the owner of lands, some of which had been allotted to her under the provisions of the act of Congress approved March 2, 1895 (28 Stat. 907, c. 188), and some of which she held as the heir of her mother, a Quapaw allottee.

It is alleged that Fannie Crawfish Blanset, shortly before her death, executed a will whereby she gave and bequeathed \$5 to her husband, the plaintiff, and devised all of the lands to her three children, and that this will was approved by the Commissioner of Indian Affairs and by the Secretary of the Interior. The plaintiff avers that no written marriage contract had been entered into between himself and Fannie Crawfish Blanset, and that he is the owner of an undivided one-third of the lands of which she died seized by virtue of the statutes of Oklahoma, and prays that as to him the will may be canceled, and that his title to one-third share of the lands may be quieted. It is conceded that Mrs. Blanset, at the time of her death, held her lands under patents containing restrictions on alienation, and that the restrictive period had not expired. The questions presented upon these facts depend on the proper application and construction of certain statutes of the United States and of the state of Oklahoma.

[1-3] An act of Congress approved February 14, 1913 (37 Stat. 678, c. 55) amending Act June 25, 1910, c. 431, § 2, 36 Stat. 856 (Comp. St. § 4228), contains this provision:

"Sec. 2. That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent of the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, that the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the state wherein the property is located: Provided further, that the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, that sections one and two of this act shall not apply to the .Five Civilized Tribes or the Osage Indians."

The Secretary of the Interior has adopted regulations under this act, which provide that the Indian superintendent of the district of the property to be conveyed shall assist the Indian in the drawing of his will, so it shall express the wishes of the maker, but without influencing him in the disposition he desires to make. The superintendent is directed to report as to the mental competency of the Indian, the circumstances attending the execution of the will, the influences which induced its execution, the names of those entitled to share in the estate under the state laws of descent, and where the distribution proposed by the will has cut off natural heirs and disposed of the estate to persons who would not otherwise inherit the superintendent is directed to obtain from the testator, if living, an affidavit setting forth the reasons for so disinheriting such natural heirs. In case the testator is dead, he is to endeavor to learn from reliable sources the reasons for making such disposition. The competency of legatees or devisees to manage their own affairs is also to be investigated. In cases where a will has been made and the testator has died before submitting the will for the consideration of the Department of the Interior, a hearing is directed to be held to determine his legal heirs, and where the distribution to be made under the will differs from that which would otherwise have been made under the state law of descent, if the testator had died intestate, the legal heirs are to be given notice and opportunity to object to its approval.

It is appellant's contention that, notwithstanding this act of Congress and the reguluations made thereunder by the Secretary of the Interior, a married Quapaw Indian may not make a will in Oklahoma, whereby more than two-thirds of the allotted lands held under a patent from the United States, containing restrictions on alienation, are devised to persons other than the spouse of the testator. He claims that in such a case section 8341 of the Revised Laws of Oklahoma (1910) applies, which reads as follows:

"Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband: Provided, further, that no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will."

Appellant claims that the act of Congress heretofore quoted assumes that this section of the Oklahoma laws of descent and distribution shall continue in force as to wills of Indians authorized to be made by the act of Congress, because it did not expressly provide how such lands should be devised, and because it recognized the state laws of descent as applicable in case the Secretary disapproved a will after the death of the testator. We cannot agree with this contention. Before the enactment by Congress this testatrix could not have made a will conveying this land because of the prohibition in the last proviso of this section 8341 of the Oklahoma laws. The grant of the right to dispose

of this property by will is clear and comprehensive, it contains no limitation as to portions of property to be devised nor as to the devisees to be selected, nor other restraint upon the exercise of the power, except that the disposal must be in accord with the regulations to be prescribed by the Secretary of the Interior and that the will must be

approved by him.

The fact that Congress provided that the state law of descent should control in case a will was disapproved after the testator's death indicates an intent that it should not otherwise control. The general policy of Congress has been to maintain control over the Indians and the disposition of their allotments, according to its ideas of what is beneficial for them, rather than to subject them to state laws. Congress was well advised that unworthy and designing persons sometimes contract marriages with Indians with a view to obtaining the benefit of the property which the United States has granted to the Indians and that the right of a testator or testatrix to select devisees, and the right of the Interior Department to disallow any will, would often afford needed protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state laws. Where the meaning of a statute is doubtful, great weight is given to the construction placed upon it by the department charged with its execution (Swigart v. Baker, 229 U. S. 187, 33 Sup. Ct. 645, 57 L. Ed. 1143; Jacobs v. Prichard, 223 U. S. 200, 32 Sup. Ct. 289, 56 L. Ed. 405; United States v. Hermanos, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821), and regulations of a department, authorized by an act of Congress in the execution of an act and not inconsistent with it, have the force of law (In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; United States v. Foster, 233 U. S. 515, 34 Sup. Ct. 666, 58 L. Ed. 1074; United States v. Smull, 236 U. S. 405, 35 Sup. Ct. 349, 59 L. Ed. 641; McKinley v. United States, 249 U. S. 397, 39 Sup. Ct. 324, 63 L. Ed. 668).

The regulations which have been adopted by the Secretary of the Interior in the execution of this statute require the local Indian superintendent to submit such Indian wills to the department, but to report the names of those entitled to inherit by the state law of descent, and where the distribution proposed by the will has cut off natural heirs, and disposed of all the estate to persons who would not otherwise inherit, there is to be obtained from the testator, if living, or from other reliable sources, if he is dead, the reasons for so disinheriting natural heirs. No provision is made for the probate of such wills in the state courts, but they are to be approved or disapproved by the Secretary of the Interior and filed for record in that department. Legal heirs are to be given notice and a hearing, before a will is approved, "where the distribution made in the will differs from that which would otherwise be made under the state law." The construction thus placed upon the acts by the department shows that the state law of descent was not regarded as controlling. This act of Congress is not limited to Indians in Oklahoma, but confers a right upon all Indians in the United States of the class named to dispose of such property by will. It was intended to lessen the restrictions on alienation that had theretofore (261 F.)

prevailed. It is much more reasonable to suppose that Congress was conferring a uniform right upon such Indians than that it was making a grant subject to the varied restrictions and prohibitions on alienation

by will that might exist in the several states.

[4] It is conceded that Congress has the right to pass legislation in the interest of the Indians as a dependent people, and that it may control the disposition of the allotments during the period of restriction of alienation. Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820. The conclusion is that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the state as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior. We understand this conclusion is in accord with the views of the Supreme Court of Oklahoma. See Brock v. Keifer, 157 Pac. 88.

The decree will be affirmed.

VIGIL v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1919.) No. 5293.

1. RAILROADS &= 320—Duty of care to prevent injury to person on cross-ing.

Trainmen who know, or in the exercise of ordinary care ought to know, that a person on a crossing, apparently will not get out of danger, must use all reasonable efforts to slacken speed, or, if possible, to stop, in order to avert an accident.

2. RAILROADS &= 350(12)—NEGLIGENCE OF OPERATIVES OF TRAIN QUESTION FOR JURY.

In an action by one injured when a train struck his wagon, his team having run away and balked on the track, which was straight, so that one on the crossing could be seen for a half mile, the question whether trainmen were guilty of negligence in failing to slacken speed and stop the train *held*, under the evidence, for the jury.

3. Negligence 5-72-Care in emergencies.

Persons required to act in sudden emergencies under peculiar circumstances are not charged with that degree of caution required in other cases.

 RAILROADS ➡350(31)—NEGLIGENCE OF DRIVER OF TEAM BALKING ON CROSS-ING QUESTION FOR JURY.

In an action for injuries to one whose team, after running away, balked on the track until a train struck the wagon, the direction of a verdict for defendant on the ground that plaintiff was negligent as a matter of law held improper under the evidence.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Action by Elias Vigil against the Atchison, Topeka & Santa Fé

Railway Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. O. Seth, of Santa Fé, N. M., and H. B. Jamison, of Albuquerque, N. M., for plaintiff in error.

W. C. Reid and G. S. Downer, both of Albuquerque, N. M., for defendant in error.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. The plaintiff in error, hereafter plaintiff, commenced this action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. At the close of plaintiff's evidence the trial court directed a verdict against

him. This ruling is assigned as error.

Plaintiff in his complaint in substance charged: That on February 5, 1917, while he was driving a team of horses attached to a wagon in the direction of a public highway crossing over the railroad track of defendant in the county of Sandoval, New Mexico, the horses became uncontrollable through fright and ran to said crossing, stopping upon the railroad track. That plaintiff used his best effort to get said team to move off said track, and was unable so to do before a passenger train of defendant struck the wagon in which plaintiff was seated, thereby throwing him from the wagon and causing his injuries. That while plaintiff was stopped upon the railroad track by reason of the action of his horses, the servants of defendant in control of said passenger train discovered the peril in which the plaintiff was placed, but negligently failed to exercise ordinary care to check and stop said train and thus avoid injuring the plaintiff.

The facts as shown by the record are as follows: On the date mentioned in the complaint the plaintiff, about 6:45 or 6:50 o'clock p. m., started from his house, which was about 1,400 feet in a southeasterly direction from what is known as the Angustura public highway crossing over defendant's track, to drive a team of horses attached to a wagon over said crossing to his father's house, which was located south and west of the crossing. The horses were partly broken, hard on the mouth, and subject to becoming frightened at railroad trains. When plaintiff had proceeded about halfway to the crossing, or 700 feet, the horses became frightened at a passenger train of defendant coming from the north, and started to run along the road toward the crossing. Plaintiff put on the wagon brakes and attempted to hold the team, but was unable to stop them until they reached the crossing, when the team suddenly balked of their own accord: the front wheels of the wagon being in the center of the track. As the plaintiff reached the crossing the passenger train was distant from the crossing about one-half mile. The headlight of the engine was lighted and the whistle was blown from the distance of one-half mile until the train passed the crossing. For this distance of one-half mile the track was perfectly straight, with no obstructions, and a person on the crossing could be plainly seen for the full distance. On the evening in question the weather was clear

and the moon was shining. The passenger train consisted of an engine and four coaches. At the distance of one-half mile from the crossing the speed of the train was 20 miles per hour, but the speed was increased, so that when the crossing was reached it was 40 miles per hour. Between the one-half mile point and the crossing the speed was between 20 and 40 miles per hour. The train, when going 40 miles an hour, could have been stopped within a distance of 600 feet. When it was going 20 miles an hour, it could be stopped within 400 feet. When it was going 30 miles an hour, the train could be stopped within about the same distance as when it was going 40 miles an hour, or 600 feet. After giving this testimony as to the distance in which the train could be stopped, the engineer also said that it would take 800 feet to stop a train going 40 miles an hour with any weight to it. The plaintiff was excited and badly frightened by the runaway and the approaching train. He remained in the wagon, whipping his horses and yelling to them in an effort to get them off the track; but the horses continued to balk, and remained where they had stopped, until the train was almost on them, when they started ahead, the engine hitting the rear of the wagon, causing plaintiff's injuries. At the speed the train was going there was about a minute occupied in going the half mile. These facts do not present the ordinary crossing case.

[1, 2] The plaintiff by his pleading and evidence relied for a recovery upon the rule of law that when an engineer or other railroad employé knows, or in the exercise of ordinary care ought to have known, that a person on the crossing apparently will not get or stay out of danger, it is the duty of such engineer or employé to use all reasonable efforts to slacken the speed of the train and, if possible, stop it in time to avert an accident. 33 Cyc. 977, 979, and cases cited; St. Louis & S. F. Ry. Co. v. Summers, 173 Fed. 358, 97 C. C. A. 328 (C. C. A. Eighth Circuit); Kansas City & S. Ry. Co. v. Shoemaker, 249 Fed. 458, 161 C. C. A. 416 (C. C. A. Eighth Circuit).

We are clearly of the opinion that the case presented is not an impossible or an improbable one, to the extent of permitting the court to direct a verdict on that ground. It has never yet, so far as we have been able to learn, been permitted to man to know just what a frightened horse will do, or to judge its acts by the standard of reason. The facts in evidence, unexplained or uncontradicted, would warrant a jury in finding that the engineer or other employé in charge of the engine of the passenger train knew, or might have known in the exercise of ordinary care, of the peril of the plaintiff within a distance from the crossing which would have allowed the stopping or slackening of the speed of the train before coming into collision with the plaintiff. This being so, we think the court erred in directing a verdict on the ground that there was no negligence shown on the part of defendant, in that there was no evidence that the employés in charge of the passenger train knew of the peril of the plaintiff.

[3, 4] It is further contended, however, that if we conceded that the opportunities for knowing the peril of the plaintiff were as stated, then it also must be conceded that the plaintiff knew, or in the ex-

ercise of ordinary care might have known, of the approach of the train, and knowing this, and also that he could not start his horses, it was his duty to jump from the wagon and save himself from injury. A jury might upon the evidence find that the plaintiff was negligent, but the question here is: Was his negligence so plain and beyond question as would authorize the trial court to direct a verdict for the defendant on the ground of contributory negligence? The courts have had to deal with cases where persons in sudden emergencies have been called to act in peculiar circumstances, and they have uniformly held that such persons are not to be charged with the exercise of that degree of caution as is required in other cases. Union Pacific Ry. Co. v. McDonald, 152 U. S. 262, 281, 14 Sup. Ct, 619, 38 L. Ed. 434; Davis v. Chicago, R. I. & P. Co., 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424; National Life Ins. Co. v. Mc-Kenna, 226 Fed. 165, 141 C. C. A. 163; Byars v. Wabash R. Co., 161 Mo. App. 692, 141 S. W. 926; Brien v. Detroit United Ry. (D. C.) 247 Fed. 693; Great Northern Ry. Co. v. Harman, 217 Fed. 959, 133 C. C. A. 631, L. R. A. 1915C, 843. No doubt the plaintiff expected to start his horses. He must also have had in mind the fact that his property would be destroyed if he should jump from the wagon. The wagon might derail the engine of the train, and thus cause loss of life, as well as injury to the train. The plaintiff might injure himself in jumping, and those matters, coming upon the plaintiff all at once, must be taken into consideration in determining whether he exercised ordinary care in remaining in the wagon. Certainly the matter is not so clear that the trial court could as a matter of law say that the plaintiff was negligent in not jumping from the wagon. Reasonable men might honestly differ upon that question, and, if that is so, the question of contributory negligence ought to have been left to the jury.

We do not discuss the rule of the last clear chance, as that would involve an assumption that the employés of defendant knew, or in the exercise of ordinary care might have known, of plaintiff's peril, and also an assumption that plaintiff was guilty of contributory negligence, both of which questions we hold ought to have been submitted to the jury.

For error in directing a verdict for defendant, the judgment below

is reversed, and a new trial ordered.

SKUY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1919.) No. 5182.

1. CRIMINAL LAW \$\iiint 730(3)\$—Cross-examination contrary to buling not cured by judge's statement.

Repeated suggestions by the government's attorney, in the cross-examination of defendant's character witness, of his failure and bankruptcy after the court's ruling against this, will be regarded as having fastened them in the minds of the jury too securely to permit of their re-

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moval by a few oral statements by the judge in the midst of the trial, and as an invitation to the jury to disregard the court's ruling.

2. CRIMINAL LAW @==1109(1)—EVIDENCE IN DISREGARD OF RULINGS PREJUDI-

Irrelevant and immaterial evidence, injected into the minds of the jury in disregard of the rulings and directions of the court, is not less prejudicial than such evidence admitted over objection under an erroneous ruling.

3. CRIMINAL LAW € 723(5)—ARGUMENT APPEALING TO BACE PREJUDICE NOT HARMLESS ERBOR.

Argument of government's attorney, in effect a statement that in his estimation the testimony of one soldier boy, perhaps of one person not a Jew, was of greater weight than that of all Jews, made with reference to the testimony of a soldier for the prosecution, contrary to that of four Jews, is prejudicial error.

4. CRIMINAL LAW \$\ightharpoonup 1035(1), 1053, 1129(1)\top-Reviewing error without objection, exception, or assignment.

Radical fault in the trial for a crime involving the liberty of defendant will be noticed and corrected by the reviewing court, though there be no proper objection, exception, or assignment.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Abraham Skuy was convicted of perjury, and brings error. Reversed, and remanded for new trial.

H. B. Martin, of Tulsa, Okl. (Crossland & Crossland, of Paducah, Ky., on the brief), for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. Mc-Ginnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. Abraham Skuy, the defendant below, was indicted for perjury in three counts, in that, in his examination as a bankrupt before the referee in bankruptcy: (1) He falsely testified that he never sold any of his goods below cost; (2) he falsely testified that he never sold any of his goods to Jacob Fell; and (3) he falsely testified that he never removed any goods from his store in an automobile. After the assistant United States attorney had introduced testimony tending to sustain each of these charges, and the defendant had introduced the testimony of six witnesses which tended to contradict the testimony on behalf of the United States, the assistant attorney announced that he had reached the conclusion that the evidence relative to the charges in the first and second counts did not warrant the court in submitting that evidence to the jury, there was no further controversy regarding these counts, and at the close of the trial the court instructed the jury to return a verdict for the defendant thereon.

The evidence on the third count presented two issues of fact: First, whether or not the defendant ever testified that he never took any goods out of his store in an automobile; and, second, whether or not he did take any goods out of his store in an automobile. On each of these

counts the evidence was conflicting, but the real issue tried was whether or not the defendant, about April 15, 1916, removed a large quantity of goods from his store in the nighttime. Upon this issue two witnesses, Evans and Lee, testified that he did, and four witnesses, the defendant and Oscar Stekoll, Abraham Stekoll, and Lewis Stekoll, testified that he did not. All these witnesses, except Lee, were members of the Jewish race. In April, 1916, Evans was engaged in the same kind of business as that which Skuy conducted, gents' furnishings and loans, and he occupied the store by the side of Skuy's store. Lee at that time was an employé of Evans, with whom he roomed and slept. At the time of the trial, however, he was a private in the Marine Corps. In April, 1916, Evans was unfriendly to Skuy, and Lee became so before he testified. After Evans and Lee had testified for the government, and Skuy and three other witnesses had testified for the defendant as to the removal of the goods, M. Himelstein, the Jewish rabbi in charge of the Jewish Congregation at Tulsa, and five other Jews, testified that they knew the reputation of Skuy and Evans for truth and veracity in the community in which they lived, and that Skuy's was good and Evans' was bad. There was no contradictory testimony on this question.

[1, 2] In the course of the trial Mr. William Reedman was called on behalf of the defendant, and testified that he lived in Tulsa; that he had lived there for 10 years; that he was then and had been during these 10 years engaged in the mercantile business; that he was a "member of the Jewish race and persuasion"; that he knew the reputation of Skuy and Evans for truth and veracity; that Evans' reputation was not very good, but that Skuy "is a good boy." On the cross-examination of this witness, the first question asked by the assistant United States attorney was, "What was the date of your failure, Mr. Reedman?" Defendant's attorney objected and said:

"Nothing in the evidence here that I have observed that this man has ever failed."

Then the examination proceeded in this way:

"Q. You are a special friend of Mr. Skuy's, are you not? A. Not a special friend: same as everybody is.

"Q. I will ask you this question: If at the time you failed, if you did fail, you didn't store your goods in Mr. Skuy's store until a financial settlement was made with your creditors? A. There was no such things like that.

"Q. You know Mr. Stekoll, do you not? A. Yes, sir.

"Q. What connection did he have with the matter I have just referred to? "Mr. Martin: If the court please, I object to that as irrelevant and immaterial.

"The Court: Objection sustained."

"Q. Did he act as trustee? A. No, sir.

Later, in the cross-examination, after inquiring concerning Mr. Reedman's business relations with Mr. Robert A. Stekoll, the assistant attorney again returned to Mr. Reedman's suggested failure in this way:

[&]quot;Q. Was he [Stekoll] one of your creditors in your bankruptcy matter? A. No, sir.

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"Q. Did he have any connection whatever with your bankruptcy matter?

A. None at all, sir.

"Q. Do you state that no part of your goods were stored in Skuy's store pending a settlement with your creditors in your bankruptcy matter? A. Positively not.

"Mr. Crossland: I move to exclude that about the bankruptcy, or anything

else.

"The Court: Overruled.
"Mr. Crossland: Exception."

The witness was then dismissed, and the court then and there instructed the jury that the answers of this witness were testimony for their consideration, but that counsel's questions were not, and that, even though it might appear from the testimony of the witness that he had been a bankrupt, he was presumed, until the contrary was shown, to have properly availed himself of the bankruptcy law, and it was not a matter which should be permitted in any way to affect his testimony in the case.

No one will deny that the failure of Mr. Reedman in his mercantile business and his bankruptcy were irrelevant to any issue in this case, and that it was the duty of the court and counsel alike to keep these matters, not only from the consideration, but from the hearing of and the suggestion of them to the jury. The testimony of one who has failed in business or taken the benefit of the Bankruptcy Act is not rendered unworthy of belief, nor is it rendered less credible, by that fact. If the assistant attorney was ignorant of the plain rule of law which rendered the failure and bankruptcy of Reedman irrelevant evidence, which we do not intimate, he was informed of it by the ruling of the court upon the first question he asked on the cross-examination of Reedman. Nevertheless he returned to the suggestion of the failure and bankruptcy twice in his cross-examination, which occupies only two printed pages. After that first ruling was made, the duty rested upon him, as well as upon the court, to prevent further attempts to prejudice the jury against the testimony of Mr. Reedman and the defense of the defendant by endeavoring by questions to fasten in the minds of the jury the failure and bankruptcy of Reedman. The court, when the cross-examination was closed, clearly perceived the prejudicial nature of the questions of the assistant attorney, and immediately instructed the jury to disregard them; but the repeated suggestions of the failure and bankruptcy by the questions probably fastened them in the minds of the jury too securely to permit of their removal by a few oral statements of the judge in the midst of the trial, and the disregard by the assistant attorney of the ruling of the court on these suggestions was a plain invitation to the jury to follow his example and likewise disregard it. Irrelevant and immaterial evidence, injected into the minds of the jury in disregard of the rulings and directions of the court, is not less prejudicial than such evidence admitted over objection under an erroneous ruling of the court.

[3] After the evidence was closed the assistant attorney in his argument to the jury in substance said:

"It is a well-known rule of law that hearsay evidence is not admissible in criminal cases; but there is one exception to this rule: In murder cases the

dying declaration of the injured man is admissible, because the law recognizes that a man about to face his God is more apt to tell the truth than otherwise. This man Lee was on the Atlantic Coast with his company, ready to join the army in France, and was called to testify in this case by an order of the Secretary of War, that justice might be done."

At this point the trial court interrupted the speaker, instructed him that the argument he was making was improper, and admonished him to proceed no further on that line. Later in his argument the speaker again referred to the testimony of the witness Lee, and stated in substance that he did not care how many Jews the defendant brought there to testify, or what they swore to, that he believed that the soldier boy swore to the truth, that he had no interest in the case, and that every word that he testified to was the truth, and in delivering this statement he emphasized the word "soldier." An objection was made and exception taken to this latter part of the argument when it was made.

The argument challenged was in effect a statement that in the estimation of the assistant attorney the testimony of one soldier boy, perhaps of one person who was not a Jew, to a disputed fact, was in his estimation of greater weight than that of all Jews, however truthful, upright, intelligent, and numerous, who had knowledge of the fact, and this statement was made to induce the jury to adopt that view, and to find the defendant guilty on the testimony of Lee, notwithstanding the testimony of four Jewish witnesses to the contrary. The application of that rule in general practice would in effect disqualify members of the Jewish race from testifying against the testimony of members of another race, because it would render their testimony futile. Such a rule would fly in the teeth of the basic principle of our jurisprudence, that every citizen, regardless of position, property, race, or belief, is entitled to the same privileges before the law, and to the same impartial trial in court, as every other citizen who comes before it.

The testimony of the Jew, the Catholic, the Protestant, the member of each religious sect and of every political party, is entitled in the courts of this land to be weighed, considered, and given credibility and effect under the established rules of evidence according to the probability of its truth, and the character and reputation of him who gives it, free from any consideration of or prejudice against the sect or party to which he belongs or the religious belief he holds. The arguments of a lawyer representing this nation in the presentation of a case of the United States against the defendant are not without great weight and influence. Counsel for the United States permitted his zeal and anxiety for success to carry him so far in this case that the conviction cannot be escaped that there was prejudicial error in this trial which prevented it from being fair and impartial.

[4] The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince. Hall v. United States, 150 U. S. 76, 80, 82, 14 Sup. Ct. 22, 37 L. Ed. 1003; Waldron v. Waldron, 156 U. S. 361, 380, 381, 382, 15 Sup. Ct. 383, 39 L. Ed. 453. And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen,

and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment. Wiborg v. United States, 163 U. S. 632, 659, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; August v. United States, 257 Fed. 388, 391, 393, — C. C. A. —.

Let the judgment below be reversed, and let the case be remanded to the court below, with directions to grant a new trial.

BLOCH v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 26, 1919.)
No. 3368.

1. RAILROADS \$\igsim 5\frac{1}{2}\$, New, vol. 6A Key-No. Series—Carrier under federal control as ballee.

Where an interstate shipment was made during the period of government operation and control, the government was bailee of the property during its transportation.

- 2. CRIMINAL LAW \$\iiists 304(2)\$—Judicial notice of federal railway control.

 In a prosecution for receiving goods stolen from an interstate shipment, knowing them to have been stolen, where the shipment was made over an interstate road during the period of government control and operation, the court will take judicial notice of such facts, and that the government was bailee.
- 3. Receiving stolen goods €==7(5)—Sufficiency of indictment as to property stolen from interstate shipment.

In view of Rev. St. § 1025 (Comp. St. § 1691), which cures all technical defects, indictment charging offense of receiving or having in possession property stolen from an interstate shipment, knowing the same to have been stolen, which alleged that shipment was made over an interstate railroad during period of government control, and set out the name and address of the consignee, the date of shipment, and the number and initial of the car from which the property was stolen, sufficiently alleges ownership.

- 4. Receiving stolen goods \$\iiint 7(4)\$—Sufficiency of allegation of theft.

 An indictment charging offense of receiving or having in possession property stolen from an interstate shipment, knowing the same to have been stolen, which alleged that the property which was being transported in interstate commerce was stolen from a specified car, is not defective,
 - in interstate commerce was stolen from a specified car, is not defective, in that it did not show that the property was taken from the car without the consent of the owner.
- RECEIVING STOLEN GOODS ☐ 7(1)—SUFFICIENCY OF AVERMENT THAT PROPERTY WAS PART OF INTERSTATE SHIPMENT.

In a prosecution for receiving or having possession of goods stolen from an interstate shipment, knowing that they were stolen, the indictment, in view of Rev. St. § 1025 (Comp. St. § 1691), held to sufficiently allege that the property was part of an interstate shipment.

6. Indictment and information \$\iff 110(18)\$—Sufficiency in statutory language.

An indictment charging the offense of receiving or having in possession goods stolen from an interstate shipment, knowing the same to have been stolen, need not aver that defendant received and possessed the stolen property with intent to convert it to his own use; Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), denouncing the offense, which the indictment followed, omitting any reference to intent to convert.

7. CRIMINAL LAW \$\infty 338(4, 5)\$—EVIDENCE OF FINDING OF STOLEN GOODS.

In a prosecution for receiving or having possession of property stolen from an interstate shipment, knowing it to have been stolen, evidence that 11 of the 37 flasks of quicksilver which were stolen were recovered from the possession of one in New York City held admissible, over objection that defendant was not connected by proof with the flasks; it appearing that such flasks bore the same serial numbers as 11 of the flasks in the original shipment, and that they were not transferred by the consignee, etc.

8. RECEIVING STOLEN GOODS & KNOWLEDGE THAT PROPERTY WAS STOLEN FROM INTERSTATE SHIPMENT.

In a prosecution under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), for receiving or having possession of property stolen from an interstate shipment, knowing it to have been stolen, it is immaterial whether defendant knew that the property was stolen from an interstate shipment.

9. CRIMINAL LAW €== 825(4)—NECESSITY OF REQUEST TO CHARGE ON MATTERS OMITTED.

In a criminal prosecution, where there was direct as well as circumstantial evidence, defendant, if dissatisfied with the charge, because it omitted any reference to the subject of circumstantial evidence, must request the court to charge upon such evidence.

10. Receiving stolen goods &=6-Prosecution of thief for possession.

Under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), denouncing the offense of receiving or having possession of goods stolen from an interstate shipment, knowing them to have been stolen, the unlawful possession of property stolen from an interstate shipment by the thief falls within the terms of the statute.

11. CRIMINAL LAW \$\ightarrow\$800(4)—Necessity of charge defining "theft."

The word "theft" necessarily implies a taking from the owner without his consent, and in a prosecution for receiving or having possession of goods stolen from an interstate shipment, knowing them to have been stolen, it was unnecessary for the court to define the word "theft" by informing the jury that it implied a taking from the owner without the owner's consent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Theft.]

12. CRIMINAL LAW \$\infty 721\forall_2(2)\$—RIGHT OF PROSECUTOR TO COMMENT ON FAILURE OF DEFENDANT TO PRODUCE CORRESPONDENCE.

Where defendant took the stand in his own behalf, and during the course of his examination referred to correspondence between himself and one to whom he had shipped goods stolen from an interstate shipment, which he was charged to have received with knowledge that they were stolen, prosecutor may, where he cross-examined defendant as to such correspondence and asked if he objected to producing the same, refer to defendant's failure to produce the correspondence without infringing on defendant's constitutional privilege.

In Error from the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

Herman Bloch was convicted under Act Feb. 13, 1913, of receiving or having in his possession property stolen from an interstate shipment, knowing the same to have been stolen, and he brings error. Affirmed.

C. B. Hudspeth, Volney M. Brown, and Alfred J. Harper, all of El Paso, Tex., for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex., and W. H. Fryer, Asst. U. S. Atty., of El Paso, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. The plaintiff in error was convicted in the District Court for the Western District of Texas of the offense of receiving or having in his possession property stolen from an interstate shipment, knowing the property to have been stolen. The property consisted of 37 flasks of quicksilver shipped from Mendota, Cal.,

to New York City.

- [1-3] The sufficiency of the indictment is questioned for a number The indictment is challenged because it does not sufficiently allege the ownership of the quicksilver. The shipment is alleged to have been made over an interstate railroad and during the period of government operation and control. The government was therefore a bailee of the property during its transportation. The court takes judicial notice of this status, and neither averment nor proof of it was required. Again, the designation of the name and address of the consignee, the date of the shipment, and the number and initial of the car from which the property was stolen, would seem to be a sufficient allegation of ownership, so far as the purpose of informing the defendant of the accusation against him, and its nature, required such averment. Kasle v. U. S., 233 Fed. 883, 147 C. C. A. 552. If it was held to be sufficient for that purpose in a case in which the goods were stolen from a railroad station, it would seem to be equally so for all practical purposes when they were alleged to have been taken from an identified railroad car. It would certainly serve to identify the shipment, so as to furnish the defendant the information needed by him to meet the government's case, and to enable him to plead former jeopardy, in the event of a subsequent prosecution for the same transaction. If it did so, it was sufficient to withstand objections, in view of the provisions of section 1025 of the Revised Statutes (Comp. St. § 1691), which cures all technical defects in indictments. In any event the showing of government control and operation of the carrier at the time of the commission of the offense charged contained a sufficient showing of ownership, since possession as bailed was shown to be in the government of the United States.
- [4, 5] The indictment is also criticized because it does not allege that the quicksilver was taken from the car without the consent of the owner. It does allege that it was stolen from the car, and this necessarily implies a taking without the owner's consent. It also sufficiently alleges that the quicksilver was part of an interstate shipment. It was not necessary to allege the legal status of the consignee, as to whether it was a partnership or a corporation, or to do more than give the initials and car number of the car from which the shipment is alleged to have been stolen. Kasle v. U. S., 233 Fed. 883, 147 C. C. A. 552. Section 1025, Revised Statutes, cures all technical defects in the indictment, if any exist.

[6] The plaintiff in error cites the case Cohn v. U. S., 258 Fed 356, — C. C. A. —, to the effect that the indictment was fatally defective, because it contained no averment that the defendant received

and possessed the alleged stolen property "with intent to convert it to his own use." The indictment in the case relied upon by plaintiff in error, however, was framed under section 48 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1098 [Comp. St. § 10215]). That section contains the words alleged to have been improperly omitted from the indictment in this case in the definition of the offense. The indictment in this case was framed under the first section of Act Feb. 13, 1913, c. 50, 37 Stat. 670 (Comp. St. § 8603). The pertinent language of this section is:

"Shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen."

The omission of the words contained in section 48 from Act Feb. 13, 1913, distinguishes this case from that of Cohn v. U. S., supra, and from the case of Kirby v. U. S., 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 890, which was based on an indictment framed under Act March 3, 1875, c. 144, 18 Stat. 479 (Comp. St. §§ 10214, 10215), the language of which is identical with that of section 48 with respect to the intent to convert, and which words are, as we have said, omitted from Act Feb. 13, 1913. The indictment in this case adopts the language of the statute, and we think the use of the statutory language was enough. Receiving or possessing stolen property, knowing it to have been stolen, though the intent was to protect or benefit the thief, instead of the receiver or possessor, might well have been made punishable by Congress, and we think was so. In omitting the words contained in section 48 of the Penal Code, Congress broadened the offense by making the receipt or possession of stolen property punishable for any wrongful purpose, though that purpose was not to convert it to the use of the receiver.

[7] The plaintiff in error objected to proof offered by the government that 11 flasks of quicksilver had been recovered from the possession of J. H. Taft in New York City. The ground of the objection was that the defendant was not connected by the proof with the 11 flasks. The 11 flasks were shown to have borne the same serial numbers as 11 of the flasks in the original shipment from Mendota, and so were identified as part of that shipment. They must have come into the possession of Taft, either through Haas Bros., the consignees, who received a part of the shipment, or from Hardy, to whom was shipped 36 of the 37 flasks by the defendant either directly or indirectly. The remaining flask never left El Paso. The 37 flasks were shown by the serial number to have been short from the shipment consigned to Haas Bros., and shipped from Mendota. Of the 36 flasks that were reshipped from El Paso to New York, only 25 were found in the possession of Hardy, though the entire 36 had been shipped to him from El Paso, either by the defendant or his vendee. Added to the 25 flasks found and seized in his (Hardy's) possession, the 11 flasks found in Taft's possession would aggregate the exact number shipped from El Paso to Hardy. Identity of number may be a circumstance tending to trace connection.

Again, the record tends to show that the 11 flasks, found in Taft's possession, were replevied by Haas Bros., which excludes the idea that Haas Bros. put Taft in possession of the 11 flasks. The proof connecting the defendant with the 11 flasks may have been slight, but its probative value in the case was equally unimportant. It served only to account for the 36 flasks. The defendant could have been convicted as well because of the receipt or possession of the 25 flasks found at Hardy's alone as because of the receipt or possession of the entire 36 flasks. We think enough connection between the 11 flasks and the defendant appears in the record to have made it proper for the District Judge to have admitted the proof, and to have refused defendant's requested charge that it was not connected, and that it should be disregarded by the jury for that reason.

[8] The plaintiff in error contends that the government was required to show, not only that the defendant knew that the quicksilver was stolen, but that he also knew that it had been stolen from an interstate shipment. A showing that it was part of an interstate shipment is essential only for the purpose of conferring jurisdiction on the federal court. The knowledge of the defendant, or his want of knowledge, cannot affect the question of the court's jurisdiction. When it comes to the question of the defendant's guilt or innocence, that is made to depend by the terms of the act upon his knowledge of its stolen character. Knowledge of its being part of an interstate shipment would not add to or detract from the guilt of the defendant in receiving it. Kasle v. United States, 233 Fed. 883, 147 C. C. A. 552.

[9] The plaintiff in error excepted to the court's charge because it omitted any reference to the subject of circumstantial evidence. If the plaintiff in error was dissatisfied with the charge, because of omitted matter, his remedy was to request the court to charge upon the matter omitted. It could not be reached by an exception. Hughes v. U. S., 231 Fed. 50, 145 C. C. A. 238; Goldsby v. U. S., 160 U. S. 77, 16 Sup. Ct. 216, 40 L. Ed. 343; Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327. In this case there was direct, as well as circumstantial,

evidence tending to connect defendant with the offense.

[10] The court's charge is also criticized because it does not exclude the idea that the defendant may have been the thief, as well as the possessor of the stolen property. Conceding that the offenses of receiving and stealing are inconsistent, and that one cannot be guilty of both offenses based upon the same transaction, yet the statute also punishes the possession of stolen property, knowing it to have been stolen. It is clear that the unlawful possession of stolen property by the thief is not excluded from the terms of a statute, which punishes the unlawful possession as well as the unlawful receiving of stolen goods. The thief may well be also the unlawful possessor of the property stolen by him.

[11] We think the word "theft" necessarily implies a taking from the owner, and a taking without the consent of the owner, and that an omission of any express statement to this effect from the definition of theft in the court's charge was not erroneous. Nor do we think it

was error for the court not to have imposed upon the government in its charge the burden of showing, not only that the defendant knew that the quicksilver was stolen, but also that he knew it to have been stolen from an interstate shipment; for the reasons before stated.

[12] The identity of the flasks found in New York with those shipped from Mendota, and those received by the defendant at El Paso, and reshipped by him or his vendee to New York, was properly left as a question of fact for the determination of the jury. The plaintiff in error took the stand in his own behalf, and during the course of his examination voluntarily referred to certain correspondence between himself and Hardy, to whom he had shipped the quicksilver, which was had after the seizure of the quicksilver in New York. The United States attorney asked the defendant on cross-examination whether he objected to producing the correspondence referred to. The defendant referred the question to his attorneys for answer. The correspondence was not in fact produced. The United States attorney commented in his argument to the jury on the failure of the defendant to produce it. If the defendant had not submitted himself to cross-examination, the action of the United States attorney would have been reversible error. In that event defendant would have been privileged from producing the correspondence and from being subjected to adverse comment for failure to produce it. Having submitted himself to cross-examination, and having voluntarily referred to the correspondence, he thereby waived his constitutional privilege, and, if on request he failed to produce the letters, the United States attorney was free to comment on his failure. Diggs and Caminetti v. U. S., 242 U. S. 471, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

Finding no error in the record, the judgment is affirmed.

PEYTON v. FARMERS' NAT. BANK OF HILLSBORO, TEX., et al.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1919.)

No. 3353.

396(5)—Necessity of indicating selection of residence Homestead before petition filed.

Bankrupt is not entitled to a house, as a living homestead, as exempt under Rev. St. Tex. 1911, art. 3785: he, though having had property other than it suitable for his homestead, calling on him to indicate his selection, never having occupied it, nor taken preparatory steps, nor declared his intention to occupy it as a home, prior to filing of the petition in bankruptcy, when, under Bankruptcy Act July 1, 1898, § 47a, cl. 2 (Comp. St. § 9631) its status became fixed.

2. Bankruptcy \$\infty 398(1)\$—Objection to exemption.

Bankrupt is entitled to have a carriage set aside to him as exempt, under Rev. St. Tex. 1911, art. 3785, as against claim of objecting creditor that it was bought with proceeds of grain mortgaged to him, and which bankrupt had agreed to pay to him; this not being a claim which the trustee could assert, not being a transfer under Bankruptcy Act July 1, 1898, § 70e (Comp. St. § 9654), nor a lien obtained by legal proceedings,

(261 F.)

or at all, under section 67 (section 9651), but a claim to be asserted by the creditor in the state court.

3. Bankruptcy \$\sim 396(5)\$—Machinery in business homestead as exempt.

Bankrupt's mill being on leased land, he is not entitled to have set aside, as part of his business homestead, exempt under Rev. St. Tex. 1911, art. 3785, machinery in it, though constituting fixtures, nor appur-

tenances on the lot, outside the building.

- 4. Bankruptcy \$\infty\$396(4)—Exemption of machinery as "tools of trade."

 Machinery may not be set aside to bankrupt as tools or apparatus of trade, exempt under Rev. St. Tex. 1911, art. 3785, where run by other power than hand.
 - [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tools of Trade.]
- 5. Courts &=366(19)—Federal courts bound by state decisions on exemptions by Constitution and statutes.

Federal courts are bound by the decisions of the highest court of a state, construing the exemption provisions of its Constitution and statutes.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Texas; Duval West, Judge.

In the matter of E. H. Peyton, bankrupt; Edgar E. Witt, trustee, and the Farmers' National Bank of Hillsboro, Tex., objecting creditor. On petition of bankrupt to revise an order of the District Court. Modified and affirmed.

N. B. Williams and Williams & Williams, all of Waco, Tex., for petitioner.

Wear & Frazier, of Hillsboro, Tex., and J. D. Williamson, of Waco, Tex., for respondents.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. This is a petition to revise an order of the District Court, as a court of bankruptcy confirming an order of the referee, which disallowed to the bankrupt certain items set apart to him by the trustee, as exempt under the Statutes of Texas. The items, so disallowed, were (1) a house and lot claimed as a living homestead; (2) an automobile claimed as a family carriage; and (3) certain machinery connected with a grain mill, contained in a building which was allowed the bankrupt as exempt.

[1] 1. The house and lot claimed by the bankrupt, as a living homestead, was purchased by the bankrupt immediately before the filing of his petition in bankruptcy; the deed having been executed two days before that event. The purchased premises were in the possession of a tenant, whose lease did not expire until September 1, 1918; the petition having been filed in the June preceding. The bankrupt testified that he endeavored to secure possession from the grantor's tenant immediately upon his purchase, but was unable to do so. He did not testify that he then disclosed to any one that his purpose in seeking to get possession was to occupy the premises with his family as a home. The record fails to show any disclosure of that intention until after his petition had been filed, at which date the status of the property became

fixed. Section 47a, cl. 2, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [Comp. St. § 9631]); Cooper Grocery Co. v. Park, 218 Fed. 42, 134 C. C. A. 64; Garcia v. Uveda (Tex. Civ. App.) 198 S. W. 167.

The bankrupt, at the time of the purchase, had other property, which was suitable for his homestead, and was therefore called upon to indicate his selection. No preparatory steps to occupy the purchased premises were taken by him before bankruptcy. The attitude of the case is therefore that of one claiming a homestead without occupancy or tangible preparation to that end, and without having declared his intention to occupy the premises as a home. The authorities are against the sufficiency of such a showing for a homestead exemption. Franklin v. Coffee, 18 Tex. 413, 70 Am. Dec. 292; Murphy v. Lewis (Tex. Civ. App.) 198 S. W. 1062; Blackwell v. Lasseter (Tex. Civ. App.) 203 S. W. 620: Markum v. Markum (Tex. Civ. App.) 210 S. W. 841; Barnes v. White, 53 Tex. 628. In the case of Gardner v. Douglass, 64 Tex. 76, relied upon by petitioner, there was a showing of a declaration of intention, and a subsequent occupancy of the premises as a home, both of which are lacking in this case.

[2] 2. The automobile was not allowed by the District Court to the bankrupt as exempt. It was claimed as a family carriage, under article 3785, Revised Statutes of Texas. The objecting creditor disputed the claim, for the reason that it asserted that the automobile had been bought with funds procured by the bankrupt from the sale of grain, which had been mortgaged by the bankrupt to the objecting creditor, and the proceeds of the sale of which the bankrupt had agreed to pay to the objecting creditor. It is clear that the objecting creditor can take nothing by virtue of the mortgage, since it agreed that the mortgagor, the bankrupt, might sell the mortgaged property, notwithstanding the mortgage, relying on the bankrupt's agreement to turn over to the objecting creditor the proceeds of the sale. The claim of the objecting creditor, if any it has, is therefore to the proceeds by the assertion of a trust in them, if they can be traced. The proceeds of the sale of the grain were the property of the bankrupt, subject to the trust, and the automobile purchased partly or wholly with them was the property of the bankrupt, subject to the trust, if the proceeds of the sale of the grain could be traced into the money that bought it.

The bankrupt was entitled to have it set aside to him as exempt, unless the trustee in bankruptcy could assert the objecting creditor's claim. That claim was neither a transfer under section 70e of the act (Comp. St. § 9654), nor a lien obtained by legal proceedings, or at all, under section 67 (section 9651) of the act. It was therefore not vested in the trustee, and, being the right of the individual creditor alone, it could not interfere with the right of the bankrupt to have the automobile declared exempt from administration in the bankrupt court. The jurisdiction of the bankrupt court terminated when the automobile was set aside to the bankrupt. The right of the individual objecting creditor to follow the proceeds of the sale of the grain into the automobile would have to be asserted in the state court; the bankrupt's discharge having been stayed for that purpose. Lockwood v. Exchange

Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The case of Parlin & Orendorff Implement Co. v. Moulden, 228 Fed. 111, 142 C. C. A. 517, L. R. A. 1917B, 130, was one in which the agreement of the bankrupt was with all his creditors, and not one alone, and so inured to the trustee.

[3-5] 3. The District Court allowed the building in which the bankrupt was conducting his mill business to him as a business homestead, but denied the bankrupt's exemptions in the machinery and accessories claimed by him as exempt because a part of it, or as tools and apparatus of his trade. The bankrupt was a miller, and conducted his business as a miller, in a building on ground leased to him by the Cotton Belt Railroad Company. The District Court held that the building, though it was not realty, in view of the tenure by which it was held, was a business homestead as personalty. It further held that, being personalty, it did not carry its contents, though they were fixtures, as a part of it, and as exempt with it. The District Court relied upon the case of Cullers v. Henry & James, 66 Tex. 494, 1 S. W. 314, as controlling, and it seems to us to be so. In that case a ginhouse, which was built on leased land, was allowed the debtor as a business homestead, though it was held to be personalty. Refusing to allow the machinery contained in it, as exempt, the Supreme Court of Texas said (66 Tex. 499, 1 S. W.315):

"But we do not feel authorized to extend the scope of the law's purpose any further than this. The mill and gin and pertinent apparatus and machinery may become part of the homestead in town or country, not because they are in themselves exempt, but because they are parts of that which is exempt. If they are annexed to and form part of a tract of land in which a family has a homestead right, their location and use will aid in determining what portion of the tract is under protection from seizure, as in the case of Railway Co. v. Winter, 44 Tex. 597. But to be exempt as part of the homestead they must be part of the exempt realty. They form no part of the home proper, which it was the overrulng purpose of the Constitution to secure to the family, and can be claimed as exempt only when embraced in the words of the law as part of the land in terms protected."

In the same case the Supreme Court said with reference to the claim that the machinery was exempt as tools of trade under article 2395, Revised Statutes of Texas:

"The proposition that the mill and gin machinery are exempt as tools of trade cannot be seriously insisted upon. That it was urged that they were part of the homestead ought to be a sufficient answer to a claim so diametrically opposite. No authority has been cited which has gone far enough to embrace as tools of trade this kind of property, and the analogies and reason of the law do not persuade us to pioneer such extreme doctrine,"

In the case of Willis & Bro. v. Morris, 66 Tex. 628-634, 1 S. W. 799, 803 (59 Am. Rep. 634), the Supreme Court said:

"Expensive and complicated machinery propelled by steam power, or any power other than hand, is not exempt 'as tools of trade'; the latter phrase being held to apply only to simple instruments used by hand. Thompson's Homestead and Exemptions, § 756. The word 'apparatus' used in the statute may take a wider range and embrace such minor machinery as may be operated by hand, and such as courts of high authority have held not to be included under the term 'tools' as used in similar enactments."

The machinery involved in that case was used by the debtors for the manufacture of gins. In Green v. Raymond, 58 Tex. 80, 44 Am. Rep. 601, the Supreme Court construed the section as applying to the printing press and appurtenances of a newspaper publisher, though he was not himself a printer. That case is probably to be distinguished by reason of the power used to propel the machinery. Where hand power is used, the machinery is held to be "tools or apparatus of trade"; but, where steam or any other power than hand is used, machinery so propelled is held not to be included within the statutory terms. There are decisions of the Courts of Civil Appeals of Texas which do not seem to observe the distinction.

In the case at bar the mill machinery was propelled by an electric motor. The reason for the distinction and for the exclusion of machinery attached to a business homestead from the benefit of the excemption laws, because the business homestead consisted of personalty, may not be obvious; but we are bound by the decisions of the Supreme Court of Texas which construe the exemption provisions of its Constitution and statute. The appurtenances of the mill, which were on the mill lot, but not contained in the mill building, are likewise to be excluded from the benefit of the business homestead.

The order of the District Court is modified, by allowing the bankrupt the automobile as exempt, and, as so modified, is affirmed the cost of appeal to be equally taxed between petitioner and respondents; and it is so ordered.

COMMERCIAL INVESTMENT TRUST V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1919.)

No. 5301.

1. Indians \$\iff 35-Act forbidding introduction of Liquor into Indian Territory not repealed.

Act March 1, 1895, c. 145, § 8 (Comp. St. 1918, § 4136b), denouncing the offense of introducing intoxicating liquors into Indian Territory, etc., was not, in so far as it pertains to introduction of liquors from a point without the state of Oklahoma into that part of Oklahoma which was formerly Indian Territory, impliedly repealed by Enabling Act June 16, 1906.

2. Indians \$\isim 35\$—Forfeiture of vehicle used for introduction of liquor into part of Oklahoma formerly Indian Territory.

Under Act March 2, 1917, c. 146, par. 4, providing that automobiles or any other vehicles or conveyances used in introducing or attempting to introduce intoxicants into the Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner there-of or other persons, shall be subject to forfeiture as provided by Rev. St. § 2140 (Comp. St. § 4141), an automobile used to introduce intoxicating liquor from without into that part of the state of Oklahoma which formerly was Indian Territory, in violation of Act March 1, 1895, c. 145, § 8 (Comp. St. 1918, § 4136b), is subject to forfeiture, even though it was used by one in possession under a conditional sale contract, without the knowledge or consent of one to whom the seller had assigned purchasemoney notes and lien; the act of 1917 making the offending vehicle itself subject to forefeiture, and to that extent changing section 2140.

In Error to the District Court of the United States for the Eastern

District of Oklahoma; Ralph E. Campbell, Judge.

Proceeding by the United States against one Studebaker Six automobile, in which the Commercial Investment Trust, a corporation, filed an interplea claiming the machine. There was judgment condemning the automobile, and claimant brings error. Affirmed.

J. C. Denton, of Muskogee, Okl. (Frank Lee and Paul C. Williams,

both of Muskogee, Okl., on the brief), for plaintiff in error.

Cliff V. Peery, Asst. U. S. Atty., of Muskogee, Okl. (W. P. Mc-Ginnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. This was a proceeding in the United States District Court for the Eastern District of Oklahoma against one Studebaker Six automobile, under the provisions of paragraph 4 of the Indian Appropriation Act of March 2, 1917, c. 146 (39 Stat. 969, 970), providing:

"Automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section twenty-one hundred and forty of the Revised Statutes of the United States."

The libel was filed, monition issued and served, and the marshal's return duly made. Thereupon the Commercial Investment Trust came in by interplea, and made claim to the automobile in question, and alleged, in substance, that it was the owner of and had a special interest in and to the same, and, further, that one Thomas W. Grubbs purchased the same from one Philbrook and paid \$500 as a part of the purchase price, and that Philbrook at the time of the purchase retained a lien on said car to secure the balance of the purchase price, which was evidenced by a conditional sales contract and five promissory notes of even date therewith, in the sum of \$87.48 each, copies of which were set forth. It is alleged further that Philbrook thereafter, and before said notes became due, and before he had a legal right to enforce his lien against said automobile, assigned and delivered said contract and notes to this interpleader, together with all of his lien, right, and interest in and to said automobile, and that said interpleader is the owner and holder thereof. It is further alleged by the interpleader that the said automobile was never with its consent or with the consent of its agents or employés, used for the purpose of introducing intoxicating liquor into the Eastern district of Oklahoma, and that if the same was so used by any person or persons, it was so used against the will of interpleader, and that it had never either directly or indirectly caused, procured, or authorized the use of said automobile, either to introduce liquors into said District or to transport the same into the state of Oklahoma, and that it had been guilty of no act authorizing the forfeiture of the automobile; further, that it was deprived of said automobile without due process of law, in violation of the Fourth and Fifth Amendments to the Constitution of the United States. There were annexed copies of the conditional sales contract, the purchaser's statement, and written assignment, with copies of the notes secured thereby.

Thereupon counsel for the United States demurred to said interplea, and on the 5th day of March, 1918, the court, being duly advised in the premises, sustained the demurrer of the United States. Thereupon the Investment Trust duly waived trial by jury, and the issues were submitted to the court upon an agreed statement of facts filed. Judgment condemning said automobile, and confiscating the same to the United States, and forfeiting the interests of all persons in and to the same was duly entered, and to such judgment exception was properly

taken and from which this appeal is prosecuted.

[1, 2] The stipulation supports the allegations of the libel, and the first question presented is the contention of the plaintiff in error that the fourth paragraph of the Indian Appropriation Act, above quoted, does not authorize the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States (Comp. St. § 4141) of automobiles, etc., used in introducing intoxicants into what was formerly Indian Territory from without the state of Oklahoma, in violation of section 8 of the Act of March 1, 1895, c. 145, 28 Stat. 693 (Comp. St. 1918, § 4136b), impliedly repealed by the Oklahoma Enabling Act of June 16, 1906.

This contention of the plaintiff in error involves a determination of the meaning of the phrase contained in said fourth paragraph of the act of March 2, 1917, "or where the introduction is prohibited by treaty or federal statute." Does this quoted portion of said paragraph 4 apply to and include that portion of Oklahoma formerly Indian Territory? A determination of whether or not it does include such territory depends upon the consideration of the question as to whether or not the interstate introduction of liquor into that part of Oklahoma formerly Indian Territory is prohibited by treaty or federal statute. If not, then clearly the phrase quoted above would not include the same.

Section 8 of the act of Congress of March 1, 1895, provides:

"That any person, whether an Indian or otherwise, who shall, in said [Indian] Territory, manufacture, sell, give away, or in any manner, or by any means furnish to any one, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to any one, or carrying into said territory any of such liquors or drinks, shall, upon conviction thereof, be punished. * * *"

It is contended by counsel for plaintiff in error that this act is impliedly repealed by the Enabling Act of June 16, 1906. The act of 1895, in so far as it pertains to the introduction of liquors from a point without the state of Oklahoma into that part of Oklahoma which was formerly Indian Territory, was not repealed, and is still in force and effect. In re Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248;

(261 F.)

Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705. This court recently determined, in Ford v. United States, 260 Fed. 657, — C. C. A. —, that Congress intended the legislation in question to apply to Oklahoma:

"The history of this legislation, when being passed by Congress, shows that it was intended for such a situation as exists in Oklahoma. 54 Congressional Record, 2052, 2931, 2970, 3898, 3811."

Although it is presented in the interplea, plaintiff in error does not discuss the question as to whether or not the 1917 proviso extends to the property of an innocent person; that is, a person not connected with the act of unlawful introduction. Under old section 2140 of the Revised Statutes only the interest of the offending person was subject to forfeiture. This was manifest by the plain terms of the section itself.

Paragraph 4 of the Act of March 2, 1917, under which this proceeding is brought, contains the following provision: "Whether used by the owner thereof or other person." It is very evident that it was the intent of Congress to extend the power of seizure, libel, and forfeiture beyond the terms of the old section of the statute. This act of Congress authorizes a proceeding against the property so used itself. The offense attaches to the property; the property being the offender, in that it is the means of violating the law. Statutes such as this, and this one in particular, are directed at the means and methods used in the accomplishing of the violation of the statute, and are within the well-recognized jurisdiction and authority of the Congress of the United States.

The trial court rightly held that the statute of 1917 applied to the territory in Oklahoma in question, subjected the automobile involved to forfeiture, and that Congress had the power to enact the statute.

The judgment of the trial court is affirmed.

CREIGHTON et al. v. CREIGHTON et al.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1919.)

No. 5358.

1. Wills \$\infty 155(1)\to What constitutes "undue influence."

To constitute "undue influence," which will invalidate a will, the testator must be so influenced by persuasion, pressure, or fraudulent contrivance as to destroy his free agency, so that he does not act intelligently and voluntarily, but is subject to the will and purpose of another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

2. WILLS \$\ightharpoonup 155(4)\$\to Influence which is not undue.

Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced on the testator, and if his disposition of his property is voluntarily made.

3. WILLS \$\infty\$=166(1)—EVIDENCE INSUFFICIENT TO SHOW UNDUE INFLUENCE.

Evidence held not to establish undue influence, which invalidated will.

Appeal from the District Court of the United States for the District

of Kansas; John C. Pollock, Judge.

Suit in equity by Minnie B. Creighton and another against Margaret Creighton and others. Decree for complainants, and defendants appeal. Reversed.

Thad B. Landon, of Kansas City, Mo. (Adrian F. Sherman, of Kansas City, Mo., and J. R. Hyland, of Washington, Kan., on the brief), for appellants.

Edgar Bennett, of Washington, Kan., for appellees.

Before SANBORN, Circuit Judge, and MUNGER and YOU-MANS, District Judges.

YOUMANS, District Judge. James Creighton, of Washington county, Kan., died January 19, 1916, leaving surviving him his widow, Margaret Creighton, and three children by her, Cyrus Creighton, Margaret Barley, and Alexander Creighton, and two children by a former marriage, Minnie Creighton and Laura A. Owen. This suit was brought by the two children by the former marriage, residents of New Mexico, against the widow and her three children, to annul an instrument purporting to be the last will and testament of James Creighton. It was alleged in the bill of complaint that, at the time of making the will in question, the testator was of unsound mind, and that he was induced to sign it through undue influence of his wife, Margaret Creighton.

These two questions were submitted to a jury, who found, from the testimony and under the instructions of the court, that James Creighton was of sound mind at the time he made the will, but that the will was made through the undue influence of his wife. Upon that verdict a decree was entered setting aside the will. The appellants contend that the evidence is not sufficient to sustain the finding of the

jury, nor the decree based thereon.

Beatrice, the mother of appellees, obtained a divorce from her husband, James Creighton, April 9, 1884. There was decreed to her as alimony 160 acres of land and \$1,500 in money. The custody and control of the children by that marriage were by the terms of the decree left to the father and mother as the children might choose. There were three children at that time. In November, 1884, James Creighton married appellant, Margaret Creighton. Not long after this marriage, all three of the children by the first wife took up their permanent abode with their mother. Later the mother and the three children moved to New Mexico.

James Creighton made a will on June 17, 1905, in which each of the appellees, Minnie B. Creighton and Laura A. Owen, were given \$1 each, and the daughter, Lucy, by the former wife, was given \$100. Later Lucy died. On the 12th of June, 1912, James Creighton, after a visit by him and Margaret Creighton to appellees in New Mexico, made a will in which he gave one-half of his property to his wife, and, after making a bequest of \$400 to one Beatrice Hamilton, gave the remainder of his property in equal parts to his five children then living. On September 3, 1912, he made the will now in controversy,

which is the same as the will of June 17, 1905, except that it gives to each of the appellees the sum of \$1,000 and leaves out the bequest

of \$100 to Lucy.

There is no direct testimony that James Creighton was unduly influenced. The jury must have based their finding on inference. It was clearly shown by the testimony that the wife did have an influence on her husband, that he had an irascible disposition, and that she could mollify him in his fits of temper. One of the witnesses for the contestants testified as follows:

"I considered Mrs. Creighton very kind to the old gentleman. he was a little cranky, got a little off his base, as I called it, and she would look up into his face and smile, and it was all over with the old man. It just seemed as if that smile and that hand on his shoulder just took the savage all out of the old gentleman."

Another witness for contestants testified as follows:

"Q. Describe her treatment of the old gentleman to the jury. A. She was very kind to the old gentleman; treated him nice.

"Q. How did she express her kindness? A. In a general, kindly way, being good to him and seeing nothing crossed the old gentleman and irritated him. "Q. If anything did cross him or irritate him, what did she do? How did

she get him out of it? A. She would be nice to him.

"Q. How would she be nice to him? What would she do? A. When they had the trouble out there, the lady came out and took him to the house.

"Q. What do you mean by taking him to the house? A. She put her arm around him and said, 'Come on, Father; don't bother about this.'
"Q. Put her arm around his neck? A. Yes, sir.

"Q. Did you see her do that more than once? A. Did I see her do it more than once? I did see her do it once."

[1] "To constitute undue influence, the testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or voluntarily, and is subject to the will and purpose of another. It may be exerted through threats, fraud, importunity, or the silent, resistless power which the strong often exercise over the weak or infirm. It must be sufficient to destroy his free agency, and substitute the will of another for that of the testator. Entreaty, importunity, or persuasion may be employed, as may appeal to the memory of past kindnesses and calls of the distressed. Mere suggestions or advice addressed to the understanding or judgment of the testator never constitute undue influence; neither does solicitation, unless the testator is so worn out with importunities that his will gives way." In re Tyner, 97 Minn. 181, 106 N. W. 898.

"The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property." McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590; Sanger v.

McDonald, 87 Ark. 148, 157, 112 S. W. 365.

[2] "Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practiced, even though it induced the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made." Mackall v. Mackall, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84.

[3] Testimony was introduced to the effect that James Creighton criticized his son Cyrus for building a barn that the father considered was unnecessarily expensive. It was shown, however, that the barn was afterwards completed, and that the expense of construction was paid by the father. This incident is taken by counsel for contestants as indicating an estrangement between the father and son. If this alleged difference had come about because the son was wayward, improvident, indolent, or careless, there might be some ground for such an inference; but the evidence is that the son was industrious, capable, intelligent, and dependable. It appears from the testimony that the son, through the training he had received at the University of Kansas, had ideas that were somewhat different from those entertained by his father. Those ideas do not appear to discredit the son. On the other hand, they appear to have been to his credit, and that the father, under a grumbling and fault-finding exterior, was really proud of his son's initiative, industry, and efficiency. The testimony clearly shows that at the time of the making of the will he was in good health and spirits. No inference of undue influence on the part of Margaret Creighton can be drawn, except by a strained and unnatural construction of the testimony. All the testimony tends to show that she was kind, considerate, dutiful, and patient. The substance of the contention of appellees is that this conduct on her part was due solely to craft and cunning. The testimony does not warrant such an inference, nor does it sustain the finding that the will of September 3, 1912, was made through undue influence on her part.

This case will therefore be reversed, with directions to dismiss the

bill.

POLLARD V. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. November 25, 1919.)

No. 3315.

1. Indictment and information €==3—Offense of maintaining house of ill fame triable by indictment; "misdemeanor."

The offense of maintaining a house of ill fame within five miles of a military camp, in violation of Selective Service Act, § 13 (Comp. St. 1918. § 2019b), is only a misdemeanor, within Penal Code, § 335 (Comp. St. § 10509), declaring that offenses not punishable by death or imprisonment for a term of one year shall be deemed misdemeanors, for

prisonment for a term of one year shall be deemed misdemeanors, for the maximum punishment prescribed is imprisonment for not more than 12 months and a fine of not more than \$1,000, or both, and it is uncertain at the time of sentence whether defendant, though given the maximum sentence, would be unable to pay his fine and stand committed for more than a year; hence such an offense is triable by information.

than a year; hence such an offense is triable by miormation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Misdemeanor.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 251 U. S. ---, 40 Sup. Ct. 344, 64 L. Ed. ---.

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2. Criminal law \$\infty\$ 1186(4)—Formal defects in information.

A technical defect in the conclusion of an information, which was formal, is cured by Rev. St. 1025 (Comp. St. § 1691).

8. CRIMINAL LAW \$\infty 1144(17)\$—Presumptions on Appeal.

Where counts unassailed were sufficient to support the sentence imposed, the sentence will, where another count of the information was attacked, be presumed on appeal to have been based on the sufficient counts.

4. WAR 5-4-MAINTENANCE OF HOUSE OF ILL FAME.

Where defendant within the prohibited zone received immoral women into a house for the purpose of lewdness, he was guilty of a violation of Selective Service Act, § 13 (Comp. St. 1918, § 2019b), though he was not the owner of or in control of the premises, provided he knowingly aided in maintaining the place of ill fame.

5. Criminal Law \$\infty 656(9)\$—Remarks of trial judge.

In a prosecution for maintaining a house of ill fame, etc., within five miles of a military camp, in violation of Selective Service Act, § 13 (Comp. St. 1918, § 2019b), the remarks of the trial judge that the conduct of a witness "was awful" did not impute guilt to defendant, and statement that he did not believe defendant was imposed upon by immoral women, who frequented his hotel, etc., was a permissible expression of opinion, in view of his subsequent charge that his expressions of opinion were not binding, and that the jury were free to disregard them.

6. Criminal law $-721\frac{1}{2}(3)$ —Comment of prosecutor on failure of de-

FENDANT TO PRODUCE CHARACTER WITNESSES.

Where defendant offered character witnesses, it was not improper for the prosecutor to refer to the fact that defendant failed to produce character witnesses from the place where the offense was charged to have been committed.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

J. B. Pollard was convicted of violating Selective Draft Act, § 13, by maintaining a house of ill fame within five miles of a military camp, and he brings error. Affirmed.

William H. Atwell, of Dallas, Tex., for plaintiff in error.

Jed. C. Adams, U. S. Atty., and W. B. Harrell, Asst. U. S. Atty., both of Dallas, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. The defendant (plaintiff in error in this court) was convicted of violating section 13 of the act of Congress approved May 18, 1917 (40 Stat. 83, c. 15 [Comp. St. 1918, § 2019b]), known as the Selective Service Act, and from the judgment of conviction he has sued out this writ of error.

[1] He complains first that he was tried upon an information, and that the offense with which he was charged was an infamous one, which could be prosecuted only by indictment. The offense is made a misdemeanor by the terms of the statute, and the maximum punishment prescribed by it is imprisonment for not more than 12 months and a fine of not more than \$1,000, one or both, and was a misdemeanor under section 335 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10509]). It is contended that a failure to

pay the fine, in the event the defendant was ordered to stand committed until it was paid, would result in 30 days' imprisonment in addition to the 12 months, if the maximum imprisonment was imposed. Such additional imprisonment would, however, be no part of the original punishment. It would be uncertain, at the time the sentence was imposed, whether the additional 30 days would ever be served. It is not additional to the 12 months, but an alternative to the payment of the fine imposed, the endurance of which depends upon the willingness and ability of the defendant to pay the fine. It is a means of enforcing the payment of the fine, and not a punishment by imprisonment for the offense. The offense was not one involving moral turpitude, nor was it a crimen falsi, and it was not punishable by a penitentiary or hard labor sentence, and so was not an infamous crime, which was triable, under the Constitution, only by indictment. A contrary view would lead to the result that the maximum imprisonment could never be legally imposed, attended with a fine which a defendant was ordered to stand committed to pay, since, in that event, the actual imprisonment might exceed the 12 months maximum, in the event the fine was not paid. It cannot be assumed that Congress would impose a maximum sentence impossible of legal execution.

[2] The conclusion of the information is purely formal, and, though it were technically incorrect, the defect is cured by R. S. § 1025 (Comp.

St. § 1691).

[3, 4] The plaintiff in error also contends that the first count of the information is insufficient, because it charges no offense created by the act of Congress. The act which authorizes the Secretary of War to make regulations, and which makes it an offense to violate the regulations made by him, is asserted to be a delegation of legislative power to the Secretary. We find it unnecessary to pass upon the sufficiency of the first count, because the remaining counts support the sentence imposed, and it will be referred to the good counts of the information. The remaining counts charge the defendant with unlawfully, knowingly, and willfully receiving and permitting to be received and to remain for immoral purposes—i. e., for the purpose of assignation and prostitution—a woman into a structure, etc., then and there used for the purpose of lewdness, assignation, and prostitution, within the prohibited zone of a cantonment used for military purposes. The act makes it an offense for one to receive or permit to be received or remain for immoral purposes any person into any structure, etc., used for purposes of lewdness, assignation, or prostitution within the prohibited zones. The language of the information and of the statute are substantially alike. The criticism is that the information does not charge the defendant with having been the owner of or in control of the premises, and hence that his act may have been an entirely innocent one, consistently with all the information charges.

We do not think the information bears such a construction. Its effect is to charge the defendant with having received the woman into a place known by him to have been kept for the purpose of assignation or prostitution, knowing that she was being received there for immoral purposes. If the defendant did this, he violated section 13 of the act.

though he was not the owner of or in control of the premises. If he knowingly aided and abetted the owner or proprietor by giving a woman entrance to the premises for such purposes, his guilt was that of

a principal, and might be so charged under the Penal Code.

[5] The conduct and certain remarks of the trial judge are assigned as errors. The judge's statement that it "was awful" did not impute guilt to the defendant, but characterized the conduct of the witness who was detailing her conduct from the stand. It did not tend to place responsibility upon the defendant for such behavior of the witness. The statement of the court that the defendant was not imposed upon by the witness was a permissible expression of opinion by the trial judge, in view of his subsequent charge to the jury that such expressions of opinion by the court were not binding on the jury, and that they were free to disregard them.

[6] Lastly, the remark of the United States attorney, addressed in argument to the jury, to the effect that the defendant brought no character witnesses from Ft. Worth, where light was wanted, was not an improper one. The defendant had put his own character in issue by offering evidence in support of it. It was then competent for the government either to offer counter evidence or to criticize in argument any weakness in that offered by the defendant. The locality of the residence of the witnesses, as being distant from the place where the offense was charged to have been committed, was proper comment.

We find no reversible error in the record, and the judgment is af-

firmed.

ALPHA PORTLAND CEMENT CO. v. UNITED STATES. (Circuit Court of Appeals, Third Circuit. November 26, 1919.) No. 2474.

1. Internal revenue \$\sim 9\$—Evidence insufficient to show income within corporation excise tax plan.

There was no income, within Corporation Excise Tax Law Aug. 5, 1909, § 38, where a corporation, pursuant to a scheme of recapitalization, organized another corporation, conveyed properties to it, constituting all its assets, received therefor its entire stock, except directors' shares, of greater par value than the price paid for the properties, distributed the shares, after formally valuing them at par, among its own stockholders, and then effected a merger between the two corporations.

2. TRIAL \$\ightharpoonup 139(1)\$—SUFFICIENCY OF EVIDENCE TO GO TO JURY.

Though one party's evidence, standing alone and unexplained, shows profits in a transaction, yet when explained by evidence for the other party, in no respect inherently unreasonable, improbable, or inconsistent with that for the first party, or shown unreliable, the whole evidence is susceptible only of the inference that there was no profit, there is no question of fact for the jury.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by the United States against the Alpha Portland Cement Company. Judgment for the United States, new trial denied, and defendant brings error. Reversed, and new trial granted.

Louis H. Porter, of New York City, for plaintiff in error. Ernest Harvey, of Philadelphia, Pa., for the United States. Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. The defendant in error (the plaintiff below) sued to recover certain moneys which it claims were due from the plaintiff in error by way of taxes under the Corporation Excise Tax Law of August 5, 1909 (36 Stat. 112, c. 6, § 38), and recovered a judgment for the full amount claimed. There was no conflict in the evidence, and the facts, as distinguished from the inferences which

it is claimed may be drawn therefrom, are not in dispute.

It appears that during the year 1909 the defendant purchased certain properties, the legal title to which was taken in the name of its president, as trustee. Later in the same year, pursuant to a plan for increasing the capital stock of the defendant, these properties were conveyed by the trustee to a corporation known as the Cement Manufacturing Company, which had been formed for the express purpose of thus acquiring and using them in carrying out the recapitalization scheme. The consideration of the conveyance was the issuance by the latter company to the trustee of its entire capital stock, except a few shares necessary, under the laws of the state where the company was incorporated, to be held by the directors. The stock thus issued to the trustee was immediately transferred by him to the defendant, which in turn distributed it among its stockholders, share for share. Thereupon, in furtherance of the recapitalization plan, a merger was effected between the defendant and the Cement Manufacturing Company. For purposes of the merger, the value of properties so conveyed to the Cement Manufacturing Company (which constituted all of its assets) was fixed at the same figure as that at which the trustee had conveyed them to that company; also, before the stock was distributed among the defendant's stockholders, it was formally valued by its directors at par. The par value of such stock greatly exceeded the price at which the property had originally been purchased by the defendant. The defendant did not include as income in the tax return, which it was required by law to make for that year, the apparent profit resulting from the difference between the price which it had originally paid for the properties and the price at which it had ostensibly sold them to the Cement Manufacturing Company. The government, however, when it learned of the transaction, or a part of it, took the position that the alleged profit—both the purchase and sale having taken place within the tax year of 1909 -was taxable income of that year under the before-mentioned Act (Doyle v. Mitchell Bros. Co., 247 U. S. 179, 38 Sup. Ct. 467, 62 L. Ed. 1054; Hays v. Gauley Mt. Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061) and thereupon brought this action to recover the tax thereon.

[1] From the foregoing recital of facts, it is apparent that while, as a matter of form and of bookkeeping, the defendant did realize a very considerable profit during the tax year in question on the pur-

chase and transfer of these properties; yet in reality it made no profit whatever. The ultimate and real result of the various transactions was that the defendant purchased some properties at one figure, and in working out a plan of recapitalization valued them at a higher figure. The intermediary corporation, to which the legal title of the properties was conveyed by the trustee, was brought into being by the defendant for the express purpose of working out the recapitalization plan, and ceased to exist as a separate entity after that plan had been carried out. The defendant was no richer after the alleged sale than it was before, notwithstanding the book entries, resolutions of directors, transfers of title, etc. Viewed in this light, we think that it needs no argument to demonstrate that the case falls within the principle of the decisions of the Supreme Court in Southern Pacific v. Lowe, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142, and Gulf Oil Corp. v. Lewellyn, 248 U. S. 71, 39 Sup. Ct. 35, 63 L. Ed. 133. Indeed, it cannot be distinguished on principle from the decision of this court in Baldwin Locomotive Works v. McCoach, 221 Fed. 59, 136 C. C. A. 660. Under the above stated facts, considered as a whole, the defendant was therefore not liable for the tax which the government sought to recover in this suit.

[2] It is contended on behalf of the government, however, that there was a question of fact as to whether or not the defendant had realized a profit on the transactions, because one part of the evidence (that produced by the government), when standing apart from the rest and unexplained, showed that the defendant had purchased the property for one figure and then had sold it to another corporation at an increased figure. Hence it is argued that there was a jury question in the case, which the verdict has settled in accordance with the government's contention. The evidence, which explained the transactions and placed them in their true light, was brought out during the presentation of the defendant's case, and, except for some resolutions in the defendant's minute book (which were fully explained), was given by the same witness from whom the facts upon which the government relies were elicited. Moreover, his explanatory and supplemental version of the transactions is in no respect inherently unreasonable, improbable, or inconsistent with that given when called as a witness for the government; nor is there anything to indicate that it is otherwise unreliable.

In this situation, it was not permissible to consider only a part of the evidence, separate from that which supplemented and explained it, or to accept the former and discard the latter. It was necessary that it be taken as a whole. When thus considered, it was susceptible of only one inference, viz. that the defendant had in reality made no profit. Accordingly there was no question of fact for the jury to pass upon. We think, therefore, that the defendant's request for binding instructions should have been granted, and in declining to direct a verdict for the plaintiff the trial court committed error. It is proper to observe that, when the case was before the learned trial judge on a motion for a new trial, he entertained the same views as we have above expressed; but anticipating that, irrespective of whatever deci-

sion he might reach, the case would ultimately find its way into an appellate court, he declined to grant a new trial, so that the plaintiff would have the benefit in such court of the effect, if any, that the verdict of the jury might have on the case.

The judgment is reversed, and a new trial granted.

MACKEY, County Treasurer, et al. v. CHOCTAW, O. & G. R. CO. et al. (Circuit Court of Appeals, Eighth Circuit, October 14, 1919.)

No. 5215.

1. Public lands \$\igcred{\ightarrow} 92\to Grant of railroad right of way over Indian lands NOT AFFECTED BY REVERSIONARY INTEREST.

The character of a railroad right of way over Indian lands, granted by Congress in perpetuity, and which with the consent of Congress was leased to another company for 999 years, held not affected by the Indian reversionary interest, so as to exempt it from special assessments for local improvements.

2. MUNICIPAL CORPORATIONS \$\infty 425(3)\$—RAILROAD RIGHT OF WAY SUBJECT TO SPECIAL ASSESSMENT.

The general rule, which is also the rule in Oklahoma, is that a railroad right of way, whether owned in fee or held in easement, is real estate property or ground which may be subjected to special assessment for the cost of local improvements.

3. MUNICIPAL CORPORATIONS \$==479—IDENTIFICATION OF PROPERTY FOR SPECIAL ASSESSMENT.

A railroad right of way through a city, not platted in lots and blocks, held sufficiently identified under a state statute in proceedings for special assessment thereof for a local improvement.

Appeal from the District Court of the United States for the Eastern

District of Oklahoma; Ralph E. Campbell, Judge. Suit in equity by the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company against B. W. Mackey, County Treasurer of Hughes County, Okl., and others. Decree for complainants, and defendants appeal. Reversed.

J. B. Furry, of Muskogee, Okl. (E. C. Motter, of Muskogee, Okl., on the brief), for appellants.

C. O. Blake, of El Reno, Okl. (R. J. Roberts and John E. Du Mars, both of El Reno, Okl., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an appeal from a decree in a suit by the railroad companies enjoining the city of Holdenville, Okl., and the county treasurer, from enforcing special assessments against the railroad right of way and station grounds for the improvement of Oklahoma avenue, upon which the right of way and grounds abut. The railroad companies claim the assessments are invalid because (1) of the peculiar character of their interest in the property and of the reversionary estate; and (2) there was not a sufficient identification of the property in the proceedings of the mayor and city council. The first of these contentions assumed three phases. It was urged that the reversionary estate was in the Creek Nation of Indians and held in trust for them by the United States; that the congressional grant of the easement for railroad purposes charged the railroads with certain continuous public duties and services which would be defeated or impaired by the enforcement of the assessments in question; and that the laws of the state of Oklahoma gave no authority to impose such charges on railroad rights of way. The trial court granted the injunction because of the Indian character of the reversionary estate and the particular purposes for which Congress granted the railroad easement.

[1] The town (now city) of Holdenville was established, surveyed, and platted into lots, blocks, streets, and alleys under the direction of the Secretary of the Interior and according to the provisions of the Original Creek Agreement. The lands included were exempted from allotment. The railroad right of way through the town, with enlarged width for station grounds, comprised a tract 300 feet wide and 3,000 feet long. It was embraced within the corporate limits of the town, and was flanked on both sides by public streets; Oklahoma avenue, improved as above stated, being one of them. Other platted streets touched the grounds at right angles on both sides. In time, passenger and freight stations, elevators, warehouses, etc., were built on the grounds, and access to them necessarily required the constant use of the contiguous streets. The easement of the Choctaw, Oklahoma & Gulf Railroad Company, one of the plaintiffs, was granted in perpetuity, and with the consent of Congress it leased its railroad and appurtenances, including the grounds in question here, to its coplaintiff, the Chicago, Rock Island & Pacific Railway Company, for 999 years. The latter company is operating the leased railroad as one of the main lines of its interstate system. We think the case should be regarded as though the right of way and grounds were of the customary character, unaffected by the Indian reversion. The estate of the Indians is too remote for practical consideration, and if the assent of the government as trustee or guardian that the property should bear burdens as similar railroad property elsewhere were necessary it might reasonably be inferred from the circumstances above recited. The special assessments in question are not occupation taxes, nor imposed upon the operations of the railroad companies as governmental agencies, and have no close touch or relation to the Indian interest as was the case in Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234. The special assessments are against the railroad property which for tax purposes may be regarded as wholly owned by the companies.

[2] It is suggested that the enforcement of the assessments might disable them from performing their duties to the government and the Indians. But if it is their duty to pay, and to save the property from tax sale and dismemberment, they cannot well plead their own default. It is settled that a railroad right of way is subject to general taxation, even one granted by Congress over an Indian reservation (Maricopa &

Phoenix R. Co. v. Arizona Territory, 156 U. S. 347, 15 Sup. Ct. 391, 39 L. Ed. 447), and there is no such difference in principle between a general tax and a special assessment which proceeds on the theory of a direct and special benefit, that makes for a different conclusion. The general rule, sustained by the weight of authority, is that a railroad right of way, whether owned in fee or held in easement, is real estate, property, or ground which may be subjected to assessment for the cost of local improvements. See Louisville & N. R. Co. v. Barber Asphalt Paving Co., 116 Ky. 856, 76 S. W. 1097, affirmed so far as the Constitution of the United States is concerned in 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; Dillon on Munic. Corp. § 1451 (5th Ed.) p. 2586. We think that is also the rule in Oklahoma. See M., K. & T. Ry. Co. v. City of Tulsa, 45 Okl. 382, 145 Pac. 398, involving a right of way owned in fee but not otherwise different from the one here; also Oklahoma Railway Co. v. Severns Paving Co. (Okl.) 170 Pac. 216, and Oklahoma City v. Orthwein, 258 Fed. 190, — C. C. A. —, recently decided by this court.

[3] Was there a sufficient identification of the property? A state law provides:

"If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block districts for the purpose of appraisement and assessment, as herein provided."

That was done. The city engineer prepared and submitted to the city council a map in which the railroad right of way and station grounds were divided into quarter block areas by projecting the lines of contiguous streets and block boundaries, and designated them by arbitrary numbers. The map was duly adopted by that body and the designations of the quarter blocks were afterwards followed in making the assessments. The temporary absence of the map from the office of the city clerk did not invalidate that step in the proceedings. The agents of the plaintiffs were fully advised of what was being done and of the progress of the improvement. No question was raised until after the work was complete. The map was inadvertently sent to the bond purchasers, but the plaintiffs were not misled or prejudiced.

The decree is reversed, and the cause is remanded, with direction to dismiss the bill.

WARD v. CENTRAL TRUST CO. OF ILLINOIS. In re MORRISON.

(Circuit Court of Appeals, Seventh Circuit, October 7, 1919.) No. 2705.

1. Bankruptcy \$\sim 296\to Jurisdiction of bankruptcy courts to set aside fraudulent conveyance.

Under Bankruptcy Act July 1, 1898, §§ 60b, 67e (Comp. St. §§ 9644, 9651), the District Court for Illinois, sitting as a bankruptcy court, has jurisdiction of a bill by a trustee to set aside as fraudulent and preferential a conveyance by the bankrupt made within four months of the filing of

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the petition, even though the bankrupt and his grantee were both citizens of Illinois, and the land was located in that state.

- 2. BANKRUPTCY \$\instruction 100(1)\$—Effect of adjudication on collateral attack. In a suit by a trustee in bankruptcy to set aside a conveyance made by the bankrupt within four months of filing petition, the adjudication in bankruptcy is not open to collateral attack, and the grantee cannot defend on the ground that the trustee was wanting in legal capacity to accept the post of trustee or that his grantor was not in fact bankrupt.
- 3. Bankruptcy = 100(1)—Scope of adjudication as to fraudulent character of transfer charged as act of bankruptcy.

Though the petition on which adjudication in bankruptcy was had charged that a conveyance was an act of bankruptcy on the part of the grantor, the grantee may, in a suit by the trustee to set aside the conveyance, controvert the trustee's allegations and proofs with regard to the grantee's guilty knowledge and fraudulent conduct.

4. BANKRUPTCY \$\infty 290\$\to Defenses to action to set aside conveyance as fraudulent.

In a suit by the trustee to set aside a conveyance made by the bankrupt within four months of the filing of the petition, the grantee cannot defend on the ground that the rents of the property which was in the possession of a receiver were sufficient to pay all claims filed in the bankruptcy court; it not appearing that the grantee consented to such use of rents, which, in event of decree sustaining the conveyance, would belong to him.

5. BANKBUPTCY \$\iff 305\$—Scope of suit to set aside fraudulent conveyance.

In a suit by a trustee in bankruptcy to set aside as fraudulent and preferential a conveyance made by the bankrupt within four months of filing of the petition, the questions whether unexpended balance of funds, if any, should be returned to defendant, etc., are without the scope of the jurisdiction of the chancery suit.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Central Trust Company of Illinois, trustee in bankruptcy of Edward Morrison, against James R. Ward. From a decree for complainant, defendant appeals. Affirmed.

See, also, 252 Fed. 127, 164 C. C. A. 239.

James R. Ward, of Chicago, Ill., in pro. per.

James Rosenthal and Francis J. Houlihan, both of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Morrison was duly adjudged a bankrupt. See Morrison v. Rieman, 249 Fed. 97, 161 C. C. A. 149. The bankruptcy proceedings are still pending in the bankruptcy court.

Within four months preceding the filing of the petition in bankruptcy, Morrison deeded all his real estate to appellant. Under a bill filed on the chancery side of the District Court, the trustee secured a decree canceling the transfer as preferential and also as fraudulent.

[1] Appellant's challenge of the trial court's jurisdiction on his assertion that, because Morrison and appellant are both citizens of Illinois and the real estate is situated in that commonwealth, the courts of Illinois are alone authorized to investigate the transaction, results from a misapprehension of the nature and scope of the national Bankruptcy

Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]). See sections 60b and 67e (sections 9644, 9651); Van Iderstine v. National Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652;

Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419.

[2, 3] Appellant contends for a right to show that Morrison was not a bankrupt when he was so adjudged, that there were no creditors with valid claims then or since, and that appellee was wanting in legal capacity to be given and to accept the post of trustee, and therefore lacked capacity to sue appellant on account of the fraudulent transfer. These contentions constitute no more than a collateral attack upon the judgment and record of the bankruptcy court; that is, the judge who heard this chancery cause had no jurisdiction to review the existence of the necessary facts which the judge of the bankruptcy court found and acted upon. But that was the extent of the binding effect of the adjudication as a judgment in rem; and, although the petition in bankruptcy charged that the conveyance from Morrison to appellant was an act of bankruptcy, appellant was entitled to have (as he did have) a full opportunity to controvert the trustee's allegations and proofs respecting appellant's guilty knowledge and fraudulent conduct. Gratiot County State Bank v. Johnson, Trustee, 249 U. S. 246, 39 Sup. Ct. 263, 63 L. Ed. 587.

[4] Because the evidence showed that at the time of the trial the trustee had on hand a sum from rents largely in excess of the amount of the only claim then allowed, appellant urges that the chancery court should not have set aside the conveyance. (1) The chancery court was not asked, even if it had the power, to control the administration of the bankruptcy proceeding. (2) The rents were collected and held by the receiver, and afterwards by the trustee, under interlocutory orders of the bankruptcy court. If appellant's title to the real estate should be upheld, presumably the rents would belong to him. He made no offer that the rents should be applied by the trustee in satis-

faction of claims against the bankrupt estate.

[5] Whether the unexpended balance of the funds, if any, shall be returned to appellant, and whether the trustee shall be required to convey to appellant any unsold parcels of the real estate, are matters beyond the province of this chancery suit.

Concerning the merits of the decree on the evidence, it suffices to say that the record abundantly sustains the charges of appellant's

guilty knowledge and fraudulent conduct.

The decree is affirmed.

HAYNES AUTOMOBILE CO. v. KANSAS CASUALTY & SURETY CO.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1919.)

No. 5366.

APPEAL AND ERROR @= 499(1), 501(1)—RECORD OF OBJECTIONS AND EXCEPTIONS

TO PRESENT QUESTION FOR REVIEW.

The Circuit Court of Appeals is exclusively a court for the review of errors of law made in an action at law, and a record of an objection and exception to any rulings, where the case is tried to the court, is ordinarily indispensable to a review.

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by the Haynes Automobile Company against the Kansas Casualty & Surety Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Conrad Wolf, of Kokomo, Ind. (Earl B. Barnes, of Kokomo, Ind., and S. B. Amidon and S. A. Buckland, both of Wichita, Kan., on the brief), for plaintiff in error.

Fred Stanley, of Wichita, Kan. (C. C. Stanley, Benjamin F. Hegler, and George Siefkin, all of Wichita, Kan., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and MUNGER and YOU-MANS, District Judges.

SANBORN, Circuit Judge. On February 19, 1915, the Haynes Automobile Company, a corporation, engaged in the manufacture and sale of Haynes cars, made an agreement with G. A. Jones that the latter should have the exclusive right to sell Haynes automobiles in the western part of Missouri and should receive 27½ per cent. discount from the list price on all cars taken by him under the conditions of the contract, that the company would keep on the floor of its Kansas City branch, of which Jones was to have charge, nine new Haynes cars, that the title and ownership of all cars consigned to Jones should at all times be in the company until fully paid for by him, that Jones would promptly pay for the cars consigned to him as he sold them, and that the contract should continue in force from its date until June 30, 1915. This contract contained many other provisions immaterial to the disposition of this case. The Kansas Casualty & Surety Company gave its bond to the Haynes Company in the sum of \$20,000, conditioned that Jones should comply with and carry out in good faith all the terms of this contract. On June 30, 1915, the Haynes Company and Jones made another contract whereby they agreed that the former contract with immaterial modifications should continue in force until June 30, 1916, and the Kansas Company made another bond in the sum of \$13,-000 for the faithful performance by Jones of the contract during its extension. Jones sold several automobiles consigned to him by the Haynes Company, for which he did not pay, and thereby became indebted to it in the sum of \$7,964.52.

The Haynes Company brought this action against the Kansas Company upon its bonds to recover this amount and interest. The Kansas Company, among other defenses, pleaded that it was not liable for this indebtedness of Jones, because the automobiles on account of which it was incurred were not consigned to Jones under the provisions of the contract that the title to them should remain in the Haynes Company until they were respectively sold, and that Jones should promptly pay for each of them as it was sold, but were delivered to him pursuant to a subsequent modification of the contract, agreed to by the Haynes Company and Jones, of which the Kansas Company had no notice pursuant to which these automobiles were sold to Jones on credit and under an agreement that he should pay for them, not promptly when each of them was sold, but when he had money to his credit sufficient to do so, and when he notified the Haynes Company of that fact, and that these modifications of the contracts were the cause of Jones' indebtedness and the plaintiff's loss. A jury was waived, and the case was tried by the court, which found that the defenses set forth above were sustained by the evidence, and rendered a judgment in favor of the Kansas Company.

The Haynes Company has assigned ten alleged errors in the trial of this case. But the record discloses no objection or exception to any ruling or proposed ruling of the court below, no request or motion for any judgment for the plaintiff on the ground that there was no substantial evidence in support of the defense which the court below found to be proved, or for any declaration of law to that effect, or to any other effect. Since in an action at law this is exclusively a court for the review of errors of law of the court below, and a record of an objection and exception to any ruling on evidence or an exception to the refusal of a request for a ruling or declaration of law denied is ordinarily indispensable to a review by this court, there is nothing in the record or briefs in this case to require the consideration or decision of any question by this court. Wear v. Imperial Window Glass Co., 224 Fed. 60, 63, 139 C. C. A. 622, 625, and cases there cited.

Notwithstanding this fact, the court has examined the record and learned that the only important question of law in this case that might have been presented for review was whether or not there was any substantial evidence to sustain the finding of the court, and in order to be certain that no injustice results to the plaintiff in error, has attentively listened to the arguments of counsel, read their briefs and the evidence, and become convinced that there was such evidence before the court below, and that there was no error in the trial of this case.

Let the judgment below be affirmed.

J. M. RADFORD GROCERY CO. v. HAYNIE.

In re T. I. BROWN & CO.

(Circuit Court of Appeals, Fifth Circuit, November 22, 1919.)

No. 3338.

- 1. Evidence 575—Adoption by witness of testimony at former hearing In an action to recover payments made by the bankrupts as preferences, where one of the bankrupts while a witness without objection testified that the report of his testimony given at the meeting of the creditors was correct and that it was true, he adopted his former testimony, and the admission of the report thereof over defendant's objection was not error; it appearing that representatives of defendant were present at the meeting of creditors.
- 2. BANKRUPTCY \$\igsim 304-In action to recover preferences, denial of di-RECTED VERDICT PROPER.

In an action to recover as preferences sums paid by bankrupts, held, that denial 'of defendant's request for directed verdict was proper under the evidence.

8. APPEAL AND ERROR \$\sim 730(2)\$—SUFFICIENCY OF ASSIGNMENTS COMPLAINING OF CHARGE.

An assignment of error based on an exception reserved to part of the charge will be disregarded, when it did not comply with rule 11, requiring an assignment of such error to set out the part of the charge referred to in totidem verbis.

In Error to the District Court of the United States for the Northern District of Texas; Robert T. Ervin, Judge.

Action by R. W. Haynie, trustee in bankruptcy of T. I. Brown & Co., against the J. M. Radford Grocery Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Dallas Scarborough, of Abilene, Tex., for plaintiff in error.

Harry Tom King, of Abilene, Tex. (Kirby & King, H. N. Hickman, and C. G. Whitten, all of Abilene, Tex., on the brief), for defendant in

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. This was a suit by the defendant in error, the trustee in bankruptcy of T. I. Brown & Co., to avoid as preferences several payments of money made by the bankrupts to the plaintiff in error (which will be called the defendant), within four months before the filing of the petition in bankruptcy, and to recover the amounts of such payments. There was a trial by jury. Both the individual bankrupts were witnesses in the trial.

[1] It is assigned as error that the court, over objection, admitted in evidence testimony given by one of the bankrupts at a meeting of the creditors. Representatives of the defendant were present at the meeting. The admission of the testimony formerly given by the bankrupt followed the making by him, in the course of his examination as a witness in the trial, of a statement to the effect that the report of his

testimony given at the meeting of creditors was correct, and that he confirmed that testimony as being the truth. The witness, by adopting his formerly given testimony, made it a part of the testimony given by him in the trial. So far as appears, this was done without objection. The result of the court's action, which is complained of, was not to admit in evidence testimony not deposed to in the trial. That ruling was not erroneous.

- [2] Within the four months period the bankrupts made three payments of money to the defendant, one of \$800, one of \$750, and one of \$2,000. The money used in making the last-mentioned payment was borrowed by the bankrupts from a bank. The other two payments were made by checking on the bank deposit account of the bankrupts. There was evidence tending to prove that before the payments were made the defendant had delivered to the bankrupts for collection notes and accounts which the latter had pledged to the former as collateral security, and that with the knowledge and consent of the defendant the bankrupts deposited to their own credit in bank any collections made on such collateral, and remitted to the defendant out of their general funds, without regard to the amount collected on the notes and accounts pledged to the defendant as security for the debt owing to it. Payments so made could not properly be regarded as made out of funds or property belonging to the defendant. This is obviously true as to the \$2,000 payment, which was made with money having no connection with collateral belonging to the defendant. That payment being a transfer of property belonging to the bankrupts, and there being evidence tending to prove that the bankrupts were insolvent when that payment was made, and that the defendant had reasonable cause to believe that the enforcement of the transfer would effect a preference, the court did not err in refusing a request to charge the jury to return a verdict for the defendant.
- [3] There is an assignment of error based upon an exception reserved to a part of the charge given by the court. This assignment will be disregarded, because of a noncompliance with the requirement of a rule of this court (rule 11, 150 Fed. xxvii, 79 C. C. A. xxvii) that:

"When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to in totidem verbis, whether it be in instructions given or in instructions refused."

It will be added that the exception as reserved leaves it in doubt what statement in the charge given was intended to be excepted to. No part of the charge contains a statement substantially the same as that attributed to the court in the exception.

The judgment is affirmed.

PRIVETT et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1919.)

No. 5269.

1. Judgment \$\ifthalpha 288(3)\to Indian lands; subsequent suit by United States.

A fact determined by a state court in a suit against a minor heir of an Indian allottee held not res judicata in a subsequent suit on behalf of the minor by the United States, which was not a party to the prior suit.

2. JUDGMENT €==634—"RES JUDICATA."

To render a matter res judicata there must be a concurrence of four conditions, viz.: (1) Identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata,]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States and others against C. R. Privett, John O. Mitchell, and J. E. Crosbie. Decree for complainants, and defendants appeal. Affirmed.

Preston C. West, of Tulsa, Okl. (George T. Brown, Roger S. Sherman, and A. A. Davidson, all of Tulsa, Okl., on the brief), for appellants.

Alvin F. Molony, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., and J. C. Wilhoit, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for appellees.

Before SANBORN, Circuit Judge, and MUNGER and YOU-MANS, District Judges.

YOUMANS, District Judge. This is a suit by the United States to cancel certain conveyances of land which was allotted as a homestead to one Madison H. Brown, a half-blood Creek Indian. The allottee died September 29, 1911, leaving a widow, Cilla Brown, an adult daughter, Esther Brown, and a minor son, Samuel H. Brown. The widow and daughter conveyed their respective interests in the homestead to W. E. Privett. The interest of the minor, Samuel H. Brown, was conveyed to W. E. Privett by guardian's deed under proceedings in the county court of Tulsa county, Okl. W. E. Privett conveyed the land to C. R. Privett. He brought suit to quiet his title to the land in the superior court of Tulsa county against Cilla, Esther, and Samuel H. Brown. A guardian ad litem was appointed for the minor. Cilla and Esther Brown disclaimed any interest in the land. Upon the issue raised by the bill and answer of the guardian ad litem of Samuel H. Brown, his mother and sister testified that he was born February 23, 1906. If this was true, the land inherited by him from his father was unrestricted. The superior court of Tulsa county found that he was born on that date and that the guardian's deed conveyed a good title.

A decree was entered quieting the title of C. R. Privett, who afterwards conveyed to John O. Mitchell and J. E. Crosbie. Oil was afterwards found on the land.

The United States then brought this suit, based on section 9 of the act of Congress of May 27, 1908 (35 Stat. 315, c. 199). It was alleged in the bill that Samuel H. Brown was born subsequent to March 4, 1906, that is, on April 23, 1906, "and that by reason of the death of the said Madison H. Brown and the birth of Samuel H. Brown since March 4, 1906, being a three-quarter blood Indian, the homestead of Madison H. Brown became the property of and is now the property of the said Samuel H. Brown to the extent that the same shall remain for the use and support of said Samuel H. Brown during his life until April 26, 1931."

Mitchell and Crosbie filed an answer, setting up the decree of the superior court of Tulsa county as res adjudicata of the question of the date of birth of Samuel H. Brown. On motion of the United States this answer was stricken out. On the trial appellants offered to introduce in evidence the record in that case. Upon objection of the United States the offer was refused. The testimony of a number of witnesses was introduced by the United States, who testified that Samuel H. Brown was born April 23, 1906, and the court below upon that testi-

mony found that to be the true date of his birth.

[1, 2] The question here is whether the decision of the superior court of Tulsa county in a suit in which the United States was not a party is res adjudicata in this court.

"It is well settled that, in order to render a matter res adjudicata, there must be a concurrence of the four conditions, viz.: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made." Lyon v. Perin & Gaff Manufacturing Co., 125 U. S. 698, 700, 8 Sup. Ct. 1024, 1025 (31 L. Ed. 839); Turner Tp. v. Williams, 17 S. D. 548, 97 N. W. 842, 843; State v. Kaemmerling, 83 Kan. 383, 111 Pac. 443; Virginia-Carolina Chemical Co. v. Fisher, 58 Fla. 377, 50 South. 504, 507; Vincent v. Mutual Reserve Fund Ass'n, 77 Conn. 281, 58 Atl. 963, 964.

"The essence of estoppel by judgment is that some right, question, or fact in dispute between parties has been judicially determined by a court of competent jurisdiction; and, where such judgment is pleaded in bar of a subsequent action, the question always is: Has such question been so determined between the same parties or their privies, and not upon what evidence was it determined, or the reason therefor." Fitch v. Stanton Tp., 190 Fed. 310, 314,

111 C. C. A. 210, 214.

Therefore the decree of the state court cannot be pleaded in bar of this action. This case comes within the rule in Bowling v. United States, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080, and Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820.

It follows that the decree of the lower court should be affirmed; and it is so ordered.

ONTARIO PAPER CO., Limited, v. NEFF.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2685.

Shipping \$\iffill 104\)—Right to rescind freight contract for mutual mistake. Where, in making a contract for carriage by a steamer during the lake season of a stated quantity of paper, the parties in good faith made a computation that the vessel could carry 1,500 tons each trip, on which computation the freight rate was based, but the first trip demonstrated that her capacity did not exceed 600 tons, the carrier held entitled to rescind the contract for mutual mistake.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Charles S. Neff against the Ontario Paper Company, Limited. Decree for libelant, and respondent appeals. Affirmed.

Perry S. Patterson, of Chicago, Ill., for appellant. Charles E. Kremer, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Appellee, Charles S. Neff, filed his libel to recover of appellant certain freight and demurrage charges. This claim, allowed in full in the District Court, is not in dispute in this court. Appellant, however, maintained in the lower court, and does here urge, that its cross-libel for \$22,480.37, arising out of appellant's failure to complete its contract, should have been allowed.

The record discloses a situation that clearly entitles appellant to a decree, unless we accept appellee's urge that a mutual mistake occurred when the contract was made, which relieved it of its obligation.

Briefly, by the terms of the agreement under consideration, the steamer Charles S. Neff was to haul "about 18,000 tons of paper" during the navigation season of 1916, "in as nearly equal semimonthly proportions as possible"; the haul being from Thorold, Ontario, to a certain dock in the city of Chicago, located on the Chicago river. The freight rate was fixed at \$1.50 per ton. After making one trip, appellee refused to proceed further with its contract.

The basis for the claim of mutual mistake arose out of facts hardly in dispute. The parties in making the contract were equally ignorant of the paper-carrying capacity of the steamer, and both parties partici-

pated in a computation to determine its capacity.

It appears that appellant's agent sought appellee's representative and solicited a season's contract. The per ton charge was necessarily dependent upon the size of the cargo that the Charles S. Neff could carry. Both parties contemplated bimonthly trips. This is apparent from the language of the contract quoted above. In other words, it was expected that the boat would make 12 trips during the season and the total tonnage to be conveyed was 18,000 tons. In other words, a cargo of 1,500 tons was to be carried each trip.

The oral testimony of the witnesses supports this conclusion thus drawn from the written contract. Mr. Sullivan, representing appellee, testified:

"Q. And how did you arrive at the 18,000 tons of paper to be carried by that steamer? A. That was arrived at largely through computation made by Mr. Dean and myself. At the time the Neff was proposed for this trade, we examined first the possibilities of whether she could carry this paper or not. * * * *

"Q. Did you know at that time what amount of this paper the Neff could carry? A. We hadn't any knowledge of it at all, except the information we

received from Mr. Dean, as to the weights, etc.

"Q. Did you and Mr. Dean take up the matter of ascertaining what the ship could carry, taking his statement as to the weights, and your statement as to the size of the Neff? A. We did; we professed at the outset that we knew nothing whatever about paper. We had never carried any of it; all that we had seen of it was what we maybe had seen on wagons going through the streets, and at that time we took one of the office books, one of the published books, Michael's book, or Green's book, and we computed the cubic capacity of the ship's hold, and, as I recall it, Mr. Dean computed the cubic measurements of those various rolls of paper, and between us we computed that the Neff should carry what she would ordinarily carry of coarse freight cargoes, such as coal and iron ore and that sort of stuff, approximately 1,500 tons."

The actual capacity of the boat was found to be less than 600 tons. The single cargo carried, when it was claimed the boat was overloaded, was less than 600 tons.

The trial judge, at the close of the testimony, expressed his view as follows:

"Everybody acted in good faith, and there is no question in the mind of the court but what, if the facts had been known, the contract never would have been entered into. In other words, if Mr. Neff had been told that he could not carry but 600 tons of paper upon that boat, he would never have let it out to charter."

Upon this situation was the District Court in error in concluding that the parties should be relieved of their contract because of mutual mistake? We think not. It is apparent that both parties believed the paper-carrying capacity of the steamer was $2\frac{1}{2}$ times as large as a trial demonstrated it to be; that both parties acted upon this assumption in fixing the freight rate. The two representatives sat down together in the utmost good faith to figure tonnage capacity. An erroneous computation resulted, and the parties contracted upon the basis of this erroneous computation. Had the parties been computing interest, or striking a balance, instead of figuring on tonnage capacity, and a similar error had occurred, would there have been any doubt as to the duty of the court to relieve the parties from the effect of their mistake? Obviously not.

While involving primarily an issue of fact, the following cases announce the rule which, applied to the above statement of facts, sustains the conclusion here reached: Allen v. Hammond, 11 Pet. 63, 9 L. Ed. 633; Wheeler v. Seamans, 123 Wis. 573, 102 N. W. 28; The Stanley H. Minor (D. C.) 172 Fed. 486; 6 R. C. L. 621, § 41; 13 Corpus Juris, 376, 377.

The decree is affirmed.

In re MORRISON.

MORRISON v. RIEMAN.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2691.

1. Bankruptcy \$\infty\$ 467—Review of finding of referee on conflicting evidence approved by trial court.

A finding of a referee, allowing a claim in bankruptcy based on conflicting evidence, when approved by the bankruptcy court, will not be reviewed on appeal.

2. Courts &==366(14)—Decisions of state court as to interest as prece-

In determining whether interest was allowable on a claim arising out of written contract, under Hurd's Rev. St. Ill. 1917, c. 74, § 2, the federal courts must follow the decisions of the Illinois courts.

3. Interest \$\infty\$=19(1)—On unliquidated demand based on written instrument,

Under Hurd's Rev. St. Ill. 1917, c. 74, § 2, providing, in absence of stipulation, for interest at 5 per cent. on all moneys after they become due on a bond, bill, note, or other instrument in writing, interest is allowable on a sum found due on a written contract, even though it did not partake of the nature of a note or bond, and the amount due was uncertain until resolved by legal ascertainment.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Edward W. Morrison, bankrupt. From a decree of the District Court, approving the referee's allowance of the claim of Charles S. Rieman, the bankrupt appeals. Affirmed.

See, also, 249 Fed. 97, 161 C. C. A. 149; 252 Fed. 127, 164 C. C. A. 239.

James R. Ward, of Chicago, Ill., for appellant.

Daniel W. Scanlan and Ira Ryner, both of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. This is an appeal by the bankrupt from the District Court's approval of the referee's allowance of a claim filed by

appellee.

[1] Appellant's principal contention is that the evidence is insufficient. On looking into the record, we discover that his real insistence is that we should override the direct and circumstantial evidence which supports the claim, and declare in his favor on testimony which the referee found to be perjured and on documentary evidence which the referee found to have been manufactured under a conspiracy to defeat the claim. Appellant mistakes the function of an appellate court's review of the report of a referee or master which was based on an oral hearing of conflicting evidence and which has been confirmed by the trial court. In re Schulman, 177 Fed. 191, 101 C. C. A. 361; Poff v.

Adams, 226 Fed. 187, 141 C. C. A. 185; In re Lally (D. C.) 255 Fed. 358; Gordon Dry Gin Co. v. Righeimer, 258 Fed. 925, — C. C. A. —.

Appellee's claim was predicated upon appellant's written undertaking to pay appellee one-half of the money and property belonging to appellant and in possession of third persons, which appellee should recover or assist in recovering through services rendered or information furnished by appellee. March 8, 1910, was found by the referee and the court to be the date on which appellee's right to payment accrued. Appellant complains of the allowance of interest at the Illinois statutory rate from March 8, 1910, to August 8, 1916, the date of the initiation

of the bankruptcy proceeding.

[2, 3] Appellant's position is that the claim was not founded on a contract in writing for the payment of money within the meaning of section 2, chapter 74, Revised Statutes of Illinois, which provides, in the absence of any stipulated interest, for interest at "5 per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing." The argument is that "other instruments in writing" must be limited to those of the same nature as "bonds, bills and promissory notes," and that the contract in suit is not of that nature, because the amount and the date of payment are uncertain.

But we shall not undertake an independent analysis of the statute, for it is our duty to adopt and apply the interpretation given by the Supreme Court of Illinois. The construction placed upon the statute by that court in Scroggs v. Cunningham, 81 Ill. 110, Heissler v. Stose, 131 Ill. 393, 23 N. E. 347, and A. B. Dick Co. v. Sherwood Letter File Co., 157 Ill. 325, 42 N. E. 440, is well stated in E. J. & E. Ry. Co. v. N. W.

National Bank, 165 Ill. App. 35, 42, as follows:

"Every demand for money fundamentally involves the question of the right of the claimant to it and to how much. These questions may be the subject matter of prolonged controversy. Nevertheless, when those uncertainties shall be at last resolved by legal ascertainment, the title and quantum as found, if they shall have arisen upon an instrument in writing for the payment of money, will, when found, relate back, for the purpose of the computation of interest, to the date at which the right of the determined quantum originally existed in the law."

Under the Illinois authorities we have no doubt that the allowance of interest was proper.

The decree is affirmed.

WILSON v. SPENCER.

(Circuit Court of Appeals, Fifth Circuit. November 25, 1919.) No. 3351.

1. COURTS @==372(7)—DECISIONS OF STATE COURT ON COMMERCIAL LAW NOT BINDING ON FEDERAL COURT.

On a question of general commercial law as to the validity of a note given for the purchase price of corporate stock, which it was contended was void under constitutional provisions forbidding corporations from issuing stock, except for money paid, etc., the federal courts are not bound to follow the decisions of the highest state court.

2. BILLS AND NOTES \$\iiii375\$—Corporations \$\iiii99(1)\$—Validity of note given for purchase price of corporate stock.

A note given in Texas for the purchase price of stock of a corporation to be organized in Colorado is not utterly void under the provisions of Const. Tex. art. 12, § 6, and the similar provision of Const. Colo. art. 15, § 9, that no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, but is enforceable in the hands of a bona fide holder.

3. Appeal and error c→1177(6)—Necessity of new trial on remand.

Where the District Court, in an action involving a note which defendant claimed was void, erroneously held the note to be void, and did not decide the question of bona fides of plaintiff's possession, the cause will be remanded on appeal.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Suit by Valdo F. Wilson against J. E. Spencer. From a decree for defendant, complainant appeals. Reversed and remanded.

R. C. Chambers, of Abilene, Tex., and Theodore Mack and A. H. Kirby, both of Ft. Worth, Tex., for appellant.

J. M. Wagstaff, of Abilene, Tex., for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge. In this case the material facts are these: Appellee purchased \$10,000 worth of the stock of the Antero Valley Land Company, a corporation to be organized under the laws of Colorado, and gave his note for \$5,000 in connection with the purchase. The note passed through several hands, and came into possession of appellant, who claims to be a holder in good faith, before maturity, for value, without notice.

The note was made and delivered in Texas. The Constitution of Texas contains the following provision:

"No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Article 12, § 5.

The Constitution of Colorado has a similar provision. Article 15, § 9.

Appellee set up fraudulent representations in the sale of the stock to him, and also that the note was void under the above provision of the Constitution of Texas.

- [1] The question presented is one of general commercial law, in deciding which the federal courts are not bound to follow the decisions of the highest state courts. Watson v. Tarpley, 18 How. 517, 15 L. Ed. 509; Murray v. Lardner, 2 Wall, 110, 17 L. Ed. 857. But a discussion of that feature is unnecessary, as will presently be seen.
- [2] At the time the case was tried in the District Court there were various conflicting decisions of the Courts of Civil Appeal of Texas on the question. In deciding the case the District Court held the note to be void under the law of Texas, resting its decision on the case of Republic Trust Company v. Taylor (Tex. Civ. App.) 184 S. W. 773. Shortly before the decree was entered, the Supreme Court of Texas had decided to the contrary in the case of Washer v. Smyer, 211 S. W. 987; but the case was not then reported, was not known to counsel, and was not brought to the court's attention. As this decision conforms to the federal jurisprudence (see Watson v. Tarpley and Murray v. Lardner, supra), and would be controlling in the view of the case taken by the District Court, it is clear the decree appealed from must be reversed.
- [3] As the District Court did not consider or decide the question of the bona fides of appellant's possession of the note, the case will be remanded for further proceedings.

Reversed and remanded.

CITY OF CHICAGO v. STRAUSS BASCULE BRIDGE CO.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2677.

PATENTS \$\iff 328\$—For bascule bridge; valid and infringed.

The Strauss patent, No. 995,813, for improvement in bascule bridges, held not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Strauss Bascule Bridge Company against the City of Chicago. Decree for complainant, and defendant appeals. Affirmed.

Appellant was found to be an infringer of claims 9 and 10 of patent No. 995,813, granted June 20, 1911, to J. B. Strauss, for improvements in bascule bridges.

Those claims read as follows:

"9. A bridge comprising a movable section, a stationary cross-support therefor; the rear end of the movable section having truss members which

completely surround the said cross-support.

"10. A bridge comprising a movable section, two upright supports therefor, one on each side of the roadway, a stationary cross-support connected with said upright supports, and upon which the movable section is mounted; the main trusses of the movable section ending at the said cross-support, the rear end of the movable section having truss members above and below said cross-support, and arranged so as to at all times be free from the cross-support when the movable section is lifted."

Trial was had on oral testimony and exhibits before a master. With his

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return of the evidence he submitted a very full finding of the facts on which he based his conclusions that the claims in suit were valid and infringed. This report, after a hearing on appellant's exceptions, was confirmed, and thereupon the court entered the decree from which this appeal is taken.

On the question of the patentable novelty of the claims in suit the master

found as follows:

"In 1903 patent No. 738,954 was issued to J. B. Strauss on an improvement in a bascule bridge. Defendant's Exhibit 3. Defendant contends that Figures 7 and 8 of this patent show a bascule bridge construction having every element of claims 9 and 10 of the patent in suit, with the single exception that the truss members in the 1903 patent only partially surround the stationary cross-support, whereas the truss members in the 1911 patent completely surround the cross-support; that it did not require invention to provide the Strauss 1903 structure with truss members completely surrounding the stationary cross-support shown in the patent in suit, as engineers are familiar with the practice of compensating for the removal of any diagonal in a truss member by supplying additional trusses; that combining the stationary cross-support, as shown in the patent in suit, is nothing more than an aggregation of old elements acting in the old way and producing no distinctive or new results when compared with the Strauss 1903 patent.

"Defendant also contends that other patents prior to 1903 and other structures show a trussing around a movable cross-support, but does not claim they show trusses around a stationary cross-support, but that, taking the structure of these former patents and the structure of the 1903 patent together, they show that before 1911 all that appears in the 1911 patent was known to the

prior art.

"Volume 14 of the publication entitled 'Industries,' of which photographic copies of pages 316, 317, and 324 were introduced in evidence and marked Defendant's Exhibits 1a and 1b, was published in 1893. It is a foreign publication, consists of printed matter and drawings, and illustrates a bridge over the Tiber river near Rome, Italy. The defendant contends that these drawings show a bridge construction wherein the movable section comprises a series of plate girders, each provided with an opening through which a horizontal stationary cross-support projects, mounted on suitable standards on each side of the roadway; that the movable section in the Tiber river bridge construction is shown mounted upon trunnions that rest on the stationary cross-support with the rear end of the movable section completely surrounding the crosssupport, so as to permit the lifting of the bridge sufficiently to provide proper clearance: that under claims 9 and 10 of the patent in suit the bridge may be of truss construction, girder construction or construction of any other mechanical form that is practical in engineering, and that therefore the Tiber river bridge, as shown by the drawings, wholly meet claims 9 and 10 of the patent in suit; that the drawings, Defendant's Exhibits 1a and 1b, are sufficiently clear to enable one skilled in the art to understand the mechanical construction shown; and that the Tiber river bridge construction anticipates claims 9 and 10 of the patent in suit.

"With these contentions I do not agree. The Strauss 1903 patent shows a bridge entirely above the trunnions and the support for the trunnions. It does not show a bridge where the truss members surround the cross-support. The problem presented to Strauss was how, in heavy weights and spans, where a deep truss must be used, like that of the Washington street bridge, to support the inside end of the trunnions that sustain the truss and about which it revolves, without having this support interfere with the space for the counterweight, and where the truss was of such construction that any support for the inner end of the trunnions must project through the truss itself. In doing this, and arranging a construction that would permit the bridge to open to a sufficient degree, Strauss had to invent or devise a way to truss around the cross-support without making use of the triangle form or construction. This problem had not before then been solved. If engineers

had tried it, they had met with failure.

"The basis of the truss is the triangle; it is the only figure the shape of which cannot be changed without changing the length of one or more of its sides. To project a cross-support through one of these triangles forming the truss, and still permit the bridge to open sufficiently, could not be done; one or more of the triangular members would strike the cross-support and stop further and sufficient movement to secure the desired opening, and if one of the members of one of these truss triangles is out, or removed to give more space, the truss will fail. Strauss solved this problem by departing from the accepted practice in the art. He used in this truss, in place of a triangle, a quadrilateral, and this quadrilateral gave him sufficient space through which to project the cross-support for the inner end of the trunnion and yet permit the bridge to be sufficiently opened without any member of the quadrilateral striking the cross-support. It also permitted him to use a very deep truss. While this quadrilateral on its face departs from the triangle, it does not depart from the law of the triangle, for Strauss so arranged the parts that two sides of the quadrilateral were so connected with triangles in the truss as in fact to make these two sides immovable as to each other; two sides of the quadrilateral in mechanical effect, though not in form, one side of a triangle. This quadrilateral form of construction in mechanical effect had all the functions of the typical triangular form, but with an additional and new result, in that it permitted the bridge to open a sufficient amount without any member striking the cross-support projecting through the quadrilateral, which is the prime function of the bascule bridge.

"In addition to the Strauss patent, No. 738,954, Defendant's Exhibit 3, already considered, defendant introduced the Lamont patent, No. 544.733, Defendant's Exhibit 4, the Cowing patent, No. 672,848, Defendant's Exhibit 5, the Brayton patent, No. 632,985, Defendant's Exhibit 6, the Vent patent, No. 683,627, Defendant's Exhibit 7, the Wetmore patent, No. 349,020, Defendant's Exhibit 8, and the Emery patent, No. 398,956, Defendant's Exhibit 9, in support of its contention that there was no novelty in the patent in suit and that all of the elements combined were old in the art and produced no new result. A consideration of these patents separately or together discloses that they fail to indicate how they might be combined or arranged so as to accomplish the result Strauss sought to accomplish. Claims 9 and 10 of the patent in suit are not anticipated by these patents, nor do they show anything to negative invention or novelty of the structure set out in claims 9 and 10 of the patent in suit.

"The photographic copies of pages from the foreign publication 'Industries,' Defendant's Exhibits 1a and 1b, illustrate a bridge over the Tiber river, and consist of printed matter and drawings. The chief purpose of the drawings seems to be to illustrate the hydraulic mechanism for raising and lowering the span shown in this bridge. The hydraulic counterweight is commented upon and described in detail in the printed matter shown on the copies, while the remaining structure of the bridge is not mentioned in the printed matter. While the drawings in a way illustrate the entire structure, they appear to be sufficiently definite only to make plain the construction of the hydraulic counterweights. The Tiber bridge is hardly comparable with the Washington street bridge. The Tiber bridge is small, narrow in width, of girder and not truss construction, has a short span and a long counterweight, and the counterweight and span weigh 73 tons and 1,200 pounds; while the Washington street bridge is of truss construction, of dimensions requiring deep trusses, and the counterweight and span weigh about 2,000 tons. The movable span of the Tiber bridge is mounted on high piers, so that a long counterweight arm may be used without a counterweight pit; such construction could not be used over the Chicago river at Washington street.

"The drawings and descriptive matter shown in this publication do not clearly show what the construction is, other than the hydraulic operation of the counterweight, and do not disclose with sufficient clearness to one skilled in the art any structure that would anticipate claims 9 and 10 of the

patent in suit."

George A. Chritton, James R. Offield, and Russell Wiles, all of Chicago, Ill., for appellant.

Donald M. Carter and Stuart G. S. Shepard, both of Chicago, Ill.,

for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Beyond approving the master's findings and conclusions as sufficient answers to appellant's contentions in chief, there is one position, taken in an addi-

tional reply brief, which should be stated and met.

As appears from the master's finding, and also from the specification of the patent, Strauss's particular construction of "truss members above and below said cross-support, and arranged so as to at all times be free from the cross-support when the movable section is lifted," or "truss members which completely surround the cross-support," was a quadrilateral, two sides of which formed a re-entrant angle, and which was saved from distortion by having each of the re-entrant sides itself a side of a triangle in the general truss. On this specific disclosure Strauss framed and was allowed the broad claims in suit.

Additional counsel in the additional brief assert that all that Strauss invented was his specific quadrilateral; that it was merely an accident that appellant used that form; that appellant can easily provide its openings for the stationary cross-supports by using other polygonal forms or even a triangle; that the claims, being clearly broader than the actual invention, should not be recast through a judicial reissue; and that appellee's only remedy is through a Patent Office reissue.

We should of course agree with counsel, if we could accept his prime assertion that the Tiber bridge publication disclosed the generic invention of a bascule bridge having openings in the side walls (of truss or equivalent construction) for the stationary cross-support. is no verbal description of the parts in question. In the drawings and photographs in the publication the experts for appellant see the Strauss bridge, while appellee's experts find no suggestion of it. Our own examination leaves us uncertain of the actual construction of the portions of the Tiber bridge in question. What we are certain of is that the foreign publication does not "contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent." Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33.

We conclude, therefore, that Strauss's specific disclosure warranted the allowance of the claims in suit.

The decree is affirmed.

CONSOLIDATED WINDOW GLASS CO. v. WINDOW GLASS MACH. CO. et al. *

(Circuit Court of Appeals, Third Circuit. October 13, 1919.)

Nos. 2443-2447.

1. PATENTS \$\infty 54, 173-Validity as affected by prior patents.

Patents for a machine and process for drawing glass for windows mechanically are not anticipated by patents for earlier and abortive devices and methods, where the patents in suit were the first that were successful, and such patents must be given a broad and liberal construction; the inventors being pioneers in the art.

- 2. Patents \$\iiis\$328—For drawing window glass valid and infringed.

 The Lubbers patent, No. 702,013, claims 1, 2, 3, 5, 8, 9, 10, 12, 13, 15, 16, 17, and 18, as well as patent No. 702,014, claims 2, 3, 4, 5, 8, 9, 11, and 13, the first of which was for an apparatus for mechanically drawing window glass and the latter being a method patent, held valid and infringed.
- 3. PATENTS \$\infty 328\$—FOR MECHANICAL DRAWING OF GLASS VALID AND INFRINGED.

The Lubbers divisional patent, No. 702,015, which showed the use, in connection with his shield in the forehearth, of floating rings, all of which apparatus was used for the mechanical drawing of glass, held valid and infringed.

4. PATENTS \$\infty 328\$—For drawing glass valid and infringed.

The Lubbers patent, No. 886,618, for an air vent hole in the apparatus for mechanically drawing glass, claims 20, 21, 23, 24, and 26, held valid and infringed.

5. PATENTS \$\infty 328-Improvement of patent for drawing glass valid and infringed.

The Lubbers patent, No. 886,618, for an air vent hole in the apparatus mechanically drawing glass, the application for which was filed May 21, 1903, and which was granted May 5, 1908, after the patentee at the suggestion of the Patent Office later made a divisional application of that patent, applying for patent No. 1,020,920, and filing nearly three years later additional claims for his original patent, held valid; it appearing that the whole art was in a state of flux and experiment, and it being impossible to say with definiteness that Lubbers had satisfactorily worked out the open vent solution more than two years in advance of his application.

6. Patents \Leftrightarrow 328—For improvement of method of drawing glass valid and infringed.

The Chambers patent, No. 762,880, for a method for gradually increasing the speed of the drawing operation for the mechanical drawing of glass, held valid and infringed.

7. PATENTS \$\iff 328\$—REGULATING SPEED OF DRAWING GLASS VALID AND INFRINGED.

The Lubbers patent, No. 822,678, for a method of regulating the speed for the mechanical drawing of glass, held valid and infringed.

- 8. PATENTS \$\iiiis 328\$—REGULATING DRAWING OF GLASS VALID AND INFRINGED.

 The Lubbers patent, No. 914,588, for an appliance to regulate the mechanical drawing of glass, so that the surface tension on the bait would be equalized, held valid and infringed.
- 9. Patents \$\iiis 328\$—For capping glass cylinders valid and infringed.

 The Hitner patent, No. \$21,361, for a device for capping off glass cylinders, held valid, despite the contention that it had been placed on sale more than two years before application, and also held infringed.

10. Patents €=328—For hoisting device valid and infringed.

The Hitner patent, No. 822,452, for a hoïsting device to move large cylinders of glass mechanically drawn, held valid and infringed.

11. Patents €=328—For holding glass cylinders valid as to certain claims.

The Bridge patent, No. 1,006,995, for an apparatus for holding the large mechanically drawn glass cylinders, which was fit for use when the cylinders were divided into segments, held valid as to claims 1, 2 and 4.

Appeals and Cross-Appeals from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward

Thomson, Judge.

Suits by the Window Glass Machine Company and another against the Consolidated Window Glass Company, against the Pennsylvania Window Glass Company, and against the Kane Glass Company, which were consolidated. From a decree for complainants, but which denied some of the relief sought, the several defendants appeal, and complainants assign cross-errors. Modified and affirmed.

Marshall A. Christy and Robert D. Totten, both of Pittsburgh, Pa., and Charles Neave, of New York City (James I. Kay, of Pittsburgh, Pa., and A. W. Bright, of Washington, D. C., of counsel), for appellants.

Clarence P. Byrnes and George H. Parmelee, both of Pittsburgh, Pa. (Livingston Gifford, of New York City, of counsel), for appellees.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns window glass, a product which enters into practically every home and structure in the country. It covers a great pioneer step in this universal art, when to its customary and time-used method of blowing such window glass by human skill, "man-blown glass," there was added the mechanical exactness and increased production of "machine-drawn glass." That step gave to a machine and a mechanical process the equivalent of the fine skill of the most skillful of artisans, and of artisans who dealt with the most difficult to handle of products, viz., molten glass, which was changing its nature every second it was handled. This step freed the window glass art and its universally used product from the absolute domination and monopoly of a small body of skilled artisans, whose organization absolutely controlled its operation and the amount and price of its output. This change enabled some 70 ordinary mechanical employés, with the help of machinery, to produce the product theretofore made by substantially 600 blowers, whose exacting work was often done at the expense of their health, for the glass-blower's work, with its abnormal lung expansion, often caused physical decline. change also brought about a decreased price of a universally used product. The machine-drawn output is now two-thirds of the window glass product of the United States, and this machine-drawn process and apparatus have been such that within a few years after they began in the latter country they have been adopted and used in England,

France, Germany, Austria, Italy, Russia, Spain, Portugal, Japan, and also in Canada.

The width of the change from the hand-blown process of the old era to the machine-drawn process of the new, is best illustrated by a brief description of both. To make a square sheet, from which panes of window glass can be cut, it is necessary to have a cylinder or roller whose sides are of uniform thickness and whose length is about 4 or 5 feet. Such a cylinder, or sectional cylinder, must be then split or parted on a straight line through its entire length, and then placed, with such split uppermost, in a heated furnace. As the glass softens, the sides of the cylinder recede from this longitudinal split, and we have the rectangular sheet of glass desired, from which, after certain flattening, annealing, and cleaning processes have been applied to it, panes of window glass of appropriate size may be cut. The formation of such cylinders, or sectional cylinders, is the aim of both the hand-blowing and machine-drawing methods; but the blower could only make one cylinder at a time, and this of a length limited to say 4 or 5 feet, and a diameter of say 10 inches, while by the machine-drawn method a cylinder of say 38 feet in length and 38 inches in diameter, and capable of being cut into five or nine subsections or rollers, could be produced. In doing this, the blower used a tool called a blowpipe, which consisted of a hollow stem through which he blew, and a bell-shaped enlargement at its end, on which he manipulated the molten glass. Taking this blowpipe, a workman, called a "gatherer," first inserted the bell-shaped, heated end of the blowpipe into a pot or tank of molten glass, and rotated it so as to gather a small mass of such molten glass on such end. The pipe was then taken to the cooling tub, where the pipe shaft or stem was cooled, and the glass shaped or cooled on the surface. This operation was repeated three times, which gave to the mass successive layers of glass like the skin of an onion. The glass lump, which still remained plastic, was then shaped by turning it in a suitably cooled wooden or metal block having a shaped cavity. The blower then took the tool with the glass mass on its end, and blew in some air by his lungs, while still turning the mass in the blower block. This gave it a rough pear shape. The glass was then reheated in the "blow furnace," and the blower then swung the depending plastic mass in a trench, and while turning or twirling the pipe blew into it at intervals. By this operation, the size of the glass structure was determined by the air blown in, the glass being meanwhile elongated by gravity and the centrifugal effect of swinging, and at the same time the whole mass was kept symmetrical in form by twirling. During such manipulation the glass became too cold to work, and it was again reheated in the blow furnace, and again elongated by the intermittent steps of swinging, twirling, and blowing, until a cylinder of equal diameter and thickness through its entire length was formed. When this was done, the end of the cylinder or "roller" thus formed was heated in the blow furnace, and the closed end blown open. The roller was then laid horizontally on a horse or rack, and the blowpipe was broken or cracked off the one end, and the other or rounded end of the cylinder was then "capped off," or severed by wrapping around it

a thread of hot glass and touching it with a cold iron; the expansion by reason of the hot thread and the contraction by reason of the cold iron, resulting in a straight cut of the cylinder on a line at right angles with the horizontal length of the cylinder itself. These rollers or small cylinders, so produced by glass blowers, were, as we have said, from 5 to 6 feet in length, and 8 or 10 inches in diameter, and weighed about 20 pounds, though their weight in glass of double strength might run over 50 pounds. The rapid and skillful handling of this swiftly changing, molten mass, the difficulties and skill of manipulation, and the requirement that the finished product should be of even thickness throughout, manifestly necessitated work of the highest skill, coupled with great strength and endurance. This skill was of such a character that three years of apprenticeship was often required to learn it, even by a man who was familiar with the work incident to such blowing, and the workmen were so restricted in numbers and of such individual skill that they formed a labor organization which absolutely dominated that industry.1

A visit, at the time of the argument of this case, of the members of this court to a glass factory near Pittsburgh, showed them the machine-drawing method of making window glass. The extent of the operations of this factory, and the call for molten glass, were such as to necessitate the use of a tank to keep up the supply of glass required. This tank, of course, had nothing to do with the patents here involved; but, as a part of a practically continuous process from the raw material to the flattened sheets of window glass, we note that such a vital element as the tank and the process therein employed, for keeping up the continuous supply of glass, will be found described in the case of Siemens v. Chambers (C. C.) 51 Fed. 902, a case decided in this cir-

1 "Q. What was the condition as to the labor organizations to which these blowers and gatherers belonged? A. At that time, there were, if I recall correctly, two labor organizations, both of them trying to outdo each other in arbitrariness. They formulated rules for the operation of your factory, which you were obliged to live up to. You were restricted in the amount of glass that your men should blow in the eight-hour turn. They were required to lay off a certain portion of each eight-hour turn. The number of cylinders they were allowed to make was limited, and the number of boxes of glass for the week's work was limited, and an excess production over the limit was punished by severe penalties inflicted on the workmen. But the shortage of men made the workmen very arbitrary. They wanted their glass cut in sizes which made them the most money, irrespective of whether these sizes were the sizes which the trade required. The larger the size the glass was cut into, the greater were the earnings of the blower and gatherer and flattener. In addition, a man could make more money, and make it easier, blowing double strength than single strength, and, while the normal requirements of the country were always considered to be about one-fourth double and threefourths single, lots of factories, our own included, were producing between 40 and 50 per cent. double, instead of 25, because we could get double strength blowers when we couldn't get men who would blow the single. The business from a manufacturing standpoint was chaotic. Q. 15. How difficult was it to obtain membership in these unions? A. Both the unions enforced the rule that no one could learn the trade, could learn any of the trades, what is termed the four trades, the blowing trade, the gathering trade, the flattening trade, and the cutting trade, unless he was a father, son, or brother of a member of the union.

cuit, and in that connection it is in evidence in this case that one of the beneficent effects of the installation and successful use of the machine-drawn process was to permit the use of the tank, and the savings and product increase due to that economical agent of efficiency and to the use of which the glass blowers had always objected. In this tank a huge bowl at the end of a long handle, which was suspended by a chain from an overhead runway, was dipped into the tank mouth and filled with molten glass. The dipper was then swung around and the glass carried to a glass pot, from which the molten glass was to be machine-drawn. It will here be noted that the use of this pot, situate at some distance from the tank, was the method used in this particular factory, while the alleged infringing method used, and with which we are here concerned, consisted in working the molten glass, not in a pot, but in a structure situated alongside of and drawing its glass directly from the tank.

But, to return to the factory visited, it will be noted that the machinery by which this draw is there effected was centered in a platform about 40 feet above the molten glass. This platform contained the different mechanisms required, and had suspended from it the mechanical semblance of a glass-blower's tool. This tool was a hollow pipe about 5 or 6 feet in length, at the bottom of which was a circular piece of steel, the whole tool somewhat resembling a mushroom stem, with the top or umbrella inverted. From a cage in front of the mechanism, where the single operator, who controls the operation, watched and operated, the drawing tool or bait, as it is technically termed, was caused to slowly descend. As the cage or mechanism was lowered along guideways which reached nearly to the pot, the inside of the steel bait dipped into the molten glass, which entered and filled the interior of the bait. As the bait had an interior edge or knuckle at its lower part, a circular rim of glass was at once formed by the molten glass coming in contact with the cooling steel. This solid rim thus formed was the start and support for the drawing operation which followed. As the bait slowly emerged from the pot of molten glass, a cylinder began to form, in a shape resembling a great demijohn: that is, first the neck, then the gradually expanding shoulders, then the main or cylinder body proper, which slowly increased until a diameter of about 38 inches was reached. As the "bait" continued rising, a molten glass cylinder was slowly drawn upward from the pot, and this cylinder, now 38 inches in diameter, slowly and majestically was drawn upward and upward until it reached a height of about 38 feet. The slow emergence of these cylindrical walls of even thickness from a bath of molten fluid, mounting to such a height, self-supporting and changing gradually from fluid to plastic, then to solid, glass, impressed one as a real, veritable miracle, as the great cylinder stood erect, of predetermined thickness, and of clear transparency. It stopped substantially 40 feet above the ground, supported by its own sides, and those sides resting on a fluid bed of molten glass at its foot. We stop at this point to place in a note in the margin² an extract from the

² "Q. When you began this investigation, what impressed you at first as the main physical factors involved, or what particularly impressed you

testimony of Dr. Bishop, professor of physics and dean of the school of engineering of the University of Pittsburgh, who has admirably stated, not only the outward and visible features of the drawn-glass process, but the great range of occult and invisible functional elements which tend to make or mar such a process.

What shall be done with this immense cylinder? A cold bar of steel is run around the lower end of the cylinder, and it is at once cut off from the plastic glass, which falls back into the pot. We here note that the glass which falls back into the pot, and which is called the "aftermath," does not concern us in the present case; but the character of that aftermath and the conditions necessary for its treatment were matters which had to be reckoned with in effecting the industrial and economical success of the drawing process under consideration. A large hoop, padded with asbestos, is then run around the severed end of the cylinder. To this is attached an overhead line. The lower end of the cylinder is drawn out from the pot into mid-air, and as it is drawn out the cage, with the bait, is lowered until the great cylinder reaches a horizontal position. Then the bait is detached, and, although its weight is well up to 100 pounds, it is held suspended by the cylinder itself. The cylinder is then dropped into a long horse or supporting rack, which consists of upright stems having semicircular hoops at their upper end, which are so spaced as to support the cylinder when lowered onto them. At this point a workman takes a capping tool, and, be-

mainly in the operation? A. Well, the whole process, from the time they commenced to feed the glass into the enormous tank of molten glass until the time the process was complete. But to a physicist, who has been obliged to handle glass, and knows its brittle character and the strains that are produced in it, this drawing of a glass cylinder from a bath of molten glass strikes one as being really a marvelous performance. I recall very distinctly the first time I visited this plant and observed the bait lowered into the glass, and marveled at the ease with which the glass was fastened to it; and as the bait was drawn upward the tendency was to watch the bait and the attached glass cylinder and see how soon it would fall down. After I became accustomed to that, I then watched to see what was going on in the bath of molten glass. It naturally separated itself in this way: We have the molten liquid glass, then a zone that we might call the meniscus zone; then above this the plastic zone, where the glass is flexible and moves with the greatest ease, something like a leaf in the wind; above this plastic zone comes the setting zone; and then passes into window glass in the upper part of the cylinder. Now, I was impressed with the fact that the mechanical appliances must be quite remarkable, and there must be a very close correlation and co-ordination, not only between the various physical factors which enter into this, but between the eye and the hand of the operator and the machines which correlated these various factors. Q. You have referred to the physical factors involved in this process. I will ask you to state, from your study of these methods, what you consider to be the main physical factors involved. A. After a prolonged study of this subject, I decided that the main essential factors are: (1) The bath of molten glass. (2) Heating to maintain the glass in a liquid state at a proper drawing temperature. (3) Shielding the heat from the drawing point. (4) Chilling of the glass in the bath. (5) Surface tension. (6) Viscosity. (7) Flexibility of the glass in the plastic zone. (8) Homogeneity of the glass; and under this two subheads: (a) Uniform mass density; (b) uniform thermal density. (9) Symmetrical segregation of the glass at the drawing point. (10) Speed of draw, and its relation to the temperature conditions in the receptacle. (11) Relative air

ginning with the upper end of the cylinder, next the bait, caps or cuts the cylinder along the desired lines. These large cylinder sections are then moved away to separate horses or racks, and, after being longitudinally cut, are subjected to the treatment of flattening, ironing, annealing, and cleaning, which were followed in the course of the small single cylinders of the glass-blower's art. To those interested in the subject the number of the National Geographic Magazine of May, 1919, contains illustrations and descriptions of this process.

[1] The proofs in this case show:

First, that while the suggestion of machine-drawn glass had been made and was recognized in the literature of the art as early as the '50's, no practical method of machine-drawing window glass had been evolved in the 50 years following, and the highest achievement of the art and the only method of making window glass was the hand-blown process first described. Interesting, therefore, as these prior suggestions were, suggestive as they may have been, in practice they got nowhere. It therefore follows that the men who in 1894 began a systematic and costly campaign to draw glass by machinery were absolutely pioneers in that field, so far as accomplishment was concerned. It follows, also, that these prior patents, none of which solved the problem of machine-drawn window glass, should have no effect in anticipating, qualifying, or defeating the claims for patent protection of those whose subsequent effort actually produced machine-drawn window glass.

pressure within and without the cylinder and controlled by vent. Strains: (a) Produced in the glass while drawing; (b) taking down strains. (13) Cool glass remaining in the receptacle at the end of the draw; that is, the aftermath. Q. Have you arranged any classification of these factors you have enumerated? A. Of course, these factors entered, with perhaps one or two exceptions, simultaneously in a drawing operation. But it is possible, I think, to perhaps systematize these somewhat roughly under four heads: (a) Factors affecting the glass in the receptacle; (b) factors affecting the glass during the drawing; (c) factors affecting the glass during the taking down; (d) factors preliminary to the next draw. Now, if you go back to these same 13 factors which I have enumerated, you can perhaps classify them somewhat under this arrangement: Under (a) "Factors affecting the glass in the receptacle," we have: (1) The bath of liquid gluss; (2) heating to maintain the glass in the bath in a liquid state; (3) shielding the heat from the drawing point; (4) chilling of the glass in the bath; (8) homogeneity of the glass in regard to its mass density and thermal density; (9) symmetrical segregation of the glass at the drawing point. The factors which have to do with the cylinder that is being drawn—that is, the ones that come under (D)—are: (5) Surface tension; (6) viscosity; (7) elasticity; (10) speed of draw; (11) relative air pressure and vent control. The factors which enter during the taking down, under class (c) are: (12) Strains which exist in the glass due to the method of the formation of the cylinder, and those which are introduced by the method employed to take the cylinder down and lay it in a horizontal position. Those factors which are preliminary to the next draw-that is, class (d)-are those which result from the necessity of removing the cool glass remaining in the receptacle at the end of the draw. This involves either a new factor in heating, if the aftermath is to be melted back and refined in place, or if the device which produced the symmetrical segregation of the glass at the drawing point is to be removed, and a new one put in its place. I want to be very clear that, in attempting to classify these, that does not mean that one class occurs, and then another class occurs, and so on, but practically all of these occur all the time during the operation.'

Nor should these earlier, but abortive, attempts which resulted in absolutely nothing, shield and protect from infringement and accounting those who copied not the abortive failures, but the successful steps of the originators of machine-drawn glass.

Second, while, of course, many of the general principles on which the hand glass blower formed the cylinder, must in the nature of things be the same as those by which the machine formed the same cylinder out of the same material, yet it will be seen that the hand-blown art and the machine art are essentially different. In that respect, the trial judge below well said:

"While there are certain analogies between the hand-blowing and machine operation of drawing glass cylinders, the former having taught certain principles, as the regulation of the size of the cylinder by internal air pressure, and control of the thickness of the glass by elongation, yet there are many fundamental and vital differences between the two systems."

Third, the machine-drawn window glass is produced by one continuous, progressive operation. There is no reheating. The diameter and length of the cylinder are so different that it is evident that the magnitude of the article handled, the continuous operation in handling, and the size of the product produced, in themselves are factors indicating that the problems involved in this continuous process, their interrelation to each other, the elements of air distention, the glass heat, and its rapid changes, unite with many other factors to make the whole process so corelated and interwoven that each element or invention which contributes to the successful end cannot be considered as an isolated inventive act, but must be viewed from the standpoint of all the parts of an interrelated, corelated, combination whole. In that respect, the trial judge well said:

"It is, perhaps, true that few, if any, of the arts presented so many perplexing problems as the drawing of glass cylinders by machinery from a molten bath. These problems appeared at the very beginning of the operation, and rose up persistently all along the way. The inventor had to deal with elemental actions, forces, and properties of matter; with things in the nature of hear, cold, the properties of solids, liquids, and gases; heat applied to the glass, and cold applied to the molten liquid; the properties and physical constitution of the glass as it passed from the solid to the liquid condition, through the plastic condition up to the solid state again; the application of air under conditions of pressure, and under conditions of pressure varied by heat. He must consider the uniformity or nonuniformity of the temperature of the glass in the furnace at different places and at different times; the conditions under which the intense heat from the furnace must be guarded from the drawing point, and the systematic segregation of the glass at that point. If the draw is from a pot, the relation between the diameter of the pot and the diameter of the cylinder being drawn; the rate of cooling of the glass in the receptacle from which the draw is being made; the speed of the draw, having relation to the temperature conditions in the drawing receptacle, as well as in the cylinder being drawn; the action of the air on the cylinder, both within and without; the temperature of the air when admitted to the cylinder. and the heating effect on the air after it has been admitted; the regulation of the air pressure in the cylinder to procure uniformity of diameter and to eliminate the 'breathing' of the cylinder, with the resultant corrugations in the glass; the symmetrical heating during the draw to prevent the lateral movement of the cylinder, and the melting back of the aftermath or residuum between the draws; the surface tension of the glass, and the strains produced in the cylinder while forming, and while being taken down. These problems

were not only numerous and complex, but many of the difficulties were latent and were only located after repeated experiments and failures. When the difficulty had been definitely determined and located, the remedy had to be found."

The patient hearing and consideration of this case by Judge Thomson, and his able opinion in its many phases, lead us to feel that the foregoing extract from his opinion points out the proper attitude of a court toward the patents which have bridged the great chasm between the hand-blown and machine-drawn window glass, and to this admirable statement of Judge Thomson's we add that of Judge Pollock, who had these same patents before him, where he said:

"Considering then: (1) All the patents involved in this suit as unified in purpose to carry forward the process devised, or as mechanical aids essential to the conduct of such process, therefore merely incidental thereto; (2) that by the process involved there was accomplished for the first time the new and useful result of mechanically drawing glass cylinders from a molten receptacle of glass of such size, thickness, diameter of cylinder, and degree of perfection as to successfully compete with hand-blown cylinders in trade and commerce; (3) because of the far-reaching importance this old result accomplished in a new and hitherto unknown way, making it of the largest economic consequence, value, and importance in the trade and in labor saving —the patents covering the process must and should, I believe, be regarded of the highest importance and be accorded the largest degree of credit given by the law to patents; and (4) indulging in favor of the validity of the patents themselves these presumptions which arise in law from the admitted facts of this case, such as (a) the legal presumption as to the validity of the patents, (b) the creation of a new mechanical industry, (c) arrived at after years of ceaseless experimentation and investigation under great difficulties and at large expense, (d) in dealing with a product of nature of such delicate and fragile texture as glass, (e) wherein the operation carried through the process was the first to employ, regulate, and successfully control natural forces and devote them to a useful end, (f) at a time when such forces were little understood and progress was impeded at every step by latent difficulties, hard to discover and harder to overcome, all of which presumptions must be indulged in this case under the rules established in the adjudicated cases."

When we consider that this machine-drawn window glass process and apparatus were the outcome of years of courageous and original experimentation, and that in those experiments several million dollars were sunk, we can see that we are dealing not only with a great contribution to a great art, but with the creation of a new art, and that the steps involved are of a radical, basic, and pioneer character.

Turning, then, to the machine-drawn window glass process and the mechanism which we have described above and seeking to find the basic principles and locate the dominant factors involved therein, we may say that the general problem attempted was to mechanically and continuously draw from a body of molten glass a self-supporting cylinder of substantially uniform diameter and substantially uniform wall thickness, in size so much larger than the glass cylinder of the handblown art as to increase output and decrease cost. In approaching this problem of an art which existed only in contemplation, it is clear the inventors departed abruptly from the art of hand-blown window glass by ignoring certain principles and dispensing with certain agencies there regarded as fundamental and indispensable.

In the art of hand-blown window glass, the size and shape of the

glass cylinder or "roller"—the primary structure—were attained chiefly by resort to certain laws of nature. The cylinder, on being swung in the trench, was elongated by gravity; it was distended by air pressure from the blower; its symmetrical form was made and maintained by the centrifugal effect of turning and twirling. Rather instinctively the blower supplied the requisite quantity of air to effect distension; thereafter his skill merely supplemented the natural operations of centrifugal force and the law of gravitation. To the control and use of these natural forces, the hand blower applied his skill; without them, he could not exercise his skill, and he could not make glass. Gravity and centrifugal force were therefore the basic elements or agencies on which the art of hand-blown window glass was built.

In searching first for the problems of machine-drawn window glass, and then for the solution of those problems, the inventors in this case wholly discarded centrifugal force as a factor in maintaining symmetry in the cylinder. They obtained the requisite symmetry by mechanically causing the motions of the cylinder to be vertical and steady, instead of oscillatory and revolving. They also discarded the law of gravitation as a means for lengthening the cylinder. They not only discarded this natural law, but they proceeded in direct opposition to it by employing means to cause the cylinder, in its elongation, to arise from a molten glass base, instead of to descend from such a base. In a word, they substituted mechanical means for natural forces; and for the human element, by which air in varying volume was—instinctively, intuitively, or intelligently—supplied to the growing cylinder, the inventors also substituted mechanism. In thus dispensing with human intelligence or intuitions, and in proceeding, not only without the aid of natural forces previously relied on, but actually in opposition to them, the conceptions of the inventors were more than novel; they were audacious, and, being practical, they involve invention of the highest order.

In working out the conception of drawing window glass mechanically, without the aid of elements of the old art, the inventors found that the controlling agencies were: (1) Temperature of glass and air; (2) distending air; (3) speed of draw. Considering, therefore, these three basic factors and their subdivisions, let us turn to an examination of the inventive steps of those who contributed to final success—for manifestly, such a result could only be born of investigation—and see, first, whether such inventive efforts are embodied in the patents here in issue; second, what protection has been given that invention in the way of claims; third, are the features thus invented, and protected by claims, found in defendant's process and mechanism.

The real pioneers in this great advance were Lubbers, who was a glass flattener and inventor, and James A. Chambers, who was an experienced glass man and whose means were placed at Lubbers' disposal. Lubbers began his experimental work in 1894 or 1895, and interested Chambers therein. The hidden difficulties of the problem which confronted these daring men are well illustrated by the fact that Lubbers believed at that time he could put machine-drawn window glass on the market in three months, and Chambers was willing to in

vest large sums of money on the faith of that belief. Indeed, the difficulties that were from time to time encountered by these two men were almost superhuman, and it was not until 1901, and after a million dollars had been sunk in experimenting, that they were able to draw cylinders 8 or 10 inches in diameter and only 5 or 6 feet in length; in other words, to do just what the glass-blower could do. And while the results were such as to encourage them to go farther, the stupendous difficulties confronting them are apparent, when it is considered that, with all this outlay of effort, inventive skill, and money, they were not able even then to produce machine-drawn window glass on a successful commercial scale. Addressing our attention to that period of development, let us consider in serial order the inventions made and the patents granted during that time in the three basic fields above stated, viz.: (a) Temperature of glass and air; (b) distending air; and (c) speed of draw.

Turning first to the basic question of temperatures, Lubbers was confronted with radically new conditions and problems bearing on heat, both of the molten glass in the pot before it was drawn and in the cylinder as it was being drawn. We say "radically different" because, while the hand blower had to meet varying heat conditions when he took his molten glass from the tank or the pot, the problem of the glass remaining in the tank or the pot no longer concerned him, and while, of course, he had to meet changing heat conditions of the mass he was handling as he progressively developed his cylinder, yet it will be observed the blower was able to apply heat anew three different times to the glass mass he was working, as the process advanced. In the case of machine-drawn glass, on the contrary, the maintenance and control of the necessary heat conditions was an absolute essential, not only in the glass being drawn, but in the pot, also, because the process was a continuous one, and the pot was continuously being drawn from. Hence the maintenance and control of heat in the pot was vitally essential to the success of a continuous process. In the same way, the maintenance and control of heat essential to drawing a cylinder were equally essential and became more difficult because the glass in the cylinder could not be subjected to reheating as the process went on. Lubbers, therefore, began with the tank, which was the necessary base of a continuous process, and devised something that was wholly new in the tank art, namely, a forehearth or sidewise extension, whereby the glass was withdrawn from the main body of the tank and segregated in a place where it could be conveniently handled in a continuous process. But, while the forehearth afforded a convenient means of reaching the glass, Lubbers found that the glass being removed from the intense regenerative gas heat of the tank became colder at the outside wall of the forehearth and hottest in the part near the tank itself. To meet such objectionable heat variations, three different agencies or processes were at various times devised, to wit, a turntable pot, a pot and kiln method, and the forehearth method already referred to; but, as the question of infringement here involved concerns the latter, the forehearth method alone, we restrict ourselves to

showing Lubbers' contribution to that problem.

[2] In taking up this heat problem, as well as the other problems concerned in the case, it is to be noted that the inventions made involve, as stated by Judge Thomson in the extract quoted above, the unusual feature of first locating or discovering the difficulty to be overcome and its relation to the whole problem, before any inventive steps were taken to solve it. In other words, these patents involve, so to speak, two series of inventions: First, discovering the difficulty; and, second, discovering means to overcome that difficulty, for the proofs show that, while the mischief or difficulty was time and again seen in the broken or imperfect cylinders made, the complexity of the process, the many factors affecting it, and the difficulties incident to studying molten glass, all united to so obscure and confuse that it was impossible to locate the real cause of an objectionable result. To this temperature problem Lubbers' patent No. 702,013 for an apparatus for drawing glass, applied for September 28, 1900, granted June 10, 1902, was addressed. Without entering into a detailed discussion of it and its companion method patent No. 702,014, we may say that Lubbers therein disclosed drawing the glass from the forehearth of a tank furnace, and that the use of the forehearth necessarily required that some provision for the regulation of tank heat be made. To that end, Lubbers provided a heat shield and a water-cooled ring, for the purpose of securing symmetrical heating, symmetrical cooling, and symmetrical proper temperature generally, at the point where the cylinder was being drawn. The process and apparatus were wholly novel in use in the problem of machine-drawing window glass. The judge below found the claims here involved, to wit, claims 1, 2, 3, 6, 8, 9, 10, 12, 13, 15, 16, 17, and 18, valid. This apparatus patent was a companion to method patent No. 702,014. The judge below found claims 2, 3, 4, 8, 9, 11, and 13 valid, a conclusion in which we concur. He found claim 5, which is for "the method of forming hollow glass articles, consisting in drawing a hollow article from a bath of molten glass, supplying air to the interior of the article, and increasing the rate of air supply as the article increases in length, substantially as described," invalid, in that regard saying:

"It is undoubtedly true that the elongating cylinder gradually cools, causing shrinkage in volume of the compressed air, and that there is a gradual decrease in the amount of heat imparted to the air as the cylinder lengthens, thereby lessening the expansion. It is also true that to meet these conditions there must be an increase in the air supply as the cylinder lengthens. Plaintiffs claim that this conception, covered by claim 5 of this method patent, is new in the art. I cannot concur in this view, even if this broad claim is read independently of the specifications defining the invention, wherein the inventor declared that to keep the cylinder of substantially uniform size it was necessary to automatically control the air supply, so as to regulate it according to the length of the cylinder being drawn, and that the supply of air should be slowly and gradually increased during the drawing operation. That the diameter of the forming glass cylinder must be maintained by air pressure is an old and well-recognized basic proposition in the art of glass making. The glass-blower by hand was perfectly familiar with the principle. He knew that to enlarge the cylinder the air pressure must be increased, and to lessen it the pressure must be diminished. But he also knew, and put into constant practice, the principle that to maintain the cylinder of uniform diameter the air pressure must increase as the cylinder lengthens. Had he not known and practiced this principle constantly, the fine art of hand-blowing

window glass cylinders could not have developed. Without such knewledge no merchantable cylinder could have been blown at all. It was basic and fundamental in the art. That the hand blower might not have been able to assign the scientific reasons therefor is not important. He knew the principle and applied it. Those who attempted to do by machinery what the hand blower had done successfully for generations presumptively knew the fundamental principles upon which that art had been built."

In this conclusion we feel the court below was mistaken. The claim is limited to the process of drawing from a bath of molten glass, and the method claimed was in substance for supplying air to the interior of a machine-drawn cylinder and increasing the air supply as such drawn cylinder increased in length. The judge below found that the same thing was done in the manual drawing of the glass-blowing art. Possibly this is true. The blower may have instinctively supplied air as he found the need of air, but the proofs do not show that the blower so increased the air with the increase in the length of the cylinder. But in the hand-blowing of cylinders there was the additional potent factor of a swing, as well as the blowing, to maintain the diameter of the cylinder as it increased in length. No such swing, and therefore no such means, of cylinder lengthening by gravity exists in the machine-drawn process. It is evident, therefore, that Lubbers' method of meeting the difficulty was physically and functionally different from the hand-blower's method. It therefore seems to us that claim 5 should be held valid.

[3] In connection with the process patent, No. 702,014, Lubber was granted a divisional patent, No. 702,015, which showed the use, in connection with his shield in the forehearth, of floating rings; the ring and shield having a sealing joint whereby the surface of the glass within the ring is practically shut off or segregated from the surrounding heat. This apparatus was protected by six claims, all of which were found novel and inventive in character by the judge below, a conclusion in which we concur. We are not unmindful that the use of floating rings in tank furnaces was old, but in the tank furnace they floated generally over the whole glass surface, and their principal function was not to segregate or protect from heat, but to keep the glass within them free from objectional substances. But Lubbers used them in a different way, in that they were necessarily confined to one place. and that place was in the forehearth, and they were used in connection with shields which he also devised, and their use was here for the purposes of heat control alone.

[4] Turning next to the problems relating to the regulation of air and the solution thereof, we note that claim 5 of patent No. 702,014 was an air problem, and under the order of discussion pointed out earlier in this opinion, would regularly be discussed under this present head. Regarding that claim, therefore, as a part of this present subject, and as here discussed by reference, we next turn to Lubbers' patent, No. 886,618, for an air vent hole. The difficulty to which this patent was addressed was a fundamental one, and one which threatened to defeat the practical commercial success of the machine-drawing of window glass. The difficulty that arose from air pressure was that exceedingly slight variations led to the enlargement and corruga-

tion of the cylinder, which of course made it practically unusable. Efforts had been made to overcome this difficulty by means of mechanical valves, of which Lubbers' apparatus and method patents, No. 702,016 and No. 702,017, in which Lubbers essayed to meet the difficulty, are examples; but the air pressure was so light, and the necessity of adjustment so exact, that such mechanical valves had proved failures.

In this dilemma Lubbers made the simple and novel discovery that nature itself could solve the difficulty if an open vent was provided, and that such vent would automatically take care of air pressure, and would prevent corrugations and bumps, or breathing, as it was termed. In other words, that where an overpressure of air was passing down the bait stem such overpressure would find a safety valve in a continuously open vent located in the path of supply. It was a novel, daring, and original suggestion, and in our judgment went to the very heart of the success of machine-drawing. Indeed, the simplicity of the use of an open vent, which simplicity is cited as evidence of lack of invention, to our mind shows the high order of novelty and invention, in thus making use of a simple opening, instead of complicated mechanical appliances, in order to accomplish a really remarkable result. Substantially there is nothing to the patent except the vent, used in the connection it is; but that very simplicity, originality, and effectiveness of the use evidence a high order of invention in employing such a simple appliance to accomplish such a vital result. As to the invention, the patentee states:

"The invention also relates to the exhaust or relief of a small portion of the air supplied to the interior of the article during drawing, through a small hole which is opened by the operator after the forming of the cap, so that a constant opening is provided through which the excess air is passed out as it becomes heated within the article. This has been found desirable, especially in connection with the graduating valve by which the supply of air is controlled, since the small outlet prevents enlarging of the article during drawing which is otherwise liable to occur on account of variations of pressure in the cylinder."

The broad character of the invention was recognized by the Patent Office in awarding a generic claim such as No. 20:

"In glass-drawing apparatus, an air supply pipe having an open outlet for air, arranged to equalize pressure in the article being drawn, substantially as described."

This claim, and Nos. 21, 23, 24, and 26, were all found valid by the court below, a conclusion in which we concur.

[5] We have not overlooked the able argument of counsel that Lubbers was not entitled to this claim, by reason of certain proceedings in the Patent Office. The history of the proceeding was that Lubbers applied on May 21, 1903, for patent No. 886,618, granted May 5, 1908. At the suggestion of the Office, he later, and on a divisional application of that patent, applied for patent No. 1,020,920, and the claims noted above were filed on April 25, 1906, which, it will be noticed, is almost three years after the original application was filed. We have carefully considered the subject, and see no reason to feel

that this second application of Lubbers was not properly made, in connection with his original application. It was germane to it. The whole art was in a state of flux and experiment. New difficulties were being discovered, and it took time to locate what was the cause of these difficulties, as well as to devise means for meeting them. Certainly this whole matter of venting was an open, unsolved subject during this experimental season, and we find no time we can place our hands on with definiteness when Lubbers had satisfactorily worked out this open vent solution, which time is more then two years in advance of his application.

[6] Turning next to the speed of draw, which we have found one of the basic elements of success in the process, we note the patent, No. 762,880, granted to James A. Chambers June 21, 1904, for a method

of drawing glass articles. The claims involved are:

First. "The method of shaping glass articles, consisting in drawing them from a glass bath and gradually increasing the speed of drawing through the drawing operation, substantially as described."

Second. "The method of shaping glass articles, consisting in drawing them upwardly from a bath of molten glass and gradually and automatically increasing the speed of the drawing operation, substantially as described."

The court below found the two claims invalid. Our study of this art brings us to a different conclusion. It is, of course, clear that it is a self-evident fact that the faster a draw of molten glass is made the thinner the resultant article, and, of course, the slower the draw the thicker the glass. But from the time these experiments were begun by Lubbers no one seems to have thought of applying that general principle in a practical way to the new art of drawing that was being experimentally developed, until Chambers, who was a practical, experienced, and pioneer operator in glass, suggested his solution. Chambers' account of the art that Lubbers had up to that time developed in blown articles, and his remedy, are set forth in his application. He says:

"My invention relates to the drawing of glass articles from a molten bath, and is designed to increase the output of drawing machines and to make the thickness of the glass more uniform throughout the cylinder or article being drawn. Heretofore in the drawing of cylinders and similar articles from receptacles containing a molten glass bath, the bait has been drawn upwardly at substantially the same speed throughout the drawing of the article. In such cases, especially where a cylinder is drawn two or three times the length of a roller, the glass of the lower portion of the cylinder is thicker than that in the upper portion. I have found that this difference in thickness is due to the gradual chilling of the glass in the bath, the glass gradually growing stiffer through the time occupied in the drawing operation, and that by gradually increasing the speed of the bait during the drawing operation I can reduce the time occupied in drawing and produce the article having a more uniform thickness of glass throughout its length."

Chambers disclosed a practical method of employing his principle by the use of a conically shaped drum, rotated at uniform speed. The drawing began when the line was around the small end of the conical drum, and as it proceeded the successively larger portions of the drum over which the drawing line passed automatically increased the speed at which the bait was drawn upwardly. Chambers' method solved a

real difficulty, and his principle of difference in speed drawing made it possible, even with the molten glass growing stiffer, to make the entire length of these great cylinders more uniform in thickness. It will, of course, be seen that the application of this speed principle to the mechanical process of drawing from a molten bath was novel, for, while the abstract principle of difference in speed as affecting thickness was known, an experienced man like Lubbers, confronted by failure of his valuable principles and patents by reason of the nonuniformity of his cylinder walls, had not thought of any practical application of that principle to keep his cylinder walls from thickening as they were drawn. His cylinders were becoming longer, but with the longer cylinder came the thickening of the glass. It was then that Chambers stepped in and applied the old, but unthought-of, principle to this new process, which was a drawing and not a blowing operation. Lubbers had formed the cylinder initially by blowing. He was getting a longer cylinder, but the increase in length was accompanied by an increase in thickness, and it was at this point that Chambers, by speeding up the drawing, helped to save the process from failure. The claims involved the limitation of drawing from a glass bath. It was to the drawing art that Chambers applied in a novel way the principle, and contributed his important part in making the entire drawing system a success.

Conceding that the blower had a conception that the longer his article was made the thicker it became, we find no reason therefrom to minimize what Chambers did. The blower was dealing with a fixed quantity of glass, and he had a fixed thickness to get from that limited quantity of glass. He had the benefit of a swing to thin his glass as he operated it, and it was his practice to subject it to heat three different times during the blowing process. In the machine-drawing method, the problem was essentially different. There was no fixed quantity of glass to be operated on, but a pot filled with a molten mass which was liable to be drawn in thinner or thicker form, according to its heat. There was no method of recharging or reapplying the heat. The factors, therefore, which confronted Chambers in the drawing art, were altogether different from those of the blower, and Chambers met the problem by drawing small quantities of molten glass into the cylinder zone during the earlier stages of the operation when the glass was at a higher heat, and compensated for the loss of heat, and the consequent larger thickness of glass drawn, by a more rapid drawing, which became rapid automatically, during the latter stages of the operation. It was a simple, novel, and effective means of meeting the difficulty. It was one of the links that made a chain of success possible. We are of opinion Chambers' patent was valid.

[7] The orderly consideration of the speed of drawing next brings us to consider the patent to Lubbers, No. 822,678. Chambers, as we have seen, in his patent just considered, had shown how the body of a long cylinder, which was to be cut into rollers, could be kept of uniform thickness while the draw was going on by gradually and automatically speeding up the draw of the cylinder walls themselves. But, in addition to the necessity of regulating the draw of the main body of the cylinder, difficulties developed themselves in the cap at the

top of the cylinder, and also in the lower part of the cylinder, just over the molten mass. These difficulties arose as an attempt was made to draw cylinders of longer length, for when such longer cylinders were attempted to be drawn it was found that the cap which had to support the whole weight of the cylinder gave way under the strain. Lubbers' solution of that problem was to use three speeds in the operation:

First, a low speed in drawing the cap. Regarding this feature, Lubbers says in his specification:

"I have also discovered that by using the lower speed in starting the drawing of the cylinder I can draw cylinders of a length equal to at least two or three of the cylinder rollers which had previously been blown by hand. I can thus draw a cylinder of several times the length of an ordinary roller, and then sever the cylinder at an intermediate point or points, to give rollers of a length desirable for flattening and working up."

It will thus be seen that the strengthening of the cap by slow drawing was an important factor in the development of the new art of drawing very long cylinders. Of the drawing of the main cylinder body, Lubbers says:

"In drawing cylinders with this form of apparatus, the blowpipe is lowered into the bath and causes the glass to adhere thereto, and the pipe is then drawn up with a small amount of air admitted to form a neck portion 7. More air is then admitted to swell out the glass being drawn to the size of the cylinder desired, thus forming what is called the 'cap.' During the forming of the neck and the cap, and during the first part of the drawing of the cylinder proper, the drawing frame is lifted at slow speed by suitably controlling the fluid passed to the motor or in any other desirable manner."

Second, in drawing the main body of the cylinder, Lubbers speeded up the draw, preferably gradually, all of which were, of course, features also shown by Chambers. He says:

"After the cylinder proper is started, the speed of the drawing frame is increased, preferably gradually, until it reaches the full normal drawing speed, which may then be continued until the complete cylinder is drawn of the desired length."

When the end of the cylinder proper was reached, and it was desired to form the cylinder end which dipped into the molten glass, and which was to be "capped off" eventually from the main cylinder body, Lubbers suggested that this cap or end should be drawn thin, so that it might be easily sheared or cut off and dropped back into the molten mass. To do this he changed to a third and still higher speed, saying in his specification of that operation:

"The speed is then increased to a considerable extent, such as to draw a thin portion of glass at the lower end, which may be easily severed from the glass in the tank by shearing, cutting off with the flame, or otherwise."

Referring to these three relative speeds, Lubbers points out his method of use as follows:

"The relative speeds which I prefer to employ are about as follows: If the motor gives about 100 revolutions per minute in drawing the first portion, I preferably increase this to about 600 revolutions in drawing the major portion of the cylinder length. The speed at the end to thin the glass is preferably

much higher, preferably about 2,400 revolutions per minute. The speed which I have employed during the main drawing operation is about 30 inches per minute, with 600 revolutions. After cutting off, the drawing frame is lowered and the glass removed in the ordinary manner. By this method the cylinder is made stronger and thicker in the upper part, so as to support a long cylinder without breaking, and the change from the slow speed to faster speed is preferably gradual, so as to prevent excessive jerks which would injure the cylinder. I am thus enabled to draw a cylinder of at least two or three times the length of an ordinary hand-blown roller, which cylinder I then crack off at an intermediate point or points and cap off at its ends, thus forming several glass rollers or cylinders, which are cracked longitudinally and flattened in the ordinary manner. By thus drawing a cylinder of more than ordinary length, I am enabled to increase the output and cheapen the product."

It will be observed that the gradual increase of speed during the second, or cylinder proper, process, was not original with Lubbers, but was disclosed by Chambers. But Lubbers proposed to use in combination with this second or main cylinder body drawing, and to use in one continuous operation, a lower speed in making his upper cap and a higher speed in making his lower cap, with the practical and commercial result of making the long cylinders, without which the process would have been a commercial failure.

The claims here involved do not cover the second or Chambers method, standing alone, but only in combination with the lower speed in forming the upper cap, which elements are embodied in claims 1, 2, 3, and 6, or in combination with the forming of the upper cap at lower speed and the lower cap at higher speed, which elements in combination are embodied in claims 5, 7, and 8. In connection with both the slower speed in the upper cap and the higher speed in the lower cap, this particular Lubbers patent showed new combinations which the lower court found were valid, a conclusion with which we concur.

[8] We have already seen that the problem of obtaining cylinders of substantially uniform thickness was effected by positive controlling agencies which involved (a) temperature, (b) the distending air, and (c) speed, and the patents on these separate elements have already been discussed. But in addition to these positive controlling agencies, which had to be devised, the development of this art disclosed serious and obscure other difficulties of apparently an inexplicable nature, which had to be eliminated, overcome, or neutralized. For example, the natural thing, of course, was to let the bait drop into the center of the pot and draw the glass from that point, but for some inexplicable reason it was found in practice that the cylinder as it was drawn began to shift from this central position in an unaccountable way, with the result of producing glass of uneven thickness on opposite sides of the cylinder. This difficulty was finally located, its cause explained, and the trouble caused thereby overcome by Lubbers in his patent No. 914,588. Briefly stated, Lubbers found that the cooler portion of the molten glass has what is called a surface tension, or draw, of greater power than the hotter portion, and the tendency of this cooler and stronger portion was to shift the location of the bait from the center of the pot toward such cooler surface. Referring to this difficulty, in his patent Lubbers says:

"In such drawing operations it has been found difficult to make the glass of the same thickness in the different portions of the circumference of the hollow article. * * * The glass thus drawn is often of the 'thick and thin' variety. This forming of thick and thin portions during the drawing operation is not only objectionable on account of the variations in thickness, but it causes a large amount of breakage, both during the drawing and the subsequent treatment. It also injures the quality of the glass, by making it very difficult to flatten properly, where cylinders are formed producing waste in cutting, and sometimes prevents cutting the glass in the desired way."

The cause of this shifting Lubbers explains in his patent as follows:

"I have found that where the glass is fed into a receptacle, for example, a refractory pot, the glass may be of a different temperature and stiffness in one portion of the pot from that in another portion, and the heat of the pot may vary in different parts thereof. There may also be variations in the character of the pot material in different portions of its walls, and other causes also lead to a difference in the surface tension in different parts of the article being drawn. I have found that, by adjusting the pot and drawing mechanism relatively to each other, I can reduce and avoid these difficulties to a large extent. With proper care in the adjusting, I can practically eliminate thick and thin glass and its consequent difficulties and objections. The importance of this will be understood when it is considered that in changing shifts of men all of the conditions surrounding the feeding of glass into the pot and the drawing operations are changed. These operations still depend to a considerable extent on the skill and familiarity of the workmen. For example, if the glass is ladled from the tank into the drawing pots, one operator may become accustomed to ladling the glass from a portion of the bath which is at a certain distance from the wall of the tank. His successor on the next shift may be accustomed to ladling from a different point in a different manner and under other conditions. For these reasons, it has been found that, where the drawing was proceeding in the proper manner with one ladler, it might draw in an entirely different manner with the next ladler. For some time it was not understood what caused this difference, which led to such important variations in the drawing of the glass. I have found that, by adjusting the pot and drawing tool or bait relatively to each other in a lateral direction, I can to a large degree compensate for these differences, owing to individual peculiarities in the workmen, and with proper care can practically eliminate thick and thin glass. Similarly, I can overcome the troubles arising from variations in the heat conditions and material of the pot."

To overcome these difficulties, Lubbers devised a simple drawing apparatus, by which the bait was made adjustable in lateral directions. When it was found that the bait and the cylinder were being drawn to one side by surface tension, he started the next draw a corresponding distance away from the center, so that the effect of the surface tension was to center the draw in the center of the pot and thus make a cylinder of uniform thickness. Speaking of his apparatus and of its method of use, Lubbers says:

"I thus obtain two horizontal adjustments at right angles to each other, by which I can bring the blowpipe or bait to any desired position relative to the walls of the pot. If, on starting a shift, it is found that the glass is drawing thick and thin upon a pot, I loosen the adjustable screws for the blowpipe support of this pot, and shift the position of the blowpipe to compensate for the differing conditions of tension at the different parts of the

surface of the bath. For example, if the glass is of a lower temperature at one side of the bath than at the opposite side, the blowpipe will be moved toward the hotter side. The cooler and stiffer portion of the glass will have a greater surface tension than the hotter portion, and consequently by moving the blowpipe toward the hotter portion I can compensate for this difference in the condition. Similarly, if the cavity or wall of the pot is hotter on one side than the other, thus giving more heat to the glass, I move the bait correspondingly. It is found in practice that, by adjusting the position of the bait or blowpipe relative to the walls of the pot, the difficulties in drawing thick and thin glass are practically overcome. In practice this adjustment may be needed when a shift is changed, or it may be needed even while the same workmen are operating the apparatus. The occasion which calls for adjustment is easily recognized, and with a little practice the mode of adjusting is easily understood."

This surface tension patent, three claims of which, claims 5, 6, and 7, are involved, the court below found valid, a conclusion that commends itself to us, for we feel that the location and discovery of this obscure phenomenon was a matter of great originality and value, and its solution, by the simple compensating, self-adjusting mechanism which Lubbers devised and covered by the claims in question, was a very material element in the success of the whole art of the successful

machine-drawing of window glass.

[9] In addition to the difficulties that arose and which had to be overcome in the drawing of the cylinder from the pot center, all of which elements have been considered in the foregoing patents, difficulties were also encountered and had to be overcome in the treatment of the cylinder after it was drawn, namely, in getting it into a position where it could be handled and cut into rollers, and also in the apparatus for properly cutting it into rollers. The cutting of the upper cap off the cylinder, and the cutting of the cylinder body itself into rollers of proper length, was accomplished by the device of Hitner for capping off glass cylinders, disclosed in his patent No. 821,361, which was applied for March 6, 1905. It is, of course, true that previous to Hitner's device cylinders had been capped off by means of an electrically heated wire. This wire was held in stationary position and the glass was moved toward it. This resulted in considerable waste, and the moving of a large cylinder in this way was obviously objectionable. Hitner devised a tool made up of a small heated wire of metal, of high electrical resistance, and of sufficient length to encircle the glass cylinder to be capped off. The leading-in wires were made flexible, so as to allow free movement of the device with relation to the stationary cylinder, and one of them was provided with a switch on the handle, by which an electric circuit could be made or broken, as desired by the operator. By the use of this device, the operator could loop the wire around the glass cylinder, and its free end passed around a roller held by the finger or thumb of the operator. When the switch was turned on, the current rapidly heated the encircling wire, which heat was communicated to the cylinder and caused the narrow zone of glass near it to expand. When this heated ring of glass was tapped by a cold steel tool, the glass parted on the line spanned by the wire. The court below, however, found the patent

was invalid, because it had been placed on sale more than two years before the application.

A study of the case has brought us to a different conclusion. As the application was filed on March 6, 1905, such sale and public use must have been prior to March 6, 1903. This would be during the period when the work of devising a window glass drawing machine process and apparatus as a successful whole was in an experimental state, both at Alexandria and at Gas City. Now, while the capping machine of Hitner was in substantial form the same from the start, and while it operated in the same way then as now, nevertheless we are convinced that at the time these machines were devised and made by the Doubleday-Hill Electric Company for the American Window Glass Company, and were paid for, that under the peculiar circumstances of this case said machine was still in an experimental stage, and such sale and use was not a public one in the sense of the statute. In the first place, the operations at both places were of a most secret nature. The machine was not made by the Doubleday-Hill Electric Company and sold to the American Window Glass Company in the ordinary commercial sense, but the American Window Glass Company, in order to have some electrical work, which it was not able to do itself, done by competent people, arranged with Doubleday-Hill Electric Company to furnish them with the services of Hitner, one of their employés. During the course of this employment, Hitner devised the capping machine, and it was constructed by Doubleday-Hill & Company, his employer, under the orders and at the request of the American Window Glass Company. In substance, we regard the making of the machine as having been made really by the American Window Glass Company. But not only was this the case, but its use was not a public one. The plants were closed and the operations carried on in the most carefully guarded way. Moreover, while this device was used, its use was wholly experimental, for success had not been reached in the manufacture of long cylinders, and the breakage and failure of the experiments up to that time were charged, inter alia, to this very Hitner capping device. It had not then justified itself, and its success and its freedom from blame for the troubles that undoubtedly then existed in the successful manufacture of long cylinders were not such as to warrant an application for it as a device which had passed the experimental stage. We are therefore unable to agree with the conclusions of the court below that Hitner's patent was invalid. On the contrary, we find that it was inventive in character and applied for in due time.

[10, 11] What we have said in a general way as to this patent of Hitner applies to his patent No. 822,452 for a hoist. As stated earlier in this opinion, after the cylinder was drawn and swung out to a horizontal position in mid-air, it was lowered and cushioned on a long horse or stand that stood on the floor. The proofs in this case show that as the development went on several devices were tried for supporting such drawn cylinder, but none were satisfactory. Lubbers sought to form such a rest, but his took too much time and it was

abandoned. Thornburg, also an experienced man, sought to solve the difficulty, but without success, and it remained for Bridge to develop an apparatus which had proved entirely satisfactory and for which patent No. 1,006,995 was granted him. Without entering into minor details, we may say that his device consisted of a series of upright standards provided with semicircular arms, which were made resilient by the use of springs supported on arms which extended from the standard to the crosspiece which supported the semicircular hoops on which the cylinder rested. The arrangement of parts was such that, not only was the entire cylinder safely rested upon all the semicircular arms of the device when the cylinder was lowered, but as each roller was capped off and parted from the remainder of the cylinder, not only was the capped-off roller properly supported by the semicircular arms on which it rested, but the remainder of the cylinder remained safely nested on the remaining semicircular arms of the device. This device was only perfected after much experimenting. We are of opinion, with the court below, that the device involved invention, was novel and useful, and the patent was applied for within two years of its being perfected. We therefore agree with the court below that the claims in controversy, claims, 1, 2, and 4, are valid.

Turning to the question of infringement, we note the fact that prior to the patents in suit there were no apparatus or methods in existence for machine-drawing window glass. It is therefore self-evident that the defendants' apparatus and method of machine-drawing window glass, which is a commercial success, was not drawn from the prior art. There is no evidence that it was originated by themselves. There is evidence that some of those who helped install their plants had formerly been in the employ of the plaintiff company, and knew of its methods. It is therefore quite reasonable to infer that the successful devices of the complainant must have had a material influence in formulating the methods and apparatus which the defendants followed and used. In view of this situation, we are not surprised to find that, taken as a whole, the defendants copied and infringed the plaintiffs' process and apparatus, and this copying is in the main so apparent, if the plaintiffs' patents are held valid, that the conclusions reached by the court below are self-vindicating. We therefore refrain from a minute discussion of the question of infringement, with the exception of referring to the principal and basic element of whether the defendants used a forehearth from which they drew their glass. In that connection, we may say that the defendants' furnace and its mode of operation are aptly described in the opinion of the court below. from which we quote as follows:

"The defendants' tank furnace at Hazelhurst, previously used for hand blowers, was rebuilt and changed in 1908 from the hand-blowing tank to the machine tank. As reconstructed, the working end was considerably widened, thus giving extensions of the main tank. The construction of the Kane tank is the same. These extensions were partially separated from the tank proper, by a series of piers, drawing places being provided in the side extensions by lowering the roof over the drawing positions of the bath, and providing covers near to the glass level in the extensions. The heat currents in the main bath were vertically cut off from those shielded covers by 'vertical shades' or

clay plates resting on the piers which extended down near to the glass level. As thus constructed, the depth of the glass in these side extensions was less than that of the glass in the main tank; the floor being elevated or built up. Being partially separated from the furnace proper by the piers, the heat currents in the main bath to some extent cut off by the vertical shades, the depth of the glass being less than that in the main tank, bounded on one side by an outer side wall and on the other joined to the hot glass in the main tank, from which the glass on the same level flowed to the drawing station, these extensions present all the characteristics of the forehearth. I have here attached transverse and longitudinal sections of the working end of defendants' furnace, showing the side extensions and drawing stations, being copies of Plaintiffs' Exhibit 68. Defendants' furnace structure is shown in a plaster model (Defendants' Exhibit 30), the correctness of which seems to be conceded, except as to the stepping down of the pedestals in the drawing holes, which is correctly shown in the drawings attached. Similar extensions were also built at the end of the drawing portion of the tank. Four gas burners for each drawing station, were extended through holes in the side walls; the two outer burners being at right angles with the wall, and the intermediate ones being pointed in a converging angle toward the draw. These burners perform the same function as the burners in the Lubbers forehearth. The heat above the glass at the drawing stations coming from these burners and that entering from the main furnace was shielded from the drawing point, first by a vertically movable clay cylinder lowered through the top stone, and later by this cylinder coacting with a floating clay ring. One floating ring was first used, then two, and finally three, for each drawing place. Before the draw began, a ring was pulled into place by the operator, and the cylindrical clay shield was then lowered to make a joint with the floating ring, which largely cut off the surrounding heat and also centered and held the ring in position concentrically under the drawing hole. The draw then began and proceeded slowly, no water-cooled chilling ring being then employed; the glass being chilled solely by exposure to the atmosphere. Later a water-cooled chilling ring was added inside of the clay ring to increase the chilling effect, thus greatly increasing the speed of draw and the amount of production. Later, by proportioning the width and depth of the water chilling ring so that it extended from the top stone down substantially to the floating ring, it was found that the clay cylinder or anchor ring could be done away with. Since then the drawing has proceeded within the floating ring and up through the water-cooled shielding and chilling ring, which was not protected by a surrounding cylinder. Except in unimportant details, the operations of the Consolidated, the Pennsylvania, and the Kane Glass Companies were the same. In some cases the water ring was tilted according to the judgment of the operator. Sometimes the water ring had small centering lugs, which held the rings a fraction of an inch apart, and sometimes these were cut off, in which case the rings set close together."

From a study of the proofs, of the drawings and models, we conclude that the defendants, who had been previously drawing their glass from a tank and the body of the tank, saw fit to change both the construction and the mode of operation of their tank. Their change in construction consisted in adding to the side of the tank, at its working end, side chambers, into which the glass flowed from the main body of the tank, so that in this way they received a continuous and full supply of molten glass. The roof of this side structure was lower than the tank roof. It was also shielded both from the direct effect of the burning of the generative gas in the tank proper and was measurably protected from the radiation of that heat, not only by its retired position and by its roof, but by the shields and heating-reducing devices employed in and about such side chamber. We are quite clear that this

side structure of the defendants, from which they drew their glass, was the functional equivalent of Lubbers' forehearth. It had all the functional features which Lubbers first pointed out to the art in his forehearth. It was automatically fed from the main body of the tank. Its heat was less than the main body of the tank. It used shields and cooling rings. It afforded a workable basis for drawing window glass cylinders, and its structure was such as to allow the control and modification of heat, which were essential to the success of a machine-drawing system. Its location and relation to the tank were such that, while this side structure got the benefit of the whole maximum heat of the tank and of the whole molten product of the tank, those operating it were enabled to use only such ranges of the maximum heat as they needed to maintain proper glass molten conditions, and yet were enabled to shield or shut off such portions of the tank as were harmful. In no sense of the word did the defendants in their reconstructed tank follow, either in function or physical effect, the old system of working from the tank proper; but they availed themselves in function and practice of Lubbers' forehearth in a modified form, which one of the plaintiffs' witnesses has happily called a "sheltered cove." We are quite clear that the judge committed no error in holding that defendants' side tank practice was an infringement of Lubbers' patents.

As to those features of infringement which the court below did not pass upon, we deem it sufficient to say that, in view of what we have already said on the general subject of infringement, we feel that, in addition to what the court below found infringed, we are justified in also finding that claim 5 of patent No. 702,014 to Lubbers, which we have before indicated was valid, was also infringed. We further find that claims 1 and 2 of patent to Chambers, No. 762,880, which we have before found valid, were also infringed. We also find that claims of the patent to Hitner, No. 821,361, for capping off glass cylinders, which we have heretofore found valid, were infringed. We also find the claims of patent No. 822,452 to Hitner, for a hoist, which we have heretofore found valid, were also infringed. We also find that claims 20, 21, 23, 24, and 26 of the patent to Lubbers, No. 886,618, for a hole vent, which we have found valid, were infringed.

With these additions and modifications, the decree of the court below will be affirmed, and in thus concurring in the conclusion reached by that court we place of record the fact that the work of the individual members of this court in understanding the complicated and difficult questions involved, in digesting the proofs, and in formulating their views have been greatly aided by the industry, patience, and research expended by Judge Thomson in the preparation of his able

and exhaustive opinion.

DUNKLEY CO. et al. v. PASADENA CANNING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 29, 1919. Rehearing Denied January 5, 1920.)

No. 3316.

PATENTS \$\infty 328-Infringement; fruit-peeling machine.

The Dunkley patent, No. 1,104,175, for a fruit-peeling machine, in view of the prior art, is limited to the particular means employed for removing the skin of the fruit after treatment, and, as so limited, held not infringed.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by the Dunkley Company and the Michigan Canning & Machinery Company against the Pasadena Canning Company and George E. Grier. Decree for defendants, and complainants appeal. Affirmed.

This is a suit for infringement of letters patent No. 1,104,175, issued July 21, 1914, for a machine or device for peeling peaches and other fruits, and also for infringement of letters patent No. 1,237,623, issued August 21, 1917, for the process of peeling peaches or other fruits or vegetables. From a decree in favor of the defendants, the plaintiffs have appealed.

for the process of peeling peaches or other fruits or vegetables. From a decree in favor of the defendants, the plaintiffs have appealed.

Many of the questions here involved were before this court on appeal in certain consolidated suits, wherein one of the present appellants was plaintiff, and parties other than the present defendants were defendants. A decree upholding the validity of the machine patent and adjudging infringement was there affirmed by this court. Central California Canneries Co. v. Dunkley Co., 247 Fed. 790, 159 C. C. A. 648. Reference is made to the opinion in that case for a more complete description of the patented machine or device and the issues involved, as the pleadings in the several cases are substantially, if not identically, the same.

Raymond Ives Blakeslee, of Los Angeles, Cal., Fred L. Chappell, of Kalamazoo, Mich., and Drury W. Cooper, of New York City, for appellants.

Francis J. Heney, Kemper B. Campbell, Frederick S. Lyon, and William J. Carr, all of Los Angeles, Cal., for appellees.

Before GILBERT and HUNT, Circuit Judges, and RUDKIN, District Judge.

RUDKIN, District Judge (after stating the facts as above). While there are many assignments of error, the only questions deemed worthy of consideration are the following. The appellants contend: First, that the appellees are estopped by the judgment or decree in the case of Central California Canneries Co. v. Dunkley Co., supra; second, that, regardless of the question of estoppel, the decision in that case should be followed here under the rule of stare decisis; third, that, regardless of the prior decision, the patents in suit are valid; and, lastly, that the patents have been infringed. The court below

found against the appellants on each of these several propositions, but in the view we take of the case it is only necessary for us to consider the question of infringement; for, assuming that the decision in that case should be followed here and is binding upon the appellees, the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case. In that case we said:

"The Grier device was never patented. Grier appears to have been connected with the fruit-canning business for many years, and was familiar with the process of dipping peaches in lye as early as 1891, and thereafter washing them with water. In 1902 he formed a partnership with a Mr. Taylor, and leased a canning plant in Pasadena, where they handled peaches, among other fruits, and from the testimony it would appear that he was considering how to handle a greater quantity, and attempting to devise more efficient means for peeling than the hand method; but the only real experimentation that he made in 1902 was by putting a few peaches in a wire basket and dipping them in the heated lye solution, and then using a hose by hand to wash off the peeling. He says he conceived the idea right then of building a machine to do that work; but there is no testimony to the effect that he did anything in the way of reducing the idea to a practical form, or proving his idea an operative one, until the following summer, 1903, when he built two machines, one for his own plant, and one for another company in Pasadena, not identical with the plaintiff's machine, but embodying the idea of rotation of the peaches as they progressed, and the application of peeling sprays or jets of water. The ideas of Grier and the plaintiff may have been contemporaneous; but there is no evidence of such prior use of the Grier device as to defeat the plaintiff's priority of right. Grier did not apply for a patent for his device, and discontinued the use of his machine when he received notice of Dunkley's claimed infringement."

On the contrary, the Grier machine or device now owned and operated by the appellees is a patented device, and in our opinion differs widely and materially from the device covered by the Dunkley patents. A brief reference to the claims in the respective patents will readily demonstrate this. Under the Dunkley patent the fruit is delivered into an endless conveyor, and passes between rotary brushes for a distance of about six feet; the brushes rotating the peach as it passes along, so that every portion of the surface is subjected to jets of water striking the fruit tangentially from perforated pipes arranged along the passage, and driven with such force as to remove the disintegrated skin remaining on the peach and cleansing the particles from the brushes.

The appellees' device, on the other hand, is well described in the second claim of the patent as follows:

"In a fruit-treating machine, a cylinder, a series of partitions in said cylinder formed with central openings, said partitions dividing the cylinder into a series of communicating compartments adapted to contain a body of liquid, a revoluble shaft extending axially of the cylinder, a series of perforated projected screw blades of relatively great pitch, offset and angularly disposed to each other, mounted on said shaft, one blade in each compartment, adapted on rotation of the shaft to pick up the fruit deposited in one compartment and eject it into the adjacent compartment through the opening in the partition, and whereby the fruit may be advanced step by step throughout the length of the cylinder and finally discharged therefrom."

In view of the prior state of the art, it is quite apparent to us that there is a substantial and material difference between the two devices. The art of peeling peaches by the use of hot caustic soda or lye, and then removing the disintegrated skin by the use of water, was well known years before the application for the Dunkley patent was made. The manner of using the caustic soda or lye was always the same, but the mode of removing the disintegrated skin varied from time to time, from merely dipping the peaches in water in a perforated bucket, to the use of a common hose. In view, therefore, of this prior state of the art, the Dunkley patents must be limited to the particular means employed, and those means must be limited to directing peeling jets of water upon the fruit as described in the patent. For if the patent should be construed to cover every possible means for removing the disintegrated skin by the use of water it would grant an unwarranted monopoly, and, furthermore, the patent would be rendered utterly void because of anticipation and prior use. The court below saw the different machines in operation, and its conclusion upon the facts that there was no infringement is manifestly right.

Some question has been raised as to the costs or witness fees in the court below, but no particular item is objected to, and we see no reason for disturbing the conclusion of the court in that regard.

The decree is therefore affirmed.

GENERAL INSULATING MFG. CO. v. UNION FIBRE CO.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2673.

1. PATENTS \$\ightharpoonup 328—For process for making mineral wool valid and infringed.

The Parkison patent, No. 945,583, for process of making mineral wool, held not shown to be invalid for prior public use, and held valid and infringed.

2. PATENTS \$\sim 81-Prior public use.

Proof of prior public use of a patented article or process, to defeat the patent, must be such as to leave no doubt of the prior public use more than two years before application for the patent, and in general oral testimony as to date of such prior use should find corroboration in evidence of contemporaneous records, or memoranda, or physical exhibits.

Appeal from the District Court of the United States for the District of Indiana.

Suit by the Union Fibre Company against the General Insulating Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

Robert H. Parkinson, of Chicago, Ill., and Howard G. Cook, of St. Louis, Mo., for appellant.

John E. Stryker, of St. Paul, Minn., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. [1] The controlling proposition involved in this appeal is the alleged prior public use of the process for manufacturing mineral wool, wherefor United States patent No. 945,-583, to Parkison, was granted in 1910. The novelty of the patent consists in dropping or otherwise applying oil upon a stream of molten slag or scoria as it pours from the cupola in which it is melted, and is driven by a strong blast of air or steam into and through a nearby blow tube and into a chamber, whereby the finely divided filaments become coated with the vaporized oil, or the oily smoke created by combustion of the oil on its striking the highly heated stream, and thus rendering the filaments less brittle, and making the product waterproof. The application was filed in November, 1908, and the evidence of the prior use was by four witnesses, former employés in the factory of which patentee Parkison was in charge, who testified with more or less positiveness (though with some contradiction as to some details) to such use of oil for this purpose in that factory, beginning some time in 1905 and continuously thereafter. The testimony of the witnesses was given in open court in 1918, and was wholly from memory, without contemporaneous entries or memoranda or correlated facts of definite date to better fix the time on which the successful use of the process commenced.

[2] It is held that proof of the prior public use of a patented article or process sufficient to defeat the patent must be such as to leave no reasonable doubt of the prior public use more than two years before making the application for the patent. Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 C. C. A. 613 (7 C. C. A.); Interurban Ry. & T. Co. v. Westinghouse E. & Mfg. Co., 186 Fed. 166, 108 C. C. A. 298. These and other cases recognize, also, that in general the oral testimony of date of the prior use should find corroboration in evidence of contemporaneous records or memoranda, or physical exhibits before striking down a patent because of prior public use. Appellant urges in support of the contrary view opinions of this court in Clark El. Co. v. United States El. Tool Co., 245 Fed. 753, 158 C. C. A. 155, and Hobbs Patent Co. v. Atlas Specialty Co., 244 Fed. 176, 156 C. C. A. 604. In the first there were contemporaneous book entries which aided materially in fixing date of the alleged prior use, and in the other there were written records in support of the oral testimony. Besides, in these cases, the oral testimony was heard in open court, and the chancellor, with the witnesses before him, had the better opportunity of judging of their credibility and the weight to be attached to their testimony, and the reliability of their recollection, and the conclusion on appeal was in each case in accordance with the finding of the chancellor, who had this superior advantage in passing on the evidence. Such was also the case here, the evidence on prior public use having been adduced in open court, and we cannot say that the court erred in concluding that the evidence of these witnesses of the date of beginning of the alleged use, dependent solely on their recollection of things occurring far in the past, and without the corroboration of related facts of definite date, or of records or memoranda, was not sufficient to sustain the burden of proving beyond reasonable doubt this defense of prior public use.

The decree of the District Court is affirmed.

WIREBACK v. CAMPBELL et al. WIREBACK et al. v. SAME.

(District Court, D. Maryland. November 3, 1919.)

1. Patents \$\issup 328\$—For extension shoe valid and infringed.

The Wireback patent, No. 736,186, for an extension shoe, held valid and infringed.

2. COPYRIGHTS \$\iff 9\to Illustrating cuts subject of copyright.

Cuts designed and prepared by persons of skill and artistic capacity of articles of manufacture used to illustrate advertising catalogues held subject to copyright under Copyright Act.

3. Copyrights == 26-Defective application affecting validity.

That an application for a copyright by a firm did not set forth the citizenship of the applicants, as required by a rule, *held* not to invalidate the copyright, under Copyright Act, where attention was not called to the omission, and it is shown that the applicants were citizens.

In Equity. Suits by Joseph F. Wireback and by said Wireback and others against Thomas D. Campbell and others, partners doing business as the Maryland Orthopedic Company. Decrees for complainant.

A. Taylor Smith, of Cumberland, Md., and Edward A. Lawrence, of Pittsburgh, Pa., for plaintiff.

Horace P. Whitworth, of Westernport, Md., and A. P. Greeley, of Washington, D. C., for defendants.

ROSE, District Judge. In the first of the above-entitled causes, the infringement of the first, second, and fourth claims of letters patent No. 736,186, for an extension shoe, issued to the plaintiff on the 11th of August, 1903, is charged. In the second it is alleged that two copyrighted trade catalogues of the plaintiffs have been infringed by the reproduction of certain original cuts contained in them. As much of the testimony is common to both cases, they were by agreement tried together.

Patent Case.

[1] I see no reason to question the validity of any of the claims in suit. The defendants put certain prior patents in evidence. None of them appear to anticipate that now in controversy. There was no attempt by expert or other testimony to show that any of them did. The evidence of infringement is clear. The defendants deliberately set out to make the plaintiff's device and they did. They may have made immaterial modifications or additions, but they reproduced every element of the plaintiff's claim. He is entitled both to an injunction and to an accounting.

Copyright Case.

The plaintiffs, who did an extensive business in making and selling orthopedic devices, including the extension shoe before mentioned, were the proprietors of two copyrighted catalogues, each of which contained a number of cuts of the appliances in which they dealt. The drawings, from which these cuts were made, had been executed by persons specially skilled in such work, under the direction and supervision of the plaintiff Wireback.

For a number of years one Cox had been in the employ of the plaintiffs. Early in 1918 he spent a Sunday with the defendant Hoffa. They agreed that, in view of the World War, the business of making and selling artificial limbs would be profitable. They looked over the catalogues of the plaintiffs, and then and there made up their minds to go into the business; Hoffa to furnish the money and Cox the experience.

The latter thereupon left the plaintiffs' employ, taking with him a number of their catalogues, and proceeded to get up an advertisement of the wares of the new concern. It is clear that he and Hoffa, together with the other defendants, who subsequently came into the scheme, expected to make and sell goods just like those of the plaintiffs. For that purpose, Cox went to the very concern that had printed the plaintiffs' catalogue, and had it copy some of the copyrighted cuts, especially those representing the patented extension shoe.

Cox and other of the defendants induced some of the plaintiffs' workmen to leave their former employment and to go into that of the

new concern.

[2] There is no denial that there has been an infringement, if the cuts could be copyrighted and legally were. They were originally designed and prepared by persons of skill and artistic capacity. The defendants contend that, as they were merely parts of advertising pamphlets, the only way in which they could be copyrighted, if at all, was by registry in the Patent Office, and not elsewhere. They rely on Mott Iron Works v. Clow (C. C.) 72 Fed. 168, and similar cases. All that need now be said on this point is that in Westermann Co. v. Dispatch Printing Co., 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499, pictorial illustrations of styles of women's apparel were held properly copyrightable under the act of 1909 (Act March 4, 1909, c. 320, 35 Stat. 1075).

[3] The defendants assail the validity of the copyrights because the plaintiffs, in their application for them, did not set forth their citizenship, as required by copyright rule 31. The applications were made and the registrations were granted in the firm name, as was, of course, permissible. Scribner v. Allen (C. C.) 49 Fed. 854. The names of the partners were not given. In the 1911 application, nothing was said as to the citizenship of the firm. In that of 1916 it was said to be a citizen of the United States, something which defendants say is legally impossible.

sible.

Assuming so much to be true, and that the 1916 application was in consequence no better than that of 1911, is the copyright which the plaintiffs sought to secure, and which they supposed they had obtained, worthless? The error was not noticed by the Register of Copyrights. If it had been, it would, of course, have been called to plaintiffs' attention, and would have been at once corrected. All the statute requires is that the author shall be a citizen or a resident alien. There is proof, slight, but sufficient, in the absence of contradiction, from which the court may infer that all the plaintiffs, and for that matter all the artists who co-operated in making the cuts, were residents of Pennsylvania. Patterson v. Ogilvie (C. C.) 119 Fed. 451.

If there was any doubt as to it, I would direct the case to be reopened

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for further evidence on the subject; but I am certain it would be a mere waste of time to do so. I am confident that everybody concerned had the residential qualification. The sole question is whether the omission to state the fact in the application invalidates the copyright. So to hold would be to run counter to the whole spirit and much of the purpose of the act of 1909. All through it, there is evidence of the intention to make sure that in the future authors and publishers shall not lose their rights as the result of unintentional failure to comply with the details of statutory requirements, and that Congress wished to avoid the injustices that, under the old law, courts were compelled to sanction. If that be so, a thoughtless oversight to do everything directed by one of the copyright rules cannot be allowed to have an effect which Congress was at pains to see should not follow from the neglect of many of the prescriptions of the statute itself.

The plaintiffs are entitled to an injunction, and to a decree for the statutory \$1 for each of the infringing copies found in defendants'

possession, and for the destruction of such copies.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA V. DE FOREST RADIO TELEPHONE & TELEGRAPH CO.

(District Court, S. D. New York. July 7, 1919.)

PATENTS €=328—Infringement of detector for wireless telegraph apparatus.

It having been shown that the detector of the Fleming patent, No. 803,684, is also capable of use as a generator of oscillations, under the rule that a patentee is entitled to all the benefits of his invention, whether or not known to or foreseen by him, the patent held infringed by a generating device.

2. PATENTS \$\incides 176\top Claims for device as including reversible functions. Where there is a capacity of reversibility in a patented device, the courts will not restrict the claim to one attribute, to the exclusion of the reversible attribute.

In Equity. Suit by Marconi Wireless Telegraph Company of America against De Forest Radio Telephone & Telegraph Company. Prior decree extended.

For former opinions, see 236 Fed. 942; 243 Fed. 560, 156 C. C. A. 258.

J. Edgar Bull and L. F. H. Betts, both of New York City, for plaintiff

Samuel E. Darby and Samuel E. Darby, Jr., both of New York City, for defendant.

MAYER, District Judge. [1] The Fleming patent, No. 803,684, so far as concerned a detector for radio waves, was fully discussed in Marconi v. De Forest (D. C.) 236 Fed. 942, affirmed 243 Fed. 560, 156 C. C. A. 258. The effect of the decision supra of this court, as affirmed by the Circuit Court of Appeals, supra, was to accord to Fleming's invention a high place in the art.

Eight or nine years after the date of the Fleming patent—the exact dates are unimportant—Armstrong, Hogan, Waterman, Weagant, and probably other experts in the radio art, while using these devices as radio wave detectors, independently observed that the detectors possessed the function of oscillating, or, in other words, of generating radio waves. This was an extraordinary additional property or function of the so-called incandescent lamp detector, of which Fleming had no knowledge.

Claim 1 of the patent in suit reads:

"1. The combination of a vacuous vessel, two conductors adjacent to but not touching each other in the vessel, means for heating one of the conductors, and a circuit outside the vessel connecting the two conductors."

While the claim covers broadly the device when used in the radio art, yet when read with the context of the specification, it is plain that Fleming's disclosure was addressed to use of the instrumentality as a detector only. It is, however, a principle of the patent law—so well settled as not to call for citations of authority—that a patentee is entitled to all the benefits of his invention, whether or not known to or foreseen by him.

Thus the first inquiry is whether the Fleming valve, as disclosed by the patent, will oscillate when used in circuits and with instrumentalities available as of the Fleming date and of the kind and character which, upon the evidence, it would be assumed would or could have been used as of that date. The testimony of the experts and numerous demonstrations in the courtroom (some required by the court by way of extra caution and assurance) proved beyond peradventure that the two-element valve possesses inherently the same capacity for generating radio waves as is possessed by defendant's three-element device.

The only question in this connection is whether plaintiff, in order to hold this feature of the Fleming invention, may use a battery. Obviously the Fleming valve cannot oscillate unless a battery is used; but to use a battery would, of course, not involve invention, once it is determined that the Fleming valve possesses inherently the ability to generate radio waves. As counsel for plaintiff aptly say:

"One might as well ask whether a boiler could be made to generate steam without a fire under it, or whether a dynamo could be made to generate electricity without an engine to drive it."

Indeed, on this branch of the case, the question is whether, in order to make the Fleming valve oscillate, anything need be done or added which would amount to invention. As the answer to this inquiry is plainly in the negative, one necessarily returns to the proposition that, as Fleming gave the art a new instrumentality, and as that instrumentality, without inventive changes or additions, will oscillate as well as detect, he is entitled to this feature although unknown to him.

The next question is: If the two-element valve will certainly and reliably oscillate in common and well-known detector circuits of Fleming's day (Marconi or PN circuit), but will not certainly and reliably oscillate in the precise circuit shown in the Fleming patent without a

condenser, is Fleming entitled to the benefits of the device as a generator of oscillations?

The valve was made to oscillate without a condenser, although the action in this regard is not certain and reliable; but this latter fact is immaterial. The main case has really disposed of this point, because this court and the Circuit Court of Appeals have held, inter alia, that Fleming's contribution was the device per se, which could be used in any circuits and with any instrumentalities then known to the art. Bell Telephone Case, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863.

Indeed, the case on analysis is much simpler than when first presented. On preliminary impression there is reluctance to extend the patent to an unexpected characteristic, only observed after a considerable lapse of time by the highly skilled men who are students in the art. Yet, after all, it was Fleming who made this remarkable contribution of a wholly new device, which of itself and in its development has done so much toward the practical advance of this great art. The case is fully as meritorious as Western Electric Co. v. La Rue, 139 U. S. 601, 605, 11 Sup. Ct. 670, 35 L. Ed. 294, which, as nearly as may be, presented an analogous question.

[2] Under the authority of that case it is clear that, where there is a capacity of reversibility with the same instrumentality, the courts will not restrict the claim to one attribute, to the exclusion of the reversible attribute; and, for that matter, this case is stronger than the La Rue Case, because claim 1, supra, is broadly for the instrumentality. It is concluded, therefore, that the so-called oscillion of defendant infringes, and that the decree heretofore filed should be ex-

tended thereto, with costs.

Submit decree accordingly, not later than July 11, 1919.

SEARCHLIGHT HORN CO. v. VICTOR TALKING MACH. CO.

(District Court, D. New Jersey. October 22, 1919.)

1. JUDGMENT @==675(1)—CONCLUSIVENESS OF DECREE FINDING PATENT VALUE AND INFRINGED.

A final decree, finding a patent valid and infringed, rendered in a suit against a purchaser from defendant, which manufactured the alleged infringing articles, is a conclusive adjudication as to those matters binding on defendant, where defendant participated in the litigation and its counsel openly conducted the defense.

2. Patents = 22-Mechanical equivalents.

The doctrine of mechanical equivalents can be invoked in all patents.

3. Patents €==99-For horn for phonographs valid.

A patent for a device which performs a novel and useful function, as a patent for a horn for phonographs which did away with the annoying tintinnabulations, is entitled to protection, where the specifications disclose the method, even though the inventor is ignorant of the scientific principles involved.

4. PATENTS \$\infty 328-For metal horn for phonographs valid.

The Nielsen patent, No. 771,441, for a metal horn for phonographs, made of longitudinally connected strips of metal, held valid, doing away with the annoying vibrations and tintinnabulations of other horns,

5. PALENTS €==81-PRIOR USE.

Oral testimony as to prior use of a patented device should be scrutinized most carefully.

6. PATENTS €==81-PRESUMPTIONS IN FAVOR OF VALIDITY.

Every reasonable doubt should be resolved against one attacking the validity of a patent, particularly when the attack is based on oral evidence of facts long past relied on to prove prior use.

7. PATENTS \$\infty 62-Proof of anticipation.

Anticivation of a patent should be established, not merely by testimony of witnesses relating to facts many years previous, but by concrete, visible, contemporaneous proofs, and the proof must establish a clear conviction, and something more than oral testimony, even of the highest character, is required, when there has been a considerable lapse of time.

8. Patents \$\iff 328\$—For horns for phonograph not anticipated.

The Nielsen patent, No. 771,441, for horns for phonographs, held not invalid on the grounds of anticipation and prior use.

9. Estoppel \$\sim 52\$—What constitutes equitable estoppel.

Where a person, by anything which he does or says, or abstains from doing or saying, when it is his duty to act or speak in respect of a subject-matter, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than he would have acted, but for that belief, and he so acts, and materially changes his position in respect of the matter to his detriment, then the first person is not allowed, in a suit between himself and such other person, to deny the truth of the thing done or stated.

- 10. Patents € 289—Delay in prosecuting other infringers while the validity of a patent is in active litigation does not constitute laches.
- 11. Patents 289—Delay in prosecuting for infringement not laches. Where the owner of a patent promptly protested against infringement, and the infringer was in no way misled or induced to change its position, several years' delay in instituting suit for infringement of a patent does not constitute laches, which will bar relief; it appearing during a considerable period of the time negotiations for settlement were continued between the parties, and the owner of the patent, before suing, established the validity of the patent in litigation against others.

In Equity. Bill by the Searchlight Horn Company against the Victor Talking Machine Company. On final hearing. Decree for complainant.

John H. Miller, of San Francisco, Cal., and Frederick S. Duncan, of New York City, for plaintiff.

Fenton & Blount, of Philadelphia, Pa., for defendant.

DAVIS, District Judge. The complainant in this suit seeks to restrain the defendant from making, using, or selling phonograph horns infringing claims 2 and 3 of its patent No. 771,441, issued to Peter C. Nielsen October 4, 1904, which by mesne assignments came into the possession of the complainant. It further seeks the profits realized by defendant and damages sustained by complainant on account of said infringement.

The defendant denies liability on the ground that: 1. It did not infringe "under any permissible interpretation of the patent." 2. That the claims of the patent, if not wholly invalid, are entitled to a narrow construction only by reason of: (1) Prior art patents and publications

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and prior state of the unpatented art; (2) the descriptive disclosure of its metes and bounds, apparent on the face of the patent; and (3) the acts and declarations of the patentee appearing in the file and contents of the application for it, operating to further limit the disclosure

in the patent. 3. Complainant is guilty of laches.

[1] The complainant urges that none of these questions may be raised in defense, because they have been passed upon by the United States Circuit Court of Appeals for the Ninth Circuit in the case of Searchlight Horn Co. v. Sherman, Clay & Co., 214 Fed. 86, 130 C. C. A. 562, and the judgment has become final. It appears that the defendant company sold to Sherman, Clay & Co. phonograph horns which infringed claims 2 and 3 of the patent in question. The suit was defended by the Victor Talking Machine Company, defendant in this case; its own counsel openly conducting the litigation. Final judgment, unappealed from, was entered in that case, sustaining the validity of claims 2 and 3. This judgment was properly pleaded in the case at bar. There is no question that the Victor Company openly and avowedly defended the suit in behalf of its vendee. The same question, the validity of the second and third claims of the patent, was at issue there as here, and substantially the same defenses raised and adjudicated, and under these circumstances the final judgment there is conclusive here, and the question here is res judicata. Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 119 C. C. A. 229; David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661; Cushman v. Warren-Scharf Asphalt Paving Co., 220 Fed. 857, 135 C. C. A. 289; Elliott v. Roto et al., 242 Fed. 941, 155 C. C. A. 529; Souffront v. La Compagnie Des Sucreries, 217 U. S. 486, 487, 30 Sup. Ct. 608, 54 L. Ed. 846. As Judge Buffington, under a similar situation, said in the Bemis Car Box Co. Case, supra:

"On well-established principles it is clear that all the questions involved in that issue were, as between the parties to such litigation, merged and concluded in the final decree therein entered. The validity of the claim therefore became res judicata."

[2] The facts in the case at bar bring it within the decision just quoted which is dispositive of this case. I will, however consider the case upon its merits, so that it may not be necessary to send the case back for that purpose, if the appellate court should reach a different conclusion upon the question of res judicata.

Claims 2 and 3 of the patent at issue here are as follows:

"2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly directed flanges whereby said strips are connected, and whereby the body portion of the horn is provided on the outside thereof with longitudinally arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

"3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally arranged strips secured together at their edges and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described."

The defendant contends that it does not infringe the patent because the method of joining the strips composing the body portion of the horns is limited to the butt seam and excludes the lock seam, used by the defendant.

These phonograph horns "were composed of metal strips joined together along their longitudinal edges by means of outwardly directed flanges. * * * This method of connecting the strips consisted in bending portions of the metal outward along the longitudinal edges at a right angle to the body portion of the strips of metal. The two outstanding flanges thus formed were then placed together and held securely and rigidly in place by means of solder" or in some other way. This was the butt seam. There were two kinds of seams well known in the art of joining two pieces of metal together at the time of the Nielsen invention. The butt seam has already been described. The other was the lock seam, which was made—

"by bending portions of the metal outward along the longitudinal edges thus forming flanges, one of which was made longer than the other. The longer flange was then bent down over the shorter and the interlocked flanges thus formed were then flattened down upon themselves and upon the body of the horn, forming a rib or seam on the outside thereof." Sherman-Clay & Co. v. Searchlight Horn Co., 214 Fed. 86, 130 C. C. A. 562.

Complainant contends that these seams are mechanical equivalents, performing substantially the same function in substantially the same way, that the doctrine of mechanical equivalents may be invoked in defense of the patent, and that either way of uniting the sections of the horn would be a substantial compliance with the requirements of the patent. The longitudinal outwardly directed flanges are to be so "connected" that the body portion of the horn will be provided on the outside thereof with longitudinal ribs. The drawings of the patent show the butt seam only. It is stated in the specification and claims that the longitudinal strips are provided with outwardly directed flanges whereby the said strips are "connected" without specifying in what way they are to be "connected." Since the butt seam and lock seam were both well-known methods of joining pieces of metal long before the Nielsen invention, and it is provided in the patent that "changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages," the two kinds of seams are mechanical equivalents. The lock seam may be used in substantial compliance with the terms of the patent and the limitations, excluding the lock seam, sought to be imposed by counsel for defendant as a consequence of the disclosures of the file wrapper are not justified. The doctrine of mechanical equivalents may be invoked in all patents. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 413, 28 Sup. Ct. 748, 52 L. Ed. 1122; Winans v. Denmead, 15 How. 330, 14 L. Ed. 717.

[3, 4] The object of the Nielsen patent—

"is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sound usually produced in the operation of such machines, and also to produce a full, even, and continuous volume of sound in which the articulation is clear, full, and distinct." "The body portion of the horn is also composed of a plurality of longitudinal strips, which

are gradually tapered from one end to the other, and which are connected longitudinally, so as to form longitudinal ribs b^2 , each of the strips b being provided at its opposite edges with a flange b^3 , and these flanges of the separate strips b are connected to form the ribs b^2 , * * and it is the construction of the body portion of the horn as hereinbefore described that gives thereto the qualities which it is the objects of this invention to produce, which objects are the result of the formation of the horn or the body portion thereof of the longitudinal strips b and providing the outer surface thereof with the longitudinal ribs b^2 , * * and it is the longitudinal ribs b^2 which contribute mostly to the successful operation of the horn; said ribs serving to do away with the vibratory character of horns of this class as usually made, and doing away with the metallic sound produced in the operation thereof."

We are not told just how the longitudinal ribs b^2 contribute to the successful operation of the horn, the "elimination of vibration and resultant metallic sound," whether as a "seam and strengthening ribs," or as a means of decreasing the amplitude of the vibratory waves. In either case, the lock seam would perform the same function in substantially the same way as the butt seam,

The defendant claims in effect that there was no problem of vibration or metallic resonance to get rid of, and, if there was, Nielsen did not do it. After the Nielsen patents were granted, and the horns constructed thereunder were put upon the market, they were sooner or later adopted by the great majority of persons in the horn business. The witness Krabbe said:

"During the latter part of 1904, and for a number of years succeeding, it [the Nielsen horn] was practically the only metal horn used and was used in numerous quantities."

Merritt said:

"By the latter part of 1904 or the early part of 1905, practically every horn manufacturer, in the East, at any rate, was making this type of horn. They at once superseded both the brass horn and the B. & G. horns, as well as the paper horns that had previously been put upon the market in some quantity."

Lock said:

"The so-called flower horn created a furore, and practically did away with the B. & G. horn. All new trade was in the flower horn, and many people, who had previously equipped their machines with the B. & G. horn, discarded them and bought the flower horn."

These facts are not denied. The reasons for this general adoption of the Nielsen horn are, however, in dispute. At the time the patent was granted to Nielsen, and until two or three years thereafter, the large phonograph companies, such as the Victor and Edison, sold with each phonograph a small horn, which was generally discarded by the purchaser, who equipped the phonograph with a larger horn. In 1906 the Victor Company adopted the Nielsen horn, and supplied each machine sold with the horn, selling the phonograph and horn together. It denies that this was because of the elimination of the so-called mechanical, vibratory, and metallic sound, or tintinnabulation, and alleges that it was solely on account of the superior beauty and artistic effect of the Nielsen horn. I am not convinced that the artistic effect of the Nielsen horn alone accounts for its adoption. In fact, it seems not to have been the case with the Edison Company, which makes the

same defense in that respect as the Victor Company. It appears that in the case of that company the small conical-shape horn supplied with its phonographs was unsatisfactory, and it concluded to discard that horn and secure a better one.

A committee was appointed to examine and test the various horns, and select one to be attached to and sold with the Edison phonograph. This committee consisted of nine persons connected with the company, who were experts in their respective departments. They were W. E. Gillmour, president and general manager; William Pelzer, vice president; Leonard McCheeney, head of the advertising department; Walter Miller, manager of the recording department; C. H. Wilson, sales manager; F. Dolbeer, credit manager; Peter Weber, general superintendent; A. C. Ireton, assistant sales manager; and Walter Stevens, This committee invited all the horn manufacturers to submit samples for test, and during a period of over a month "they tested all types of horns then on the market." I quote from page 78 of the plaintiff's brief, which substantially states the testimony:

"These tests were exceedingly thorough. The horns were numbered and attached to machines concealed behind a curtain, so that when a horn was being used the committee did not know what particular horn it was. The horns were tested in sets of twos, and the one which proved inferior was eliminated, while the one which proved superior was set aside for tests with other horns. In this way all the horns were tested, and by this process of elimination only two horns remained at the final wind-up. Those two horns were (1) the all-brass horn of the prior art; and (2) the flower horn of the shape of 'Complainant's Exhibit X' (Pelzer, qq. 17, 21, p. 763, Edison D. R.), and shown in Edison's advertisements of December 15, 1907, and January 15, 1908, in Talking Machine World (Dolbeer, R-xq. 87, pp. 823, 824, Edison D. R.). That horn, it is needless to say, was a Nielsen flower horn. As between these two horns the committee discarded the all-brass horn and adopted the Nielsen flower horn. The result was reported to Mr. Edison (Pelzer, R-xq. p. 760, Edison D. R.), and thereupon the Nielsen flower horn was adopted as part of the standard equipment of the Edison phonograph."

It does appear, therefore, that the Nielsen horn in the opinion of the Edison Company was adopted because of its superior tone quality, and not because of its artistic effect only, and I have no doubt that the tone quality contributed in some measure, at least, to its adoption by the Victor Company. The scientific theory of the Nielsen invention, accounting for its superior tone, is alleged by the plaintiff to be:

"The mechanical vibration of the metal sections of the Nielsen horn are of such small amplitude, in comparison with the vibrations of the prior horns, as to practically do away with, or at least to so minimize as to render inaudible, the harsh, squeaky, metallic sounds found in the horns of the prior art, and which the Court of Appeals has denominated metallic resonance or tintinnabulation."

This theory may or may not be true. It is not necessary that the scientific principle be explained, or that the inventor should know it, if the thing to be done is so set forth that it can be reproduced. "An inventor may be ignorant of the scientific principle, or he may think he knows it, and yet be uncertain, or he may be confident as to what it is, and others may think differently. All this is immaterial, if by the specifications the things to be done are so set forth that it can be reproduced." Andrews v. Cross (C. C.) 19 Blatchf. 294, 305, 8 Fed. 269,

278; Eames v. Andrews, 122 U. S. 40, 56, 7 Sup. Ct. 1073, 30 L. Ed 1064. The thing to be done is so set forth in the Nielsen specifications that it may be reproduced. Whether or not the theory is correct, efforts had been made for some time to get rid of the vibration of the horn itself. Mr. Edison wrapped the horn with tape or rattan. Hawthorne and Sheble covered the outside of their horns with a silk material. These proved unsatisfactory. The Nielsen horn, whether or not doing away with the tintinnabulation altogether, must have been an improvement over all other horns in the market at that time, and doubtless was the best that could be secured. The immediate popularity and extensive use of the Nielsen horn created a presumption in favor of its novelty and utility. The conclusion is based both on the adoption of the horn generally, and upon statements issued by the defendant company to the effect that the horn was superior in tone quality to all others.

[5-8] The defendant denies liability because of prior use and anticipating patents. It relies upon oral testimony largely to establish prior use. The proof of prior use by oral testimony should be scrutinized very carefully. At best such method of proof is unsatisfactory. Forgetfulness, liability to mistakes, the power of psychological suggestion, innate tendency to remember what those calling witness desire, possible bias, prejudice, interest, or perjury, all suggest the wisdom of the rule requiring the defendants to prove prior use beyond a reasonable doubt by clear and convincing testimony. Every reasonable doubt should be resolved against one attacking the validity of a patent. The necessity of this rule is emphasized when the attack is based upon oral testimony alone of facts long past. The law requires not conjecture, but certainty. Anticipation should be established, not merely by testimony of witnesses relating to facts many years previous, but by concrete, visible, contemporaneous proofs, which speak for themselves. The proof must establish a clear conviction, and something more than oral testimony, even of the highest character, is required, where there has been considerable lapse of time. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; Mack v. Spencer Optical Mfg. Co. (C. C.) 52 Fed. 821; Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co. (C. C.) 54 Fed. 678; Pratt v. Sencenbaugh (C. C.) 64 Fed. 780; Mast, Foos & Co. v. Dempster Mill Mfg. Co., 82 Fed. 332, 27 C. C. A. 191; Brown v. Zaubitz (C. C.) 105 Fed. 242; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 703, 45 C. C. A. 544; Young v. Wolfe (C. C.) 120 Fed. 958; Pettibone Mulliken Co. v. Pennsylvania Steel Co. (C. C.) 133 Fed. 735; Mica Insulator Co. v. Union Mica Co. (C. C.) 137 Fed. 938; Koerner v. Deuther (C. C.) 143 Fed. 548; Emerson & Norris Co. v. Simpson, 202 Fed. 747, 121 C. C. A. 113; Keasbey & Mattison Co. v. Philip Carey Mfg. Co. (C. C.) 139 Fed. 576; Interurban Co. v. Westinghouse, 186 Fed. 168, 108 C. C. A. 298; De Laval Separator Co. v. Iowa Dairy Separator Co., 194 Fed. 425, 114 C. C. A. 385; Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co. (D.

C.) 205 Fed. 745; Hopewell v. Linscott Supply Co. (D. C.) 205 Fed. 759; Kryptok Co. v. Stead Lens Co. (D. C.) 207 Fed. 87; Electric Storage B. Co. v. Philadelphia Storage B. Co. (D. C.) 211 Fed. 154; Wright v. Brownlee, 212 Fed. 157, 129 C. C. A. 13; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 C. C. A. 310; Wayman v. Louis Lipp Co. (D. C.) 222 Fed. 679; Salt's Textile Co. v. Tingue (D. C.) 227 Fed. 116; Pieper v. White, 228 Fed. 31, 142 C. C. A. 486.

The defendant seeks to establish prior use in the city of Pittsburgh during the years from 1893 to 1898. A German tinsmith, C. Otto Hammer, made and sold about 150 horns to one Joseph M. Schaefer, a jeweler, from time to time from 1893 to 1898, and to one Kleber, or Kleber Bros., from 1896 or 1897, for about six months. Both Hammer and Schaefer are dead, and there are no records extant, if there were ever any, of the alleged transactions between these persons. The facts depend entirely upon oral testimony of Adolph Hammer, son of C. Otto Hammer, who, at the time he alleges he helped make these anticipating horns, was about 10 years old, and 15 other witnesses. His testimony was mostly elicited by leading questions, was in many respects contradictory, and upon the whole does not produce that clear conviction that satisfies beyond a reasonable doubt. The testimony of the other witnesses is of the same general character as that of Adolph Hammer. They contradict themselves again and again, and also contradict one another. They, unaided by counsel, had practically no definite, fixed ideas of the Hammer horns which they attempted to describe. They contradict one another in very essential matters. They produced no concrete, visible, contemporaneous proof, which spoke for itself, to show that the Nielsen horn was anticipated by the Hammer horns in Pittsburgh. They had lived 15 to 20 years after seeing what they allege they saw, and during that period they had seen many Nielsen horns in the various stores, shops, and homes in Pittsburgh, and some were selling or had sold the horns and phonographs of the Victor and other companies, and might have confused these with the Hammer horns. The witnesses, or some of them, at least, were brought together from time to time before they testified. They signed affidavits prepared for them. They were shown the horns constructed by Adolph Hammer for use in this suit. They were asked if the horns they had seen Hammer make were like these, etc. The result was inevitable. As a matter of fact, there was no reason to fix the time, place, and circumstances under which they first saw those horns. Memory is so fleeting and the human mind so susceptible to psychological suggestions, which need not necessarily be made or received with corrupt motives, that it is utterly unsafe to accept such testimony as a sufficient basis upon which to predicate prior use. This is true, even of witnesses of the highest integrity and intelligence. To base a decree of invalidity upon facts sought to be established by such testimony would inevitably result in a miscarriage of justice. Judge Van Fleet in the Northern district of California, in passing upon the testimony of the Pittsburgh witnesses, said:

"I think it is entirely referable to that readiness of the mind in man, in considering past events, to adopt suggestions as to time, place, and circum-

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stances, and dwell upon it to an extent which will enable and induce any of us in many instances to believe that the fact is as we testify it to be. That is not perjury—that simply grows out of the frailty of the human mind and memory. It is wholly impossible for me to bring my mind to the conclusion, with the evidence produced from these witnesses as to the number of these horns that are claimed to have been manufactured—I do not care, as I said a few moments ago, whether it was 50, or 100, or 150—but it is utterly inconceivable, in view of the avidity and unanimity with which this so-called flower horn was subsequently seized upon by the trade, when it was produced under the Nielsen patent, to believe that had it had a previous history of the magnitude which it has undertaken to show, that it would not have filled the same want that was being felt by the trade as it did subsequently."

What has been said of the attempt to establish prior use at Pittsburgh applies to the same defense sought to be established by the same character of testimony in the aluminum horn accompanying the Graphophone Grand machine.

The Tea Tray horn, relied upon by the defendant to invalidate the patent, is composed of a body part and an attached bell, both of conical shape and joined together by a circumferential seam. The Nielsen patent is composed of longitudinally arranged strips, running from end to end of the horn. There are points of resemblance in parts of the horns, but, when considered as a whole, they are very different in appearance and structure, and the Tea Tray 20-inch horn cannot be said to have anticipated the Nielsen horn, when the claims of the latter are read and interpreted in connection with the specifications and drawings.

The Villy patent is also relied upon by the defendant. The horn was made of a series of strips of paper, wood, linen, or other preferably flexible material secured together by a hingelike connection. Judge Morrow, in the case of Sherman-Clay & Co. v. Searchlight Horn Co., 214 Fed. 86, 130 C. C. A. 562, correctly differentiated these patents:

"In substance, the claims of the patent were for a collapsible, but self-sustained, phonograph horn, ear trumpet, or the like, composed of a number of flexible strips having curved meeting edges and flexible connections between such edges. In brief, the great object of the Villy patent was a horn made of strips of flexible material joined by means of flexible connections at the edges in such manner that the whole would be collapsible. There was not involved in the Villy patent, as in the horn described in the Nielsen patent, the problem of preventing tintinnabulation or metallic resonance; and, indeed, in a horn composed of strips of paper, wood, linen, or other flexible material such as Villy proposed to use in the structure of his horn, no precautions against tintinnabulation would, in the nature of things, have been necessary. In the material of which the strips were to be made, the method by which they were to be joined, and in the primary object to be attained, the Villy and the Nielsen horns were vastly dissimilar."

The very genius, according to the inventor of the Turpin horn, relied upon by the defendant to establish prior use, consisted in the material, wood, of which the strips were composed. As was said of the Villy patent, in the material of which the sections are composed, and in the method by which they were joined together, the Turpin and the Nielsen horns are vastly dissimilar.

The dissimilarity in one respect or another of all of the many anticipating horns introduced by the defendant is so marked as to disprove the purpose of their introduction. I have considered specifically

the more prominent ones, and those especially relied upon, and it would serve no useful purpose to analyze the horns further, when it is apparent that they can have but one result.

It is not contended by the defendant that its horns differed in any material respect from the Nielsen horns, except in the manner of joining together the strips of metal of which they were composed, the Nielsen patent illustrating the butt seam, and the defendant using the lock seam; but these seams are mechanical equivalents as before stated.

[9-11] The defendant claims that the plaintiff is estopped from receiving the relief sought because of laches. Equitable estopped may be defined as follows:

"Where a person, by anything which he does or says, or abstains from doing or saying, when it is his duty to act or speak in respect of a subject-matter, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than he would have acted, but for that belief, and he so acts and materially changes his position in respect of the matter to his detriment, then the first person is not allowed, in a suit between himself and such other person, to deny the truth of the thing done or stated."

This is a fuller statement of-

"that great maxim of justice, which declares that he who is silent when conscience required him to speak shall not be permitted to speak when conscience requires him to be silent." Besson v. Eveland, 26 N. J. Eq. 468, 472.

Mere lapse of time alone is not sufficient to establish laches. Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 149 C. C. A. 345; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203; Ide v. Trorlicht, Duncker & Renard Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Empire Cream Separator Co. v. Sears-Roebuck & Co. (C. C.) 157 Fed. 238; Valvona-Marchiony Co. v. Marchiony (D. C.) 207 Fed. 386; Davis v. A. H. Reid Creamery & Dairy Supply Co. (C. C.) 187 Fed. 157; Benthall Mach. Co. v. National Mach. Corporation (D. C.) 222 Fed. 918; Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74; Eagle White Lead Co. v. Pflugh (C. C.) 180 Fed. 579; Id., 185 Fed. 769, 107 C. C. A. 659; Armstrong Cork Co. et al. v. Ringwalt Linoleum Works, 240 Fed. 1022, 153 C. C. A. 665; Rhinehart v. Victor Talking Machine Co., 261 Fed. 646 (memorandum of Judge Long acquiescence, however, in the infringement of the exclusive right conferred by the patent will bar the enforcement of the exclusive rights. Acquiescence may sometimes be inferred by delay, as Judge Rellstab said in the case of Eagle White Lead Co. v. Pflugh, supra, but—

"the delay must be attended with such circumstances that acquiescence of the use by another is inferred. There must be either a waiver or an abandonment of rights."

In the instant case the defendant adopted the Nielsen horn as a part of the phonographic equipment, and began to sell the horn and phonograph together about the middle of the year 1906. On May 7, 1906, the defendant was notified of the violation of the Nielsen patent by B. C. Stickney, counsel for United States Horn Company, by a letter which reads as follows:

"My clients, the United States Horn Company, have informed me that you have been engaged in the manufacture and sale of horns for phonographs, in violation of United States letters patent to Villy, No. 12,442 (reissue), dated January 30, 1906, and to Nielsen, No. 771,441, dated October 4, 1904, which patents are their exclusive property, and they have requested me to notify you, in their name, of this infringement, and to request you to promptly desist from further infringement, and pay over to them all profits, gains, and advantages which you have derived from such manufacture and sale, as well as damages which my clients have suffered by reason thereof, and in default thereof they have instructed me to take steps to fully protect their rights in the premises."

The company was also notified orally from time to time of the infringement of the patent, and that all infringers would be required to account to the owner of the patent. The testimony establishes beyond a doubt that the defendant knew that the owners of the Nielsen patent claimed that it was being infringed in the manufacture, use, and sale of the horn in question, and that in the purchase and sale of the horn defendant relied upon the advice of its attorney that the patent was valid. One suit was instituted against the Nova Company in 1905, and judgment was taken in that case by default. Suit was instituted by the present plaintiff against Sherman, Clay & Co. in September, 1911. From the time the company adopted the Nielsen horn as a part of its phonographic equipment in 1906, until 1909, there were some negotiations, between the owners of the Nielsen patent and the defendant and other companies, looking toward the settlement of the case; but in 1909 the negotiations were concluded, and it was definitely settled that no adjustment between the owner of the patent and the defendant company and others could be made. From the time of the infringement until the suits were actually instituted against Sherman, Clay & Co. and the Columbia Company, the owners of the patent failed to institute proceedings. This failure was due, in part, to their financial inability, and in part to the existence of negotiations looking toward the adjustment of the case, whereby royalties might be paid to them. Poverty alone may not be a sufficient excuse for a long delay in asserting rights under the patent, but delay in prosecuting other infringers while the validity of the patent is in active litigation does not constitute laches. Stearns-Rogers Mfg. Co. v. Brown, 114 Fed. 945, 52 C. C. A. 559; Tompkins v. St. Regis Paper Co., 236 Fed. 221, 225. 149 C. C. A. 411. The delay in prosecuting the defendant for alleged infringements from the time it adopted the Nielsen horn as a part of its phonographic equipment and sold it therewith until the institution of proceedings against Sherman, Clay & Co. and the Columbia Company, especially in view of the fact that some negotiations were going on and efforts being made to induce the companies to pay royalties. is not such an unreasonable delay as to constitute equitable estoppel. At no time did the owners of the patent acquiesce in the infringement by the defendant or others. The evidence does not show that the defendant was in any way misled by the complainant or its assignors.

The only charge looking toward laches, which the defendant can bring against complainant or its assignors, is that, notwithstanding notification, written and verbal, proceedings were not actually instituted against it. The defendant, however, cannot complain of this.

because the business which it thus built up was not a new and independent business based upon the horn trade. The horn business was simply an adjunct and addition to its phonographic trade, which it had already established among the jobbers throughout the country, and instead of sending a phonograph without the horn, it added the horn to the phonograph and increased the price accordingly, thus reaping the benefit of the addition of the horn. It may well be that after the adoption of the horn by the defendant company, and before the institution of proceedings against it, or Sherman, Clay & Co., the phonographic business, including the horn of the defendant, was extended, in that the demand for natural reasons for phonographs thus equipped was greater among the jobbers, which the defendant had been supplying; and it also may well be that the invention of the Nielsen horn eliminated the mechanical vibratory and metallic sound, or tintinnabulation, and thus made the entire phonographic business more popular, and thereby increased the revenue of the defendant generally in its phonographic trade. This is, in substance, the theory of the complainant, and the literature of the defendant company and other companies, if taken to be true statements generally, with due allowance for "puffing" their business, would seem to force this conclusion.

In any event, it has not been shown that the defendant was actually misled by any act or statement, or even relied upon any of the complainant or its assignors to its disadvantage. Neither has it been shown that the failure of the complainant or its assignors to begin litigation against the defendant or other companies sooner, of which the defendant now complains, in any way resulted to the disadvantage of the defendant. The defendant sold the infringing horns during a period of their popularity and until cabinet machines were introduced. It now claims in effect that, because it was not prevented from reaping the harvest when it was ripe, it should not be called upon to account for these profits, or any part thereof. Under all the facts in the case, this

contention cannot prevail.

The Nielson horn was both new and useful, and therefore patentable. The claims in question are valid, and it follows that the prayer of the complainant as to profits and damages should be granted. The defendant no longer purchases or sells the Nielsen horn, and injunc-

tive relief is not called for.

DANIELS & FISHER REALTY CO. v. KENYON.

(District Court, D. Colorado. August 25, 1919.)

No. 6859.

1. WILLS @=476-RULES OF CONSTRUCTION.

The entire will, including codicils, must be read and considered as one instrument, and its diffierent parts harmonized, if there is no irreconcilable conflict, so that the intent of the testator as disclosed by the whole will may be carried out.

2. WILLS \$\iffsigma 457\$—Construction of phrases having definite meaning.

Phrases used in a will, to which the law has affixed a definite meaning, must be presumed to have been used in that sense, unless it clearly appears they were not intended to have that meaning.

3. Wills ⋘681(2)—Fee devised to trustee.

Where testator devised to a trustee all his real estate in fee, with power of disposition, and by codicil directed the trustee to keep, retain, and hold title to specified lots during the life of testator's son, who, on attaining the age of 30, should be placed in possession and allowed the rents and profits for life, but other directions, which could not be carried out without title in fee, were left unchanged, the estate of the trustee was not reduced to an estate for the son's life, but remained a fee with the power of disposition curtailed during the son's life.

4. WILLS \$\ightharpoonup 681(2)\$—Trustee takes estate necessary to execute trust.

Where a testamentary disposition is clearly made and a trust created to carry it through, the language used in passing title to the trustee may be restrained, or even enlarged to the extent of permitting the execution of the trust.

5. WILLS \$\igsim 506(3)\to "Heir" includes surviving wife.

Where a testator directed that a portion of his estate should go to the heirs of his son, the widow of the son was entitled to take as "heir," under the Colorado statute providing for descent to the surviving wife.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heir.]

In Equity. Suit to quiet title by the Daniels & Fisher Realty Company against Sarah M. Kenyon. On motion by plaintiff to strike the answer and cross-complaint. Motion overruled.

Pershing, Nye, Fry & Tallmadge, William P. Hillhouse, and Stokes & Sherman, all of Denver, Colo., for plaintiff.

H. A. Dubbs, Henry C. Vidal, and Garwood & Garwood, all of Denver, Colo., for defendant.

LEWIS, District Judge. This is a suit to quiet title to Lots 13, 14, 15, and 16, in Block 76, East Division of Denver. The plaintiff claims full and complete title to all of the lots. The defendant claims to be the owner of an undivided half interest in them, admits that the plaintiff is in possession, and by cross-complaint asks that title to an undivided half interest be quieted in her, and for an accounting for rents and profits received by the plaintiff. The plaintiff moves to strike the answer and cross-complaint.

Both in arguments and briefs counsel are agreed that a disposition of the motion is dependent upon the construction to be given the last will of William B. Daniels and the powers which it gives the trustee.

The testator is the common source. He died December 23, 1890, leaving an only child and son, William C., then twenty years old, and his estate was closed August 6, 1900. As the answer goes, the only basis for plaintiff's claim is a conveyance by the son after he reached the age of thirty to plaintiff's grantor; but it is alleged that he had only a life interest in the lots, that he died in 1918, and that defendant took an undivided half of the remainder in fee as devisee. William B. Daniels executed his will in September, 1883, and thereafter made a codicil in October, 1885, and another in March, 1887. In form the will is divided into three parts or articles. The first, as numbered, only directs the payment of the testator's debts. The second deals with the appointment of a guardian for the son and the son's education, and names a trustee to take title to the real property and funds to be received from the executor as the proceeds of personal property, and directs the trustee as to final disposition of both. It also embodies all of the bequests and devises, except two in the third article which were to be discharged by the executor. The third article deals exclusively with personal property. Its provisions will be first noted. It names the executor and provides for the administration of the chattel estate, it directs him to pay all debts, to deliver all pictures, paintings, books and jewelry to the son, to sell all furniture, household goods, fixtures and furnishings, all horses, vehicles, harness and personal property not belonging to the testator's business, it provides that if the testator has retired from the mercantile business at the time of his death, or shall at that time be carrying on the business without a partner, the executor shall convert all of the personal estate into money with all convenient speed, and out of it pay two legacies given in article three, discharge the testator's debts, the expenses of administration, and pay over the residue to the trustee. But if at the time of the testator's death he be still engaged in the mercantile business with one or more partners the executor is directed to continue to carry on the business until the usual time of taking the next invoice of the stock, and if at that time satisfactory arrangements can be made with the surviving partners the executor may continue to conduct the mercantile business until the son arrives at the age of twenty-seven years, and at the end of that time the interest of testator's estate in the mercantile business shall be converted into money as speedily as possible, without too great a sacrifice of the business, and paid over to the trustee, provided, however, that after the son reaches the age of twenty-one years he shall be permitted to take and continue the said business with the consent of the partners, and in that event, instead of converting the same into money the executor shall turn over and transfer all interest in the mercantile business to the son as his own property, to have and to hold the same unto himself, his heirs, assigns and legal representatives forever.

The second article names Mitchell Benedict as trustee of the estate. It runs thus:

"And to the said Mitchell Benedict as trustee I hereby give, devise and bequeath all the real estate of which I die possessed, and the rents, issues and profits thereof, and so much of my personal estate as shall by this my will

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be directed, from time to time, to be paid over to him, to have and to hold the same in trust for the following purposes to wit:

"7th. To pay to my said son when he shall have attained the age of thirty years, or make over to him by payment, assignment, conveyance or otherwise, all the estate then in the hands of my said trustee, whether real, personal or mixed, save and except the real estate known as Lots 13, 14, 15, and 16, Block 76, in the East Division of the City of Denver, Arapahoe County, Colorado.

"8th. To keep, retain and hold the title to the said last-named real estate during the natural life of my son, but from the time of my son's attaining the age of thirty years, as aforesaid, to give to him the possession thereof and leave to him the entire control and management thereof, and to allow him the rents, issues and profits thereof for his own use and benefit so long as he shall live, without let or hindrance or interference in any manner whatsoever.

"9th. In case of the death of my said son leaving lawful issue, being a child or children him surviving, then to pay to or make over to such child or children the same monies or property which otherwise would be paid to or made over to my said son as aforesaid.

"10th. In the event of the death of my son without his leaving him surviving any such child or children, then to pay to or make over as aforesaid to the said Sarah M. Kenyon, or to her heirs, one-fourth of all the estate then being in the possession and control of my said trustee, the remaining threefourths thereof to be by my said trustee disposed of in such a manner as may be directed by the last will and testament of my said son, by him made after he shall have attained the age of twenty-five years, but if he die without leaving any such will and leaving no such child or children but leaving a widow, then to pay to and make over to such widow what my said trustee shall consider a full one-third of the said remaining three-fourths of said estate. And another one-third of said three-fourths my said trustee shall pay or make over as aforesaid to Henry Martyn Hart. * * * And the residue of the said estate so remaining I hereby direct shall be paid or made over to those who then are the heirs of my said son, but if my said son shall die leaving no such child or children, and no such will and no widow, then the share which is above directed to be paid to such widow shall also go to the said Hart. * I hereby give and grant unto my said trustee full power and authority to sell, grant, bargain, convey and dispose of all the estate, real, personal or mixed, which may come into his possession and control, in such a manner from time to time as to him shall seem meet and proper."

The second article also made other bequests to be discharged by the trustee, among them:

"To pay to my sister, Mrs. Sarah M. Kenyon, of Iowa City, State of Iowa, ten per cent. of the net income of all the estate in the hands and possession of my said trustee, from time to time yearly, every year during her natural life," etc., "to my nephew, William D. Kenyon, * * * \$1,000.00: * * * Provided however, if that sum shall be more than five per cent. of my estate in the possession and control of my trustee at that time, then the amount to be paid him shall be five per cent. of such estate and no more," to pay over to my said son when he shall arrive at the age of twenty-one years the sum of \$5,000.00, and "thereafter to pay him also all the net income of my estate in the possession and control of my said trustee," etc.

The son died at the age of forty-eight. When he attained the age of thirty years the trustee made over and conveyed to him all of the estate except the four lots. The answer alleges that shortly thereafter the son conveyed the four lots and other real property to plaintiff's grantor for a recited consideration of \$200,000, and in a subsequent deed made in 1910 the son and his wife conveyed to the plain-

tiff's grantor the four lots, habendum during the lives of the son and his wife,

"and thereafter to enjoy and possess the same, and every part thereof, as devisee and appointee of William Cooke Daniels, under his last will and testament; and the said William Cooke Daniels, one of the parties of the first part, does hereby promise, undertake and agree to and with the party of the second part, in consideration of the premises, that he will by his last will and testament give and devise unto the party of the second part all the right, title and interest in and to said real property which, under the will of William B. Daniels, deceased, and in and by the terms of said will he, the said William Cooke Daniels, has been given power to give and devise, and will under the power given to him by the will of William B. Daniels, deceased, appoint the said party of the second part to take and hold said real property forever, and for its own use and benefit, and will direct by the terms of his last will that the trustee under the will of William B. Daniels, deceased, or his successor in trust, shall, under the will of William B. Daniels, deceased, convey unto the party of the second part all the right, title and interest in and to said real property remaining after the death of William Cooke Daniels."

It is alleged that the son died testate by will of date April 21, 1916, but that he did not exercise the power of appointment given to him by his father's will, and that he died without issue, his wife surviving him.

[1-3] The respective contentions are these: By the plaintiff, that although the opening part of the second article devised the lots to the trustee in fee, nevertheless, that was cut down to a life estate in the trustee by the first codicil, which changed the eighth section of article 2 so that it reads: "To keep, retain and hold the title to the lastnamed real estate (the four lots) during the natural life of my son, but from the time of my son's attaining the age of thirty years, as aforesaid, to give to him the possession thereof and leave to him the entire control and management thereof, and to allow him the rents, issues and profits thereof for his own use and benefit so long as he shall live, without let or hindrance or interference in any manner whatsoever;" that this also gave to the son a life estate in the lots, that under the Statute of Uses there was a merger of the two estates, and that the estate in trust having terminated there was an immediate reversion of the fee to the testator, and that the son took by inheritance. By the defendant, that notwithstanding the change by the codicil there was no intention on the part of the testator to cut down the fee previously granted in trust to a life estate in the trustee in view of the other provisions of the will, and secondly, even conceding the meaning of the codicil to be as contended for by plaintiff, yet the purposes of the trust are such that they cannot be executed as it is clearly intended they should be, unless the trustee retain the title to the lots after the death of the son, and in that condition the law makes the implication, notwithstanding the language used, that the trustee holds in fee if that be necessary for the execution of the trust.

As to the first proposition it may be said that the entire will, including the codicils, must be read and considered as one instrument, its different parts harmonized, if there is not irreconcilable conflict, so that the intent and purpose of the testator, disclosed by the whole will, may be carried out; such intent and purpose, however, must be obvious from the language used by the testator, and if phrases are used to

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which the law has affixed a definite meaning it must be presumed that they were used in that sense unless it clearly appear they were not intended to have that meaning. This, I take it, is the rule to be applied to all instruments. Justice Thompson said, in Jackson v. Kip, Fed. Cas. No. 7,138:

"And in applying this rule, the intention is to be collected from the whole will, and not from detached parts; and effect must be given to all the words in the will without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intent of the testator. When any technical words are used the meaning of which has been settled by usage, and sanctioned by judicial decisions, they are presumed to be used in the sense the law has appropriated to them, and must have their technical effect, unless a contrary intention is manifest; but when such intention is plain, it will control the legal operation of words, however technical. * * * There can be no doubt but that where there is a lapsed devise, for the want of a devisee answering the description in the will, or where there is an irreconcilable repugnancy or uncertainty in the disposition made by the testator, so that his real intention cannot be ascertained, the estate will descend to the heir-at-law; * * * but a devise is never construed absolutely void for uncertainty, but from necessity. If there is a possibility to reduce it to certainty, the devise is held good."

In the forepart the title in fee was given to the trustee for the purposes named, both by the original will and as it remained after the codicils. Also the original will gave the trustee power of disposition of all of the real estate at his discretion, and that remained after the codicils. But that power given elsewhere was undoubtedly cut down by the codicil, so that the trustee could not dispose of the four lots until after the son's death, otherwise if he had conveyed them before the son reached thirty he could not have let the son in when he reached that age, and if permitted to exercise that power while the son was in the fee would have been of uncertain value, dependent upon the life of the son; but the restriction on the power of alienation by the trustee would pass with the son's death if the title in the trustee were not expressly limited to that time. So that the question arises, whether the phrase in the eighth section, "To keep, retain and hold the title to the said last-named real estate during the natural life of my son," shall be held to cut down the fee given in the forepart to the trustee to an estate in the trustee for the life of the son, or whether it should be construed, when taken with the remainder of that section and the general power of disposition given to the trustee, to be only a withdrawal of that power during the life of the son. The latter impresses me as being the more reasonable purpose, and within the clear meaning of the phrase. I can conceive of no more apt expression for that purpose. It is equivalent to saying that during the life of the son the lots should not be disposed of by the trustee. When we attempt to apply them to the purposes contended for by the plaintiff there is at once doubt. They do not expressly indicate a purpose to cut down the fee given the trustee in the forepart, and the words themselves are not apt to that end. "To keep, retain and hold" is a command to non-action, for the time specified, by one to whom the fee had been given. Besides, if we take them as a limitation on the trustee's power of disposal until after the son's death we bring the eighth section into har-

mony with the clear intention of the testator expressed in the tenth. Otherwise the latter is destroyed and wholly eliminated. And this is in keeping with the general plan in the mind of the testator shown by the original will, and maintained throughout. Sections 7 and 8, as we there find them, directed the trustee to pay to and make over to the son, by conveyance or otherwise, when he attained the age of thirty years, one-half of the entire estate then in his possession and control, and to keep the remaining half so that the same shall, during the natural life of the son, produce as much revenue and income as possible in the judgment of the trustee, and to pay the net income over to the son quarterly. These sections were changed by the codicil requiring the trustee to turn over to the son, when he reached the age of thirty, all of the estate then in his hands except the four lots, to give the son possession of the four lots at that time and allow him to occupy them and receive the rents so long as he shall live, and that the trustee keep, retain and hold the title thereto during the natural life of the son. Section 10, however, remains throughout as found in the original will, unchanged by the codicil. The original intent continued, to dispose of the remainder of his estate to the persons named in the tenth section, if the conditions therein set forth should arise.

But the plaintiff, to sustain its contention brings in, in aid of the construction which it places on the forepart of the eighth section, the words in the tenth section: "To the said Sarah M. Kenyon, or to her heirs, one-fourth of all the estate then being in the possession and control of my said trustee;" and says that these lots which had been turned over to the son during his life could not be in the possession and control of the trustee at the time of the son's death. It will be noted that the property disposed of in this section is not one-fourth of the real estate then in the possession and control of the trustee but onefourth of "all the estate." The estate consisted of an interest in large personal assets. The testator had in mind and specifically named his stock of merchandise, one of the largest establishments of the kind in Denver. He had provided that that business might be continued by his executor until the son reached the age of twenty-seven years. If that business had been carried on for that length of time by the executor, and the son had died shortly after attaining the age of thirty years, there would have probably been a very large fund arising from its sale in the possession and control of the trustee. The same expression is used in other parts of the will in referring to personal property, money, to be paid over to legatees by the trustee. It undoubtedly covered both kinds of property, but was not used with the restricted meaning now claimed for it, and as additional manifestation of an intent to limit the title in the trustee to the life of the son.

[4] But giving to the phrase all that plaintiff claims for it, conceding that no other meaning can be attached to it than a clear intent and purpose to cut down the fee in the trustee to an estate for the life of the son, still the second contention of the defendant must be sustained. There can be no doubt of the intent and purpose of the testator, as disclosed in the tenth section. In it he named certain beneficiaries; he set out clearly the conditions under which he desired them to take;

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he named the proportions in which they should take. They were the objects of his bounty; and if those conditions have now arisen the bequests there made cannot be permitted to fail on account of the character of the estate vested in the trustee by the will. If a testamentary disposition of property is clearly made and a trust created to carry it through the language used in passing title to the trustee may be restrained, if need be, or even enlarged to the extent of permitting the execution of the trust, where to hold otherwise would cause it to wholly fail. Perry on Trusts (5th Ed.) § 312, says:

"The extent of the legal interest of a trustee in an estate given to him in trust is measured not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts: First, wherever a trust is created the legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not. And second, although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires."

Circuit Justice Curtis, in Ward v. Amory, Fed. Cas. No. 17,146, said:

"It is a settled rule that trustees take and hold under a will just that, quantity of interest necessary to enable them to discharge the duties of their trust,"

The rule was announced and applied in Young v. Bradley, 101 U. S. 782, 25 L. Ed. 1044. This principle of law requires that the motion be overruled.

- [5] The defendant claims that she took not only the fourth specifically given to her by the tenth section, but alleges in her answer that she is the sole heir of William Cooke Daniels, and hence she claims under the latter part of that section another fourth. It is alleged that William Cooke Daniels died without issue but leaving his wife surviving him. "Heir" is a technical word, and means the person or persons named by the law to succeed to the estate in case of intestacy. The question, as I view it, therefore turns upon a provision of the local statute as to whom real estate descends on the death of a husband without issue, his wife surviving him. The Colorado statute provides that when a person having title to any real estate or property dies intestate leaving a wife surviving and no child, nor descendants of any child, then the whole estate of such intestate, real and personal, shall descend to and vest in such surviving wife as her absolute estate, subject to payment of debts. I conclude that the widow of William Cooke Daniels took the quarter-interest in the lots under the tenth section of the will as the sole heir of her deceased husband.
- . An order will be entered overruling the motion.

THE QUOQUE.

(District Court, E. D. Virginia. October 25, 1919.)

SEAMEN @= 7-Shipping articles; validity.

Shipping articles for a voyage from Baltimore "to such ports or places in any part of the world" as the master may direct, back to a final port in the United States, for a term not exceeding six months, held too indefinite and uncertain as to the voyage and services contracted for, and void, under Rev. St. §§ 4511, 4523 (Comp. St. §§ 8300, 8314).

In Admiralty. Suit by C. G. Westwood and others against steamship Quoque. Decree for libelants.

Henry Bowden, of Norfolk, Va., for libelants. Hiram M. Smith, U. S. Atty., of Richmond, Va., for respondent.

WADDILL, District Judge. The libel in this case was filed in behalf of C. G. Westwood and others, of the crew of the American steamship Quoque, to recover wages claimed to be due them under certain shipping articles entered into between the master of the vessel and the libelants at the port of Baltimore, Md., on the 3d of April, 1919. The case turns upon the validity of the shipping articles under which the voyage was undertaken; the provision prescribing the voyage, and the duration thereof, being as follows:

"From the port of Baltimore, Md., to such ports and places in any part of the world, via an American port, as the master may direct, and back to a final port of discharge in the United States, for a term of time not to exceed six calendar months."

The Quoque started from Baltimore to Panama, on its first voyage under these articles, early in April, 1919, with a cargo of coal; thence through the Panama Canal to Mollendo, Peru, where she discharged her cargo; thence to the port of Guayaquil, and to the port of Mantes, Ecuador, where some cargo was taken on board, and back through the Panama Canal to the port of Norfolk, Va., en route for Havre, France, arriving at Norfolk on the 7th day of July, 1919. The libelants, on reaching Norfolk, demanded their discharge and wages due them, claiming Norfolk to be the end of the voyage within the meaning of the articles. Upon the ship refusing their demands, and insisting upon the libelants continuing the voyage to Havre, this libel was immediately filed.

Under the terms of the charter party, the libelants were clearly not entitled to discharge in Norfolk, 60 days in advance of the time specified in the articles, assuming the articles to be valid, and it is hence as to the correctness of the libelants' contentions regarding the invalidity of the articles that the case turns.

Section 4511 of the Revised Statutes of the United States (7 U. S. Comp. Stat. 1916, p. 8784) provides for shipping articles and what they shall contain; that is, that the master of every vessel bound from a port of the United States to any foreign port shall, before he proceeds on such voyage, make an agreement, in writing or in print, with

every seaman whom he carries to sea as one of the crew, in the manner in said section set forth; said agreement to be signed by the master before any seaman signs the same, and must contain, among other particulars, the nature and as far as practicable the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate; also in detail to give the number and description of the crew, their respective employments, the time at which they are to be on board, to begin work, the capacity in which each seaman is to serve, the amount of wages he is to receive, and each seaman is to be furnished with a scale of these provisions.

The manifest intent and purpose of the statute was to protect seamen, and advise them, as far as possible, of the general nature and description of the voyage, in advance of starting upon the same, of the foreign port they were to go to, together with the length of time of the service, and when the same would terminate. The shipping articles furnished by the Commissioner of Navigation clearly contemplate this, as one of the clauses provides for the naming of the port of the commencement of the voyage and where it is to be consummated, namely, "from the port of Baltimore, Md., to," then a space of four blank lines in which to fill in the nature of the voyage, and continues, "and such other ports and places," etc. In the articles under consideration, not only is the space left for the description of the voyage not filled in, but of the words at the end of the clause, "and such other ports and places," two are struck out, namely, "and" and "other," making the same read, without mentioning any specific port or voyage, "from the port of Baltimore, Md., to such ports and places in any part of the world," and interlining the words "via an American port." Neither do the articles give any particular voyage upon which the ship is to enter, or describe the same in general terms, to give the seamen the slightest intimation of what they are contracting to do, as far as the voyage and nature of the same are concerned.

The sufficiency of shipping articles has frequently been the subject of review by the courts, and the following cases are referred to as being of special interest. They treat as well of the necessity for substantial compliance with the terms of the act as of the invalidity of articles for lack of information in the respects involved here. Snow v. Wope, Fed. Cas. No. 13,149, a decision of Mr. Justice Curtis on circuit; Wope v. Hemenway, Fed. Cas. No. 18,042, a decision of Judge Sprague. An earlier decision of Judge Sprague will also be found in Thompson v. Oakland, Fed. Cas. No. 13,971, though the facts in the last-cited case do not apply so directly to the case under consideration, as the two first named. More recent cases on the same general subject are Schermacher v. Yates (D. C.) 57 Fed. 668, The Occidental (D. C.) 101 Fed. 997, The Catalonia (D. C.) 236 Fed. 554, and The Cubadist, 256 Fed. 203, 206, — C. C. A. —.

The court's conclusion is that the shipping articles in question are too indefinite and uncertain as to the voyage and services contracted for to bind seamen thereby; they fail to give the nature of the voyage undertaken, or so to describe the same, either by general terms or positive specification, as that those acting thereunder, or affected thereby.

can know or be advised of their contractual rights thereunder with any reasonable degree of certainty. They are therefore, under section 4523 of the Revised Statutes (7 U. S. Comp. Stat. 1916, p. 8801), void. The libelants are not bound thereunder, and should be discharged, and paid the wages due them up to the date of their refusal to continue the voyage.

The court is the more impressed with this view of the case because the failure to make clear the meaning of the articles is something for which the ship's master, who furnished the same, as distinguished from the seamen, is responsible. Having regard to the character of the undertaking, and especially the manner and time under which such instruments are usually entered into, and those whose rights the statute was passed to safeguard and protect, the utmost good faith should at all times be exercised, and at least the written contract, required by the statute to be entered into before the voyage is entered upon, should be made clear and explicit, as far as it is reasonably practicable to do so, and where such is not the case, in construing the same, doubts regarding the meaning of the articles must be solved most favorably to the seamen, and against the ship.

A decree in accordance with the foregoing conclusions will be entered on presentation.

STATE OF MARYLAND, to Use of LUND et ux., v. ATLANTIC TRANSPORT CO. et al.

(District Court, D. Maryland, October 29, 1919.)

SEAMEN & 29(2)—Wrongful death; negligence in loading ship.

A wharf owner, which furnished a mast for use in loading fishplates on a ship, and the stevedore doing the loading, both held in fault for the death of a seaman, killed by the breaking of the mast, which was rotten and was also dangerously overloaded by the stevedore.

In Admiralty. Suit by the State of Maryland, to the use of Christian Lund and Anna K. Lund, his wife, against the Atlantic Transport Company and the Bethlehem Steel Company. Decree for libelant against both respondents.

Arthur E. Hamm and Francis L. Klemm, both of Baltimore, Md., for libelants.

George Forbes, of Baltimore, Md., for respondent Atlantic Transport Co.

Alexander Preston, of Baltimore, Md., for respondent Bethlehem Steel Co.

ROSE, District Judge. The equitable libelants are natives of Denmark, and there reside. Their son was a member of the crew of the Percy R. Pyne No. 2, which was taking on railroad fishplates at the wharf of the Bethlehem Steel Company at Sparrows Point in this state. These were being put on board by the employés of the respondent the Atlantic Transport Company, hereinafter called the "steve-

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dore." For that purpose it was using a mast belonging to the Bethlehem Steel Company, under an arrangement with the latter by which it paid so much per hour for the electric current consumed in operating the winches, and had the use of the mast, boom, etc., without additional charge.

Young Lund had nothing to do with loading the ship. At 1 o'clock of the afternoon on the day he met his death, he came up on deck, and stopped for a moment to look over the ship's rails, while an iron tub, full of fishplates, was being lowered into the hold. At that instant the mast broke and the boom fell, striking him on the back of the neck and killing him instantly. He seems to have been intelligent, sober, and thrifty. He was about 20 years and 3 months old. He was earning \$75 per month, in addition, of course, to his board and lodging on ship.

The law of Maryland limits the amount which parents can recover for the death of an infant child to such pecuniary benefits as they can reasonably expect before he attains the age of 21 years. Agricultural & Mechanical Ass'n v. State, Use of Carty, 71 Md. 87, 18 Atl. 37, 17 Am. St. Rep. 507. Under that limitation, I find the recoverable pecuniary damages to the equitable libelants to be \$400, and that is all that is involved in this case.

It has nevertheless been sharply contested as between the two respondents, with the usual flat contradiction in testimony. The mast, which was 18 or 19 inches in diameter, was rotten. Its outer shell for a depth of 2 or 3 inches was sound, and then there were about 3 inches of decayed wood. Some of the expert and apparently disinterested witnesses who examined it said that the 8 inches of heart, while not rotten, were dead, and had lost their strength. Others claimed that they were sound and strong. There is no very satisfactory evidence as to the age of the mast. The witnesses on behalf of the steel company said that it had been put up about two years before the accident. While they claim to know from whom it had been purchased. their evidence was not corroborated by the production of bills showing when it was bought. Competent witnesses for the equitable libelants thought that it was much older. That it rotted was doubtless due to the fact that certain oak strips had been nailed to it to protect it at a point where it was likely to be chaffed by the tackle connected with the boom. Water had apparently gotten in between it and these oak strips, and had rotted it. The liability to decay at such a place is well recognized, but it does not appear that the Bethlehem Steel Company had ever taken any pains to ascertain whether it had taken place. On the other hand, I am persuaded that it would not have broken, except for the negligence of the employés of the stevedore. It knew that not more than 30 bundles of fishplates should be raised at any one time, and so instructed its employés. I am satisfied that the immediate cause of the accident was the attempt on the part of some of them to raise twice as many in one load. I believe the witness who so testified. The stevedore replies that even 60 bundles would not have broken the mast, had it been thoroughly sound. Perhaps so, but that

does not excuse the doing of what was clearly understood to be dangerous.

Both the respondents were in fault—the steel company because it did not closely inspect the mast at a point where decay was quite possible. If it had done so, it would have discovered that not only the mast was rotten, but the inside of the oak strips had themselves become decayed. The stevedore attempted to raise a load that it knew to be excessive.

A decree for \$400 will be passed in favor of the equitable libelants against both respondents; between themselves, they will be required to contribute equally to its payment.

UNITED STATES v. BUCKINGHAM et al.

(District Court, D. Oregon. November 24, 1919.)

No. C-8332.

1. Internal revenue \$\ifterlighthandsquare 45\top-Penalty for setting up still without begistration with collector.

The penalty of \$500, prescribed by Rev. St. § 3258 (Comp. St. § 5994), for having possession of a still set up without having registered the same with the collector, which is found in the same sentence prescribing fine and imprisonment for the offense, is part of the punishment for the crime, in view of the whole nature of the statute, and a defendant, who has served his term and paid his fine, but has not paid the penalty, is not entitled to discharge from imprisonment.

2. STATUTES \$\infty\$192\to\$Construction.

The wording of the statute as a whole determines the nature of the proceeding for its enforcement, and the use of particular technical terms is not necessarily conclusive.

H. W. Buckingham and Virgil Clover were convicted of violating Rev. St. § 3258, by having in their possession and custody a still and distilling apparatus set up, without having registered the same with the collector. On motion by defendant Buckingham to be released from custody. Motion denied.

Barnett H. Goldstein, U. S. Atty., and John C. Veatch, Asst. U. S. Atty., both of Portland, Or.

E. L. Fraley, of Portland, Or., for defendant Buckingham.

WOLVERTON, District Judge. The defendants were indicted and charged, among other counts, with a violation of section 3258, Revised Statutes (Comp. St. § 5994), for having in their possession and custody a still and distilling apparatus set up, without having registered the same with the collector. Each of the defendants entered a plea of guilty, and each was adjudged to pay a fine of \$100, and to pay a penalty of \$500, and to be imprisoned in the county jail for 30 days.

The defendant Buckingham now moves to be released from custody, having paid his fine of \$100 and served his sentence of imprison-

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ment of 30 days, but without the payment of the penalty of \$500; this because, as it is urged, the penalty is a matter for civil action, and

not for criminal procedure by way of indictment.

[1] The question involved depends upon whether section 3258 is a criminal or a civil statute. The fact that it subjects a violator of its provisions to fine and imprisonment is strongly persuasive of its character as a criminal statute. It provides, also, for the imposition of a penalty. The penalty, as an element of liability, would seem to have been imposed in contradistinction to that of fine and imprisonment; else why should not the violator have been subjected to fine and imprisonment only?

Ordinarily a civil action is appropriate to the recovery of a penalty. But, viewing the statute broadly, it is a part of the regulations of Congress for the imposition and collection of internal revenue. It imposes upon a distiller, or one who has in his possession a distilling apparatus set up, certain duties toward the government, and imposes a punishment for nonobservance of those specific duties. This is indicative of an undoubted intendment that the law shall be enforced through criminal procedure. While a penalty, so denominated, is also imposed, the statute makes no exception respecting its recovery by civil procedure. "It is a general rule," says the court in United States v. Moore (C. C.) 11 Fed. 248, 250, "that where a statute either prohibits a matter of public grievance or commands a matter of public

Mr. Justice Miller, sitting in the Circuit Court in United States v. Ulrici, 3 Dillon, 532, 534, Fed. Cas. No. 16,594, speaking of the meaning of the words "penalty," "forfeiture," "liability," and "prosecution," as used in these very statutes respecting internal revenue, has

convenience, every such disobedience is indictable."

this to say:

"But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by Congress to include all forms of punishment for crime."

This interpretation is adopted and approved by the Supreme Court. United States v. Reisinger, 128 U. S. 398, 402, 403, 9 Sup. Ct. 99, 32 L. Ed. 480. But, if it be conceded that the penalty, so called, may be recovered by a civil action as well as a criminal prosecution, it is still as a punishment for the infraction of the law, and, quoting from the Supreme Court:

"The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." United States v. Chouteau, 102 U. S. 603, 611, 26 L. Ed. 246.

See, also, 30 Cyc. 1335, 1336, 1337.

[2] The wording of the statute as a whole determines the nature of the proceedings for its enforcement, and the use of particular technical terms is not necessarily conclusive. 21 Standard Encyclopedic of Procedure, 262, 263.

Considering, therefore, the nature of the statute in question, there being no exception requiring a civil action for a recovery of the pen-

alty imposed, I am led to the conclusion that the procedure is by way of indictment, and that the penalty and the fine and imprisonment are to be imposed and enforced in the same criminal action.

The motion will be denied.

VOGUE CO, v. BRENTANO'S et al.

(District Court, S. D. New York. November 10, 1919.)

1. TRADE-MARKS AND TRADE-NAMES @=3(4)—DESCRIPTIVE NAME.

The word "Vogue," used as the name of a magazine, the contents of which relate, not only to fashions, but also to other matters of household interest, is not so descriptive as to preclude its use as a common-law trade-mark.

On motion for preliminary injunction, the trade-mark "Vogue," as the name of a magazine, *held* infringed by the use of "La Vogue Parisienne" as the name of another publication.

In Equity. Suit by the Vogue Company against Brentano's and Arthur Brentano. On motion for preliminary injunction. Granted.

Macdonald De Witt, of New York City, for plaintiff.

Sackett, Chapman & Stevens, of New York City (Edward L. Stevens, of New York City, of counsel), for defendants.

KNOX, District Judge. For upwards of 27 years the plaintiff and its predecessors in interest have published a magazine by the name of Vogue. This periodical is issued twice a month, and has acquired an American circulation of more than 150,000 copies per issue. It is also published in two or more places abroad, where it has a circulation of 55,000 copies per issue.

The contents of the publication have chiefly to do with fashions of women's dress, and these fashions purport to represent the best and most up-to-date creations of those who design (principally in Paris) the ever-changing articles of women's dress. In addition, however, to the characteristic feature alluded to, the magazine gives space to other subjects, among which may be mentioned home decoration and architecture, art, and the stage. It carries a great variety of advertising, from which is derived a gross annual income in excess of \$1,000,000. The magazine is published upon pages of 10x13 inches in size, and the pages per issue vary in number from 160 to 208. The selling price is 35 cents per copy. The name or trade-mark of Vogue was registered February 7, 1893, again June 16, 1908, and finally May 20, 1919.

Very recently the defendants have begun the circulation within the United States of a publication bearing the title or name of La Vogue Parisienne. This publication differs materially in size and appearance from the magazine known as Vogue. The sale price of La Vogue Parisienne is \$2 per copy, and it is the expressed intention of its pub-

lishers to produce 10 issues per year. It relates entirely to fashions, and its pages are in the form of loose sheets, upon which are printed handsomely illustrated figures which purport to show the latest Paris fashions. Such reading matter as appears—and this is largely descriptive of the fashions portrayed—is in French. This periodical is intended to be, primarily, a trade publication, the appeal of which is directed almost exclusively to those engaged in the manufacture of women's wear. Upon the cover sheet there appears the following disclosure as to its publishers:

BRENTANO'S Editeurs 37, Avenue de l'Opéra Paris

Each of the fashion plates contained therein shows the name of the publication, together with the Paris, London, and New York addresses of the publishers. The name, however, of the latter does not ap-

pear on the plates.

With a recital of the foregoing facts, which recital might perhaps be somewhat more amplified as to detail, the plaintiff comes into court and asks, pendente lite, an injunction restraining the defendants from "in any way using or making use of the word, name, or designation Vogue as the title or part of title, or as the name or part of the name, of any magazine, periodical, or other publication, from using or making use of said word 'Vogue' as part of the title of the said periodical La Vogue Parisienne," and from selling the same under the title to which objection is made.

I think it may safely be said at the outset that aside from the title employed, or rather the name of the periodical, the elements of unfair competition, which usually are present in cases of this kind, are largely absent. Size, appearance, and general characteristics are so distinctive as that La Vogue Parisienne would not be purchased in the belief upon the part of the purchaser that he was getting the magazine Vogue. Nevertheless I am forced to the conclusion that, once the act of purchase is complete, a stranger who would see the plates contained therein, with no name thereon of the publishers, would, if already acquainted with the authority and quality of the fashions ordinarily published by the Vogue Company, come to the belief that the plates of La Vogue Parisienne were a more elaborate and ornate showing of Vogue fashions. I should say that such belief would be not only possible, but most probable as well.

It is suggested by the defendants that the plates of La Vogue Parisienne are obviously intended for framing, and it follows that when this is done any virtue there may be in the printing of "Brentano's, Editeurs," on the cover page, will cease to exist, and for all that will then appear the plates might well be conceived to be a colored supplement, as it were, of the magazine Vogue. But, however this may be, I assume I would not have jurisdiction of the case, were it not for the trade-mark feature of the litigation, and I proceed to a very brief con-

zideration thereof.

[1] The validity of the trade-mark is objected to upon the ground that plaintiff has no exclusive trade-mark in the word "Vogue" at common law or under the 1893 registration. It is said in support of this proposition that "Vogue" is a descriptive name, and not a proper subject for an exclusive trade-mark (except as provided in the Trade Mark Act of 1905 [Act Feb. 20, 1905, c. 592, 33 Stat. 724]), but rather a word publici juris, incapable of exclusive pre-emption by any individual.

This to a degree is true, but I do not believe that the word "Vogue," as applied to the name of a magazine of the character of complainant's publication, is so descriptive as to preclude its use as a trade-mark at common law. In a sense it is more or less descriptive, but in the use complainant makes of the word I think it may be said to be arbitrary and somewhat fanciful. It is not necessarily descriptive of a magazine making an appeal such as Vogue does to the general public of the country. A perusal of the table of contents of the copies offered as evidence upon this hearing refutes, I think, the suggestion that Vogue is so descriptive in character as to make it impossible for a valuable property right in its use for the name of a publication to be acquired. As to the secondary meaning that has attached itself to the word by reason of its exploitation by the complainant, there can be no question.

[2] The discussion of the matters involved herein might be considerably extended, but entertaining as I do the belief that the equities here shown justify the issuance of a preliminary injunction, it will suffice to say that I think the case comes within the authority of Gannert v. Rupert, 127 Fed. 962, 62 C. C. A. 594, and the injunction may issue.

Bond fixed at \$5,000.

SUTTER et al. v. CITY OF NEW YORK.

(District Court, E. D. New York, November 6, 1919.)

COLLISION \$\infty\$102-Negligent navigation in snowstorm.

A collision in Buttermilk Channel between a ferryboat and a smaller boat, in a heavy snowstorm which prevented them from seeing each other until close, held due to faults of both vessels in going at excessive speed and failing to observe the rules for fog or storms.

In Admiralty. Suit for collision by Alphone Sutter and another against the City of New York. Decree for libelants for half damages.

Foley & Martin and J. A. Martin, all of New York City, for libelants

Lamar Hardy and George P. Nicholson, both of New York City, for respondent.

CHATFIELD, District Judge. On March 22, 1916, the municipal ferryboat Bay Ridge was proceeding from the slip near the Battery in Manhattan to the slip at Thirty-Ninth street, Brooklyn, on the trip beginning at 9:20 a. m. The ferryboat proceeded through the Butter-

milk Channel, encountering a strong flood tide all of the way. She was on her compass course, but apparently a little nearer than usual to Brooklyn because of a blinding snowstorm, which made the Brooklyn shore line only an indistinct blur. This compass course was changed, as was the custom, when the boat reached the turn of the shore at Red Hook. In order to proceed through the narrower Red Hook Channel to the Thirty-Ninth street ferry slip, the ferryboat ordinarily does, and apparently did on this morning, make a sharp turn under a starboard helm, going closer to Brooklyn, but still leaving room for any boat coming up at a uniform distance from the Brooklyn shore to pass the ferryboat port to port. The snow in the air was so dense that small boats were visible only some 250 or 300 feet. The ferryboat was visible nearly twice that distance, and was observed just as it started to make the turn in question by the Stanley Howard, which had come up from Fifty-Seventh street, through the Bay Ridge Channel, and was intend-

ing to proceed up the Buttermilk Channel to the Battery. The Howard was a converted oyster boat, which was then being used by certain divers for wrecking operations in the North River. They intended to call at the Battery, pick up the superintendent, and, if conditions were right, reach the wreck in the North River at slack high water. The Howard was not capable of great speed, but with the flood tide was evidently proceeding up the channel at a rapid rate. She had on board a large quantity of dynamite, and was displaying from her mast a large red flag to indicate the presence of explosives. She was a small boat, and apparently cut across from the Bay Ridge Channel to the Buttermilk Channel on a course which would intersect that of the ferryboat Bay Ridge, inasmuch as the Howard was intending to pass up the Buttermilk Channel on the starboard or Brooklyn side of midchannel. When she first sighted the ferryboat, she blew a onewhistle signal. Just after this one-whistle signal, the ferryboat sighted the Howard and blew a two-whistle signal to indicate to the Howard that the ferryboat was making a turn toward Brooklyn and was in effect crossing the Howard's bow. The Howard, which had already ported her helm, so as to go further inshore and cross the ferryboat's bow, answered with another single whistle. These whistles were followed immediately by alarms, and the ferryboat reversed. Just before the collision the captain of the ferryboat, observing the red flag and fearing the consequences, stopped the engines of the ferryboat, thereby preventing probable destruction of the Howard, with a possible explosion of the dynamite.

The Bay Ridge has a propeller wheel at each end, operated by a single shaft. It is evident that, with both propellers reversing, the ferryboat did not succeed in obtaining sternway, or even in stopping her headway, as the ferryboat cut into the Howard with considerable force. The ferryboat, proceeding on her route against the flood tide, was evidently moving at what was under those conditions a rapid rate of speed.

The witnesses upon the ferryboat are in accord that the Howard, when first sighted, was approaching and was off the starboard bow of the ferryboat. This is in exact agreement with the testimony of the witnesses for the Howard. But the witnesses for the Bay Ridge insist

that the Howard when first sighted was headed in such direction that, if she had not ported her helm and attempted to cross the Bay Ridge's bow, she would have passed the Bay Ridge from 50 to 150 feet port to port.

It must be remembered that the Bay Ridge was turning toward Brooklyn at the time. When coming down Buttermilk Channel the Bay Ridge and the Howard would have been on crossing courses, but with the Bay Ridge on the Howard's starboard hand. Under these circumstances it was the duty of the Howard to keep out of the way, so that the boats could pass port to port. This she evidently tried to do, and there is no basis for the suggestion that the Howard was going across Buttermilk Channel toward New York Bay and below Governors Island.

If the Bay Ridge, therefore, had sighted the Howard before making her turn under a starboard helm, it was the duty of the Bay Ridge to continue her course and to make the turn under the Howard's stern. If the Bay Ridge had completed her turn before she was sighted by the Howard, and the boats were on crossing courses, the Bay Ridge was still obligated (as she had the Howard upon her starboard hand) to keep out of the way, and when she indicated by a two-whistle signal that she would cross the Howard's bow, she assumed the responsibility for that maneuver, unless the Howard thereafter deliberately or carelessly changed her course. The testimony shows satisfactorily that the Howard, not only did not change her course, but that she had already indicated by whistle that she was passing to port of the ferryboat, and her movement toward Brooklyn was in pursuance of the navigation which she herself had instituted, and as to which the ferryboat responded by a cross-signal. The lookouts upon the ferryboat reported that the Howard was approaching to starboard, and the ferryboat was plainly at fault, unless the Howard was at all times on a course to pass outside of the ferryboat, after the boats were visible to each other.

It is impossible to find, after hearing the witnesses, that the pilot of the Howard was attempting to navigate a boat loaded with dynamite directly across the bow of a rapidly approaching ferryboat, under a wide sheer to starboard and with the giving of a contradictory whistle to the two-whistle signal of the ferryboat. In addition, the witnesses for the ferryboat testify that the Howard was 300 feet away when first observed. If in proceeding 300 feet she crossed the intervening space of 150 feet, and got across the bow of the ferryboat, which was at the same time turning toward Brooklyn under a starboard helm, the Howard must have been trying to dynamite the ferryboat rather than to navigate safely to her destination. The evidence does not justify any such finding, but does lead the court to conclude that the ferryboat was sighted by the Howard before the Howard was sighted by the ferryboat, that the course of the ferryboat was then changed, and that the Howard had the right of way.

If this accident had happened in clear weather, responsibility therefor would rest for this reason entirely upon the ferryboat. But the ferryboat seems to have had lookouts and officers attentive to their work

and carefully observing the handling of the boat, in view of the storm conditions. The captain of the ferryboat used good judgment in reversing his boat until just before the collision, and then stopping his engine to avoid smashing the Howard, with possible explosion of the dynamite. The entire maneuver carried the two boats toward the Brooklyn shore, as they swept up into the Buttermilk Channel, where the Howard submerged and finally sank close to the Brooklyn piers, toward which she may have been drawn by a water boat which attempted to tow her ashore.

It would appear, therefore, that the collision was further to the south than the location fixed by the captain of the Howard, who was not definite in his description of the streets near which the accident occurred. There was some testimony that the crew of the Howard called the attention of the captain to the fact that they had questioned the advisability of proceeding in the snowstorm. It seems likely from the testimony of all the witnesses that the trip to the Battery was unnecessary, except to get in communication with the inspector, as the work done at the wreck would have to be postponed on account of the storm. The Howard was making, with the help of the flood tide, speed which in a fog would have been dangerous, and certainly would have rendered the Howard responsible in case of collision. On the other hand, the ferryboat was proceeding with greater speed through the water, and the two boats were approaching each other under such conditions of light and obstructed vision that alert lookouts on the ferryboat did not discover the Howard until she was within 300 feet. On the other hand, the lookouts on the Howard, while they discovered the ferryboat, evidently did not observe that she was turning across their bow, and the captain gave a one-whistle signal, when no signal at all might have been necessary, if the weather had been clear and the Howard had not attempted to keep inside of the ferryboat's course.

Under these circumstances, as in the case of a collision in a fog, it must be held that both boats were failing to observe the rules and to apply the ordinary rules of navigation, so as to make that navigation

safe in a storm.

The libelants may have a decree for one-half their damages, and with costs.

UNITED STATES v. COGHLAN et al.

(District Court, D. Maryland. November 3, 1919.)

TAXATION 5-5-PROPERTY OF UNITED STATES SHIPPING BOARD NOT SUBJECT OF TAXATION.

Property acquired and owned by the United States Shipping Board Emergency Fleet Corporation, owned and operated solely by the United States for governmental purposes, held not subject to state taxation.

In Equity. Suit by the United States against William F. Coghlan and others, composing the Board of County Commissioners, and Nicholas Robley Merryman, County Treasurer, of Baltimore County, Md. Decree for complainant.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md., and Wm. Y. C. Anderson, of Philadelphia, Pa., for the United States. T. Scott Offutt, of Towson, Md., for defendants.

ROSE, District Judge. The county commissioners for Baltimore county assessed for taxes for the year 1919, certain land standing in the name of the United States Shipping Board Emergency Fleet Corporation, hereinafter called the "Fleet Corporation," and improved by it by the erection thereon of a number of workmen's dwellings, for the use of persons employed in shipbuilding in the vicinity, and also certain slips and shipyard shops and appurtenances standing on land

belonging to a private shipbuilding company.

By the terms of the contract between the Fleet Corporation and the shipbuilding company, the government constructed or furnished the money for the construction of these slips and buildings. They were to be used by the shipbuilding company in building ships for the government. In certain contingencies, the shipbuilding company had the right to buy them at an appraisement. If it did not exercise the privilege, the government had the right to remove them within a limited time, and if such removal did not take place they then became the property of the shipbuilding company.

The United States filed a bill in equity in this court to annul such assessment and to enjoin the county commissioners and the treasurer of Baltimore county from taking any steps to collect the taxes upon such assessment. No request was made for a preliminary injunction,

and the case proceeded in ordinary course to final hearing.

It was shown that all the stock of the Fleet Corporation was owned by the government, and that all it did was done for government account, and that all the profits which it made would inure to the government, which would have to stand all the losses. Under such state of facts, it is unnecessary to inquire whether for all purposes the Fleet Corporation is the government. It suffices that it is a governmental agency, exclusively employed in governmental work, and as such its

property is not liable to state taxation.

At the hearing it was stated that, since the levy of the tax and the filing of the bill in this cause, but after some months of the taxing year had expired, the Fleet Corporation sold and conveyed the dwellings and the land upon which they stood to private interests. Nevertheless, as the tax was assessed for the entire year, and at the time it was assessed the property was not taxable, the levy must be set aside. In Maryland, so far as I know, there is no authority to impose and collect taxes for a part of the year, and as the result of vacating the original levy the property may escape taxation for the entire year. I do not decide that it will. I will leave such questions to be passed upon by the taxing authorities and the present owners of the land, unembarrassed by anything I may do or say.

The fact that the slips and shops are on land belonging to the shipbuilding company does not so long as the things taxed are the property of an agency of the United States, and are used exclusively for governmental purposes, make them taxable. It is not intended here to intimate any opinion as to what the rights of the state would be if this property were at any time put to other use.

A decree declaring the levy void and enjoining its collection will be

passed.

WALKER et al. v. STUART.

(District Court, D. Maryland, October 28, 1919.)

MORTGAGES €=356—LENGTH OF PUBLICATION OF NOTICE OF FORECLOSURE SALE.

Under Act March 3, 1893, § 3 (Comp. St. § 1642), requiring notice of sale
of real estate under decree by publication "once a week for at least four
weeks prior to such sale," the first publication must be at least four weeks
prior to date of sale.

In Equity. Suit by William Walker and others against Thomas Keating Stuart, trustee. On exceptions to confirmation of sale of real estate. Exceptions sustained.

Walter H. Buck, of Baltimore, Md., for trustee.

Robert N. Baer, of Baltimore, Md., for exceptant Davis Coal & Coke Co.

Haman, Cook, Chesnut & Markell, of Baltimore, Md., for exceptant Frev.

Frederick J. Singley, of Baltimore, Md., for exceptant McCulloh.

ROSE, District Judge. Land was ordered sold by a decree, the language of which was substantially that of Act March 3, 1893, c. 225, 27 Stat. 751 (Comp. St. §§ 1640–1642). On the 14th of last June, the trustee, after giving the notice which he understood to be required, at the courthouse door in Garrett county, in which the land lay, sold it for \$40,200, to the Davis Coal & Coke Company.

The purchaser excepts to the ratification of the sale, on the ground that, although it was advertised in 4 successive weekly issues of the proper newspapers, namely, in those of May 22d, May 29th, June 5th, and June 12th, the first publication was only 23 days before the day of sale, and was therefore not a compliance with the statute, as the latter was construed in Wilson v. Northwestern Mutual Life Ins. Co., 65 Fed. 38, 12 C. C. A. 505.

The trustee replies that notice was given in each of 4 successive weeks. He cites many state cases construing similarly worded enactments, showing that he did all the act required. If it had not been possible so to understand the statute, the very competent and careful trustee would have seen to it that the first advertisement was made at least 29 days before the sale. Nevertheless, Wilson v. Northwestern Mutual Life Ins. Co. was decided 18 months after the act was passed. Its authority has remained unassailed for a quarter of a century, and may not now be questioned.

In that case, however, the exception to the confirmation was taken by one of the persons entitled to share in the proceeds of sale, and the trustee points out that in Lansburgh v. McCormick, 224 Fed. 874, 140 C. C. A. 296, the Circuit Court of Appeals for this circuit held that a purchaser took good title, although the land was not sold on the premises, or at the courthouse door, as the statute requires; none of the parties concerned in obtaining the highest price for the land having made any objection to the sale. Cumberland Lumber Co. v. Tunis Lumber Co., 171 Fed. 355, 96 C. C. A. 244, was distinguished.

The land now involved was sold under a deed of trust for the benefit of creditors. That deed, made back in 1884, directed payment to certain creditors in the order specified, and then provided that any surplus should be distributed among all the others. Many years ago one of the latter class, whose claim antedates the making of the deed, intervened in this cause. She now excepts to the ratification of the sale. She is entitled to complain that the land was insufficiently advertised. Wilson v. Northwestern Mutual Life Ins. Co. is directly in point.

The exceptions must be sustained.

PHOTOPLAY PUB. CO. v. LA VERNE PUB. CO., Inc., et al. SAME v. EASTLACK et al.

(District Court, E. D. Pennsylvania. November 5, 1919.) Nos. 1749, 1597.

Trade-marks and trade-names = 73(1) - Unfair competition; titles of trade publications.

The first user of the word "Photoplay" in the title of a publication devoted to the art suggested by the word *held* not to have the exclusive right to such use, but to be entitled to protection only in so far as the word had come to be associated with and to designate its publication, against the imposition of other publications on purchasers as its own.

In Equity. Suits by the Photoplay Publishing Company against the La Verne Publishing Company, Incorporated, and the Central Press Company, Incorporated, and against Frank T. Eastlack and others. Decrees for defendants.

Robert W. Archbald, of Philadelphia, Pa., and MacDonald De Witt, of New York City, for plaintiff.

Charles S. Wesley and Wm. M. Montgomery, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The legal merits, or lack of merit, of this case, depends upon a distinction which is not a little difficult to state. In any business activity, the one who has created, or is the first to discover, a special field which he occupies alone or is striving to cover, resents as a wrong the intrusion of any one else upon his chosen field. This feeling is so general, if not universal, that it must have some basis in the principles of what is called natural justice. The first comer feels that he has as much right to what he has created or discovered as the patentee has to his invention. This feeling, being common to all, is shared by publishers. Such a claim of right, however,

the law, for obvious reasons, cannot sanction. On the other hand, when the first publication has made a name for itself, and is known and is in demand by that name, and the second publication reaches out to take the custom or patronage, which is claimed by the first publisher, by falsely imposing upon such patrons the second publication as the first, the law pronounces this false personation to be a wrong and affords the first publisher protection and redress. We get this part of the thought of the suggested distinction clearly by a contrast between a patent or other exclusive proprietary right granted by statutory law and the common-law right recognized in the doctrine of unfair competition. The whole thought is really presented by this contrast, but there is another part of it which is not made so clearly to appear.

Among the divisions commonly made of the broad field covered by all publications, there is the special field covered by what are called "trade publications." They are emphatically "trade journals." They devote themselves to some special interest, class, trade, profession, art, or business. Sometimes (although this is not usual) some one has created this field. Some one, however, is often the first to discover and to seek to occupy it by a publication. If he can appropriate it, he has something of great value. He seeks to get possession of it by giving his publication a name which will identify it with the field it covers. Others are not slow to see that the field is a rich one, and hence conflicts such as that in the present case. The first publisher feels that he has the right to exclude altogether. He does not make this broad claim. however, but restricts it to a right to prevent any other publication from using a name which will accomplish what his selection of a name was intended to accomplish—identify, as we have said, the publication with the field. Even this he knows to be too bold a claim to be upheld, if plainly set forth; so he tries to bring it within the application of the doctrine of unfair competition, and get under this as a mantle of protection. It is thus seen that the determination of his rights depends upon whether or not the doctrine has application to the fact situation which he presents.

When any new art comes into existence it sooner or later comes to be known by a name, word, or phrase, which in turn becomes a part of the common speech of the people. Some little time often elapses before the word or phrase is adopted into our language. Sometimes these words are tried, used for a while, and are then dropped and a wholly new word finds acceptance. The origin of such words, although they may be of recent origin, is almost always obscure, and the subsequent search for it is interesting, but usually fruitless. The development of the art brings into its terminology additional words to express shades of meaning necessitated by divisions and distinctions. Sometimes the words are coined by some one connected with the early developments of the art, and are fastened upon it by persistent iteration and reiteration through advertising or other means. Sometimes a word used in another art is borrowed from the old art and transferred to the new. Sometimes the borrowing is from another language. Whenever it happens that the word which comes to be incorporated

in the common speech has been coined by one who was the first to enter upon the new commercial field which the new art has brought into existence, the author of the word claims the right to the commercial

proprietorship of all which the word has come to include.

Many concrete illustrations may be found of the correctness of these general statements. The words "bicycle" and "motorcycle" used in one art; "automobile," "limousine," "sedan," "jitney," etc., used in another; "kodak," "kryptoc," and scores of other words used in still other arts—afford us illustrations. People are to-day feeling around for words which may be used in a now rapidly developing art and the old familiar term of "flying machine," with which we have been familiar since the days of Darius Green, is meeting rivals in "aeroplane" and other words. The military science and art is crowded with words which illustrate what goes on in the expansion of the vocabulary of common speech. Indeed, this is true of every science, art, profession, business, and trade.

The plaintiff in this case sets up something of some such claim to the exclusive occupancy of the special field which belongs to what may be broadly called the moving picture art, or to at least that part of it to which the designation "photoplay" attaches. Plaintiff would doubtless repudiate a claim of this scope, but in a very substantial sense this is his claim. "Photoplay," he claims, is a coined word. It is what is called a proprietary word. It has become, it is true, a part of common speech, and means an art in which a great many people are interested. When he calls his publication a Photoplay Journal, Magazine, News, or by any combination of title words, in which the word "photoplay" appears, it means that the publication is devoted to matters of interest to people who are interested in that special branch of the picture play art. Any one asking for that kind of a publication will ask for it by using that word. In consequence, if he can monopolize the use of that word, he will, in a very substantial sense, monopolize the business of publications devoted to that art. Just what his rights are, and how far his claim of right has the support of the law, depends, as we have said, upon the fact situation out of which his claim

The following fact findings and statements of the principles of law applicable to these fact situations, respectively, will disclose the grounds of fact and law upon which the present ruling is made.

1. The plaintiff made use before the defendant of the word "Photoplay" as part of the title of his publication, and its publication had become associated in the minds of a large number of people as one devoted to the art suggested by that word. It is further found as a fact that the word "photoplay" has come to be in common speech the designation of the art above indicated, and the appropriate and indeed the only word of our language which by and of itself designates the special branch of the motion picture art to which it is applied. The right to the exclusive use of the word "Photoplay," as part of the title of any publication of the general character of the publications of plaintiff and of defendant, is a right of very great commercial value.

The conclusion of law found is, however, that no such right is conferred by or arises out of the fact finding made, and that plaintiff does not have a legal right to the exclusive use of the word "Photoplay" in its title, and that the defendant has the right to its use within the limits next stated.

2. Plaintiff has the right to the use of the title adopted for its publication, and to its exclusive use, so far as that title has come to be associated with and to designate by name its particular publication, and is further entitled to protection against another publication being imposed intentionally or otherwise upon purchasers as plaintiff's publication.

The fact finding is made, however, that there has been no purpose or intention on the part of defendant to deceive, and in fact no deception of, intending purchasers into the belief that the publication of the defendant was that of the plaintiff. The purpose and value of the use of the word "Photoplay" as part of the title of each of these publications was to inform intending purchasers that the publication was devoted to the interests of the art indicated by that word, and the defendant intended by the use made of the word "Photoplay" to share in, and has in fact shared in, the patronage of those who wished to buy such a publication. The use of the word, however, has not been with the intent and purpose of palming off the publication of the defendant for that of the plaintiff, nor has defendant's use of the word "Photoplay" been such as that there would be any reasonable expectation that any one knowing of and wishing to buy the publication of the plaintiff would be led into mistaking the one publication for the other.

3. The defendant is entitled to a decree dismissing the plaintiff's bill, with costs.

The foregoing conclusions of law have support in all the cases ruling the question now presented. The following citations of some of them are taken from the briefs submitted: Gannert v. Rupert, 127 Fed. 962, 62 C. C. A. 594; Social v. Howard (C. C.) 60 Fed. 270; Suburban Press v. Phila. Suburban Pub. Co., 18 Pa. Dist. 997; Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169; Lawrence v. Tennessee, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; Standard Paint Co. v. Rubberoid, 224 Fed. 695, 140 C. C. A. 235; Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550; Amoskeag Mdg. Co. v. Trainer, 101 U. S. 51, 25 L. Ed. 993; Goodyear Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 538; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144.

A formal decree in accordance with this opinion may be submitted, but no decree is made until such formal decree has been made and filed.

In re LEVY.

(District Court, E. D. Pennsylvania, November 5, 1919.)

No. 6094.

On reargument on certificate for review of order of referee, an amended petition not before the referee cannot be considered.

2. BANKRUPTCY €==372—CLOSING OF ESTATE; FINAL MEETING OF CREDITORS.

The estate is not technically closed, notwithstanding the referee's declaration of closing; there having been no final meeting of creditors on notice, as provided by Bankruptcy Act, §§ 55f, 58 (Comp. St. §§ 9639, 9642).

3. BANKRUPTCY \$\infty\$ 372—Void declaration of closing estate; order of reopening to collect assets.

Bankrupt's estate, not being technically closed, because of no final meeting of creditors, notwithstanding referee's declaration of closing, is still open on the original reference for collection of assets and administration, and order to reopen is superfluous.

4. Bankruptcy $\Leftrightarrow 418(1)$ —Power of bankruptcy court over concealed assets after discharge.

The estate not having been technically closed, though bankrupt has been discharged, with the effect, under Bankruptcy Act, §§ 1, 17 (Comp. St. §§ 9585, 9601), of releasing him from his provable debts, notwithstanding lapse of the time limited by sections 15 and 29d (sections 9599, 9613) for revoking his discharge and prosecuting him for concealing assets of the estate, the power of the bankruptcy court under section 2(7), being section 9586, to collect assets concealed by bankrupt and others, title to which was under sections 21e and 70 (sections 9605, 9654) vested in the trustee by the adjudication, continues and may be exercised by summary proceedings, with appropriate process.

On petition for reargument and leave to amend petition for order on bankrupt. Order of reversal vacated and leave to amend granted. For former opinion, see 259 Fed. 316.

See, also, 259 Fed. 314.

Edwin Fischer, of Philadelphia, Pa., for petitioner.

Maurice J. Speiser and Jacob I. Weinstein, both of Philadelphia,
Pa., for bankrupt.

THOMPSON, District Judge. The bankrupt on July 13, 1917, filed his petition for discharge. The certificate of the referee in proper form having been filed, certifying conformity by the bankrupt with the requirements of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), and there being no objection thereto, the bankrupt was, on August 29, 1917, duly discharged. The certified record of the proceedings before the referee was filed February 4, 1918, together with the referee's certificate that the case was closed. Upon the petition of Wick Narrow Fabric Company, a creditor, averring that the bankrupt had concealed assets from the trustee, the court, on April 4, 1919, ordered that the case be reopened.

The bankrupt having, on April 21, 1919, filed a petition to vacate, annul, and set aside the order reopening the case upon the ground of

want of notice, the prayer of that petition was denied on May 1, 1919. See Judge Dickinson's opinion, In re Levy (D. C.) 259 Fed. 314.

The case upon reopening having been referred to Edward F. Hoffman, Esq., the referee, upon the petition of the trustee, entered an order upon the bankrupt to pay over to the trustee the sum of \$4,867.75. Upon certificate for review of that order, the court, on June 28, 1919, filed an opinion (In re Levy [D. C.] 259 Fed. 316), reversing the referee's order, citing Judge Dickinson's opinion of May 1, 1919, supra, to the effect that the reopening of the case was limited to distribution purposes and in no way affected the bankrupt, and holding that the petition for an order to pay was insufficient in that it did not aver possession or control by the bankrupt of the fund in controversy.

On July 17, 1919, the trustee filed the present petition setting out that upon further investigation of the proceedings, it appears that the referee closed the case without calling or holding a final meeting of the creditors, which, it is contended, renders the action of the referee in declaring the case closed, void and of no effect as not in conformity

with section 55f of the Bankruptcy Act, which provides:

"Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered"

—and section 58, which provides:

"Creditors shall have at least ten days' notice * * * all meetings of creditors."

The petition also contains an averment that the trustee has information which will enable him to state what sums were received by the bankrupt and what sums are still owing to him by the Standard Jobbing Company.

The application of the trustee is for a reargument, and for a review of the opinion of the court reversing the order of the referee, and for leave to file an amended petition for an order on the bankrupt to pay.

[1] What was before the court for consideration as a basis of the opinion of June 28, 1919, was contained in the certificate for review, and upon reargument the court could not consider an amended petition not before the referee.

The petition, however, does raise two questions for consideration: (1) Whether the declaration of the closing of the estate by the referee without a final meeting of creditors upon ten days' notice is void and of no effect; and (2) whether the trustee should be allowed to file an amended petition for an order of the referee upon the bankrupt to pay, based upon allegations of money in the possession or control of the bankrupt which he has not turned over to his trustee, but has concealed.

[2, 3] Under the authority of Clark v. Pidcock, 12 Am. Bankr. Rep. 309, 129 Fed. 745, 64 C. C. A. 273, the petition and an inspection of the record have made it apparent that the estate has never been technically closed in accordance with the provisions of the Bankruptcy Act. That being so, the estate is still open upon the original reference to the referee for collection of assets and administration and the order of April 4, 1919, to reopen the estate is merely a superfluity.

[4] The question whether the trustee should have leave to file an amended petition before the referee depends upon whether the estate never having been technically closed, the referee, after the bankrupt's discharge, has jurisdiction in a summary proceeding to make an order upon the bankrupt or upon the Standard Jobbing Company to pay over the sums in their possession or control belonging to the bankrupt estate, for it would be of no avail otherwise to proceed further.

It must be determined therefore whether the discharge of the bankrupt has any other effect than that included within the definition of section 1, or that declared by section 17 of the Bankruptcy Act. The

definition in section 1 (12) is:

"'Discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act."

Section 17, as amended March 2, 1917 (39 Stat. 999, c. 1 [Comp. St. 1918, § 9601]), provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are therein mentioned.

Nowhere in the Bankruptcy Act is there any express limitation upon the power of the court to make and enforce an order upon a bankrupt to pay over money or to turn over other assets which are in his posses-

sion or control, while the estate remains open.

For fraudulent concealment of assets from the trustee before discharge, he is subject to the penalty of refusal of his discharge (section 14 [4], being Comp. St. § 9598) and, after discharge to revocation of the discharge if applied for within one year (section 15). This period had elapsed before the petition to reopen the estate was filed and presumably before the trustee had knowledge of the alleged concealment.

Section 29b (1) prescribes punishment by imprisonment for concealing while a bankrupt or after his discharge from his trustee any of the property belonging to his estate in bankruptcy subject to the limitation

in paragraph (d), by which criminal proceedings are barred.

Does the fact that the bankrupt has been discharged from his debts, and that the court has no longer power to revoke the discharge, and that criminal prosecution is barred, exempt him from the jurisdiction of the court through summary proceedings to order him to pay over money in his possession or within his control which is part of his

estate in bankruptcy?

On adjudication, title to the bankrupt's property became vested in the trustee (sections 21e, 70), with actual or constructive possession, and placed in the custody of the bankruptcy court, and the court may put the trustee in actual possession, where possession is withheld by the bankrupt or one not claiming adversely to him. This proposition is decisively settled in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In that case the order was made against Nugent upon the ground that the property was in his possession as the bankrupt's agent. If the bankrupt had already been discharged, could Nugent have pleaded the discharge as a bar to the jurisdiction of the court to compel him to surrender property, the title to which was by law vested in, and which was in constructive possession of, the trustee, and in the custody of the bankruptcy court? Manifestly not, unless title in the trustee

lapses upon the discharge of the bankrupt. If title continues in the trustee, then, while the estate is still open, jurisdiction of the court to cause the estates of bankrupts to be collected, and to determine controversies relating thereto (section 2 [7]), is not to be rendered nugatory through the concealment by the bankrupt of his property, even though he be successful in continuing its concealment until by limitation of law he is freed of indebtedness to creditors and immune from criminal prosecution. He does not hold concealed property as a debt from which his discharge has freed him, but holds it without right against the trustee having title not divested by the bankrupt's discharge.

It follows that the bankrupt's discharge has not extinguished the power of the bankruptcy court to collect assets which are manifestly withheld through concealment, and that until the estate is technically closed the court has jurisdiction over the bankrupt and others having possession of the concealed property through summary proceedings,

and may enforce its orders by appropriate process.

It is concluded: (1) That the certificate of the referee of February 4, 1918, declaring the estate closed is void and of no effect; (2) the original order of reference to the referee is valid, in force and effective; (3) the order of June 28, 1919, reversing the order of the referee will be vacated and set aside; (4) the trustee has leave to proceed by amended petition before the referee for an order upon the bankrupt to pay and turn over the money and property of the bankrupt estate in his possession or control to the trustee; (5) the case is referred back to the referee for further proceedings.

An order will be entered accordingly.

BERNSTEIN v. MORSE.

(District Court, D. Maine. November 3, 1919.)

No. 508.

- 1. Admiralty \$\iff 60\$—Determination of nature of action from whole libel. Whether a case in admiralty is ex contractu or ex delicto is to be determined from an examination of the allegations of the whole libel, and not alone from its opening statement.
- 2. Shipping \$\iff 58(2)\$—Burden of proof in action against bailee of ship. While it is the general rule that, in an action ex delicto, the libelant has the burden of proving negligence, yet where a scow was injured while in the exclusive possession of respondent as bailee, the burden was on respondent to show how the injury occurred, and that he was free from negligence.
- 3. Shipping \$\infty 42-\text{Implied warranty by charter of vessel.}

The letting of a ship for a specific purpose is an assurance amounting to a warranty that she is sufficient for the use for which she is devoted; for by general admiralty law a ship must be satisfactory and competent for the sort of cargo and particular service in which she is engaged.

4. Shipping \$\sim 54-\text{Negligence in foundering of scow.}

Respondent, to whom libelant chartered a mud scow for carrying lumber, held, under the circumstances, not guilty of negligence, so as to be

liable for the sinking of the scow, which, though it was loaded by careful stevedores, listed and sank.

5. Shipping 54—Care by charterer of sunken vessel.

Respondent, who chartered a mud scow for transportation of lumber, held not guilty of negligence in caring for the scow after it had listed and sank; it appearing that respondent sent for a schooner on which it was proposed to transship the lumber, but the coming of the schooner was delayed, due to fog, and in the meantime respondent made no effort to raft the lumber from the scow.

In Admiralty. Libel by Levi Bernstein against John A. Morse. Libel dismissed.

Emery G. Wilson and Nathan W. Thompson, both of Portland, Me., for libelant.

Edward W. Wheeler, of Brunswick, Me., for respondent.

HALE, District Judge. The libelant alleges that he is the owner of a large scow, which he chartered to the respondent, to load and carry lumber from Portland to Bath, and from Bath to Portland and Harpswell, Me. He declares the libel to be "in a cause of contract civil and maritime." He does not, however, allege a breach of the contract, but proceeds to state a case in tort. He says that, after making the charter, the respondent took possession of the scow and proceeded to Harpswell with her, where he loaded her with a large cargo of lumber, made her fast alongside the end of his pier at Great Island, where she was "allowed to ground out at low water, and owing to the great weight of the lumber and the uneven bottom on which she grounded, said scow was badly strained and otherwise injured, so that she filled and sank." The libel further alleges that "by reason of the negligent way in which said respondent handled said scow the libelant has lost use of her, and is entitled to a reasonable compensation for such loss and for damages"; further, that certain sums are due to the libelant for the damage, loss, and demurrage "sustained through the fault and negligence of said respondent and its agent, and not through any fault or negligence on the part of the libelant." The libel does not allege that the respondent has failed to meet his contract obligation. Its averments, on which issue had been joined, are those of negligence.

[1] The libelant's case rests, and has proceeded, on his allegations of negligence. The mere description of a case as one for breach of contract is not conclusive. Whether a case in admiralty is ex contractu or ex delicto is to be determined from an examination of the allegations of the whole libel, and not alone from its opening statement. Dittmar v. Frederick Star Contracting Co., 249 Fed. 437, 439, 162 C. C. A. 3. The libelant's proofs also have proceeded on the theory that a case ex delicto is before the court. The libelant contends in his brief that he has shown a case of negligence. He urges that the proofs should lead me to find that the respondent was the charterer of the scow and had exclusive possession of her; that, while in such possession, he was guilty of negligence, in that he took the scow to a dock at Great Island, Harpswell, and loaded her too heav-

ily on the offshore side, and then, instead of discharging any of the lumber, or trying to find out the trouble with the scow, when she began to list, he piled lumber on her inboard side, thus trying to right her up; that, when on an even keel, he left the scow overnight without any one to watch her, or to keep her pumped out, in case she started to list again; that during the night she rolled over and filled; that she grounded out at low water; and that the damage was caused by the respondent's negligent loading, by his carelessly allowing the scow to remain on a rough and uneven bottom, with a large cargo aboard, and by his further negligence in failing to take care of her after she sunk; that, instead of taking means to get the lumber off the scow immediately, by rafting, or in some other direct manner, the respondent attempted to notify the schooner Lizzie J. Call, which was then chartered by him and was discharging her cargo at Bath, and to get the schooner to Great Island for the purpose of taking the lumber off the scow and putting it on the schooner; that, while making this delay, a heavy fog set in, and the scow was compelled to stay in its sunken condition with a large amount of lumber aboard; that she grounded at low water on a hard, uneven bottom, and was thereby strained and damaged, and also suffered a loss in the nature of

There is a sharp conflict in the proofs. Nearly all the witnesses were before me, and I had the opportunity of noting their appearance

and of giving them some personal examination.

[2] The general rule is that, in an action ex delicto, the libelant has the burden of proving negligence on the part of the respondent. In the case at bar, the scow was under a charter to the respondent and was in his exclusive possession. In Terry & Tench Co., Inc., v. Merritt & Chapman D. & W. Co., 168 Fed. 533, 93 C. C. A. 613, Judge Noyes, in speaking for the Court of Appeals for the Second Circuit, applied the rule that, "where a ship is injured while in the exclusive possession of a bailee, the burden is upon such bailee to show: (1) How the injury occurred; (2) that it was free from negligence."

I will assume that this rule may be applied in the case before me. This gives the libelant the benefit of the rule which would have prevailed, if he had alleged a breach of contract and a failure to return the scow in good condition at the end of the charter term. In that case the burden would have been upon the respondent to show jus-

tification for such breach.

Has the respondent met this burden of proving himself free from fault under the rule I have stated?

[3, 4] The scow is 97 feet long, 27 feet wide, and 9 feet 4 inches from her deck to her bottom; she has four pockets amidships. Each pocket is about 18 feet wide, 21 feet long, is V-shaped, and has a coaming about it. Her accustomed use had been that of a mud scow.

The respondent had manufactured certain lumber into box boards, which he had sold to the Bath Box Company, to be delivered on its wharf at Bath. He had the schooner Lizzie J. Call under charter, capable of carrying about 150,000 feet of lumber. He went to the

libelant for the purpose of hiring another schooner, to be used in connection with the Call, so that one could be loading while the other was discharging. The libelant told him he had no schooner at his command, but he had a scow fitted to carry lumber, and which he would let to him. A study of the whole evidence induces me to find that the libelant assured Morse of the scow's capacity to safely carry at least 200,000 to 250,000 feet of lumber. The charter party was executed, and the libelant delivered the scow in person to the respondent at Great Island, and turned it over to Brown, the respondent's foreman, who has to have charge of loading the lumber. Brown had experience as a stevedore, but had never loaded a scow like this, having V-shaped pockets in the center opening to dump the mud into the sea. The proofs lead me to believe that the libelant indicated to Brown how much of a load could be placed on board, and how deep the scow could be loaded, showing him a bolt on the side of the scow. below the deck, and telling him that he could load it down to that mark. It appears that the loading was done by a crew of competent men under the direction of Brown, who put sticks across the V-shaped pockets and put lumber in them, according to the suggestions he had received from the libelant. Brown says:

"They started in at the bottom, and put those across and filled the pockets; got it up to the hatch covering."

The proofs show that, after 115,000 feet of lumber had been placed on board, a list to port was noticed; the scow being then in deep water and not aground. The crew then adjusted the load and balanced it upon the scow. They left her in good trim, and upon an even keel, for the night, with 115,000 feet of lumber on board. It would undoubtedly have been an act of extra precaution if the respondent's agents had left a watchman upon the scow overnight; but, in view of the fact that the libelant had told the respondent that the scow would carry something more than twice the amount then loaded upon her, and that the lumber then upon her did not bring the scow down to within a foot of the mark to which the libelant assured Brown she might be loaded, I cannot hold that it was negligent for Brown and his crew to assume that the listing had been due to an unevenness in the load, that they had corrected such listing, and that they might safely leave the scow in the ordinary manner, overnight, without a watchman.

Taking all the circumstances into consideration, I think that, with reference to loading the vessel, and also in leaving her overnight, they acted with the care of reasonably prudent men.

During the night the scow sank. I am induced by the proofs to find that the primary fault, which must be held to be the cause of the resulting damage, was the fault of the libelant in letting to the respondent a scow, unsuitable for the purpose for which it was chartered, in that she was built, and was suitable only, for carrying mud in her hold, and not for carrying a deckload of lumber. She listed in the night, in the current, and, being topheavy, she filled over the hatches and sunk. I cannot find that it was a case of grounding.

She had been let for use in carrying lumber, both in the hold and on deck; and it appears that lumber was put in the hold, in so far as possible, for extra ballast. I am not satisfied that any negligence is shown in loading the scow. The full weight of the testimony is clearly to the effect that the damage was occasioned, not by the improper loading of the scow, but by the primary fault that she was not a suitable vessel on which to pile a bulky, heavy deckload.

The libel alleges that the scow, at the time of the making of the charter, was "in every way fitted for the business in which she was engaged." The evidence negatives this allegation; within the proper meaning of the term, the scow was not seaworthy; she was not fitted for the purpose for which she was let. By the general maritime law a ship must be fit and "competent for the sort of cargo and the particular service in which she is engaged." Kent's Commentaries, 205; The Regulus (D. C.) 18 Fed. 380, 382; Sumner v. Caswell (D. C.) 20 Fed. 249. And the letting of a ship for a specific purpose is held to be an assurance amounting to a warranty that she is sufficient for the use to which she is to be devoted. The New York (D. C.) 93 Fed. 495, 497; The Thames, 61 Fed. 1014, 10 C. C. A. 232; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012.

[5] A further question of negligence is presented by the proofs, involving a more difficult question of fact: Was the respondent guilty of negligence in his care of the scow after she had sunk? For, even though the libelant was responsible for the scow's sinking, still the respondent, in taking care of her, was under the duty to exercise the care of a reasonably prudent man, under all the circumstances of the case. I think the proofs show that the best course to be pursued, after the vessel sunk, was to put her cargo upon another vessel as soon as possible, and then raise the scow. The respondent undertook this course. Immediately after finding that the scow had sunk, he endeavored to get a tugboat from Portland to go to Bath, take the schooner Lizzie J. Call in tow, and go to the relief of the scow; but he could not at once secure such tugboat. He succeeded in hunting up the tug Seguin, then in the Kennebec river, and arranged for her to start at once. A dense fog set in, and prevented the schooner from being towed to Great Island. During the continuance of the fog Capt. Haley, of the tug, remained in the river waiting for clear weather. There is some testimony of mariners that, in an emergency, it would have been prudent to start with the schooner, even in a fog; but there is not enough to satisfy me that this was the safe course to pursue. I think the delay was caused by the conditions of the weather over which the respondent had no control.

The libelant urges that it was fault on the part of the respondent to depend upon getting the schooner to Great Island to take off the lumber, when the lumber could have been rafted, or put ashore, up an incline, and then loaded upon another vessel, or could have been otherwise taken care of.

The respondent was called upon to act in a crisis. I think it was reasonable for him to apprehend loss if he tried to raft the lumber in the current at Ewing's Narrows, and that he had reason to decide

that it would be very difficult to get the boards back, up a long incline, to the shore. But whether or not the libelant took the best course, under the circumstances, as the event proved, the testimony convinces me that he acted intelligently, reasonably, competently, and in good faith; and that he was prevented from success by weather conditions beyond his control. He is not, then, chargeable for the delay in getting the schooner to take the lumber from the scow.

Upon full consideration of the proofs, I am constrained to find that the respondent has met the burden of showing that he was free from negligence; and that the fault which occasioned the injury was that of the libelant in undertaking to charter a mud scow to be used for the purpose of carrying a heavy deckload of lumber; that such scow was not fit for the use for which she was chartered; in other words, she was not seaworthy, within the meaning of the maritime law. I am led to this conclusion by the whole current of the testimony.

A suggestion has been made that some liability arises from the fact that the respondent was a marine insurer for the sum of \$4,000. It is enough to say that this point is not brought before me by the plead-

ings.

The result is that the libel must be dismissed. A decree may therefore be drawn dismissing the libel. Under the circumstances, however, my further order is that the respondent shall not recover costs against the libelant.

COMMONWEALTH FINANCE CORPORATION v. LANDIS (EMERGENCY FLEET CORPORATION, Garnishee), and three other cases.

(District Court, E. D. Pennsylvania. November 7, 1919.) Nos. 5328, 6286, 6326, 6404.

United States \$\iiii 125\$—Motion to dismiss garnishment against Shipping Board.

Motions to dismiss actions in which the United States Shipping Board Emergency Fleet Corporation was summoned as a garnishee, and to dismiss and quash actions of assumpsit against such corporation, on the ground that the corporation was not subject to process, are unknown to the law.

2. United States \$\infty 125\to Liability to be sued.

Suit cannot be maintained against the United States; it being a soverign.

3. Garnishment €==18—Emergency Fleet Corporation exempt as garnishee.

The United States Shipping Board Emergency Fleet Corporation, in so far as it partakes of the character of a sovereign, is exempt from garnishment under the principle that a municipality cannot be subjected to liability growing out of any relation of stakeholder between private litigants.

4. United States \Leftrightarrow 125—Immunity of Shipping Board Emergency Fleet Corporation from suit.

The United States Shipping Board Emergency Fleet Corporation is not subject to suit with respect to those matters of a military nature where it is acting for the welfare and protection of the whole people.

(261 F.)

 United States ⇐=125—Immunity of Shipping Board Emergency Fleet Corporation from suit.

In view of the legislation creating the United States Shipping Board Emergency Fleet Corporation, and of the fact that Congress saw fit to act through a private corporation, held that, although the United States owns the stock of the corporation, it is not exempt from service of process, and may be garnished and sued, even though it may appear at trial that the matter is one relating to which the corporation is clothed with the attributes of sovereignty, and not subject to suit.

6. REMOVAL OF CAUSES €==107(4)—MATTERS WHICH CAN BE RAISED ON MOTION TO REMAND.

Where actions to which the United States Shipping Board Emergency Fleet Corporation was a party were removed from the state to the federal court on the ground that a law of the United States was involved, it being the contention that the corporation was not subject to suit, but was clothed with the attributes of sovereignty, it may be questioned on motion to remand whether a law of the United States was involved in the first instance, or became involved in presentation of the defense.

At Law. Action by the Commonwealth Finance Corporation, assignee, against Philip Landis (No. 6326), in which the Emergency Fleet Corporation was summoned as garnishee; action by Joseph H. Kinney against the Fairbanks Steam Shovel Company (No. 5328), in which the United States Shipping Board Emergency Fleet Corporation was summoned as garnishee; and actions by James P. Judge (No. 6404) and the N. W. Lawton Lumber Company, a corporation (No. 6286), against the United States Shipping Board Emergency Fleet Corporation. On motions to dismiss the actions. Motions denied.

Louis J. Palmer, Harry M. McCaughey, John J. McDevitt, Jr., Brown & Lloyd, of Philadelphia, Pa., and McCready Sykes, of New York City, for plaintiffs.

Wm. Y. C. Anderson and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for garnishee defendant Emergency Fleet Corporation.

DICKINSON, District Judge. [1] The first question which suggests itself in these cases is the question of procedure. The motion, in some of the cases, is to dismiss the actions, and in others to quash and dismiss. No such motions are known to the practice in cases of these kinds, and they might be disposed of by simply denying them on this ground. The question sought to be raised, however, is a substantial one, and, if raised in a form known to procedure practice, must be met and answered, and for this reason we have been asked to answer it, without regard to the form in which it is raised. One of the actions is in foreign attachment; one is an attachment in execution: one an action in assumpsit; and one in trespass. The purpose is the same in the two attachment cases. The plaintiff, having secured a judgment against the defendant, is seeking to have that judgment satisfied in whole or in part by having applied to its payment moneys averred to be in the hands of the Emergency Fleet Corporation belonging to the defendant. Whether there are any such moneys is sought to be determined in the method provided by law in the respective forms of

action brought. In these forms of procedure the Emergency Fleet

Corporation has been made the garnishee.

[2, 3] The defense now interposed is not that there are no moneys in the hands of the garnishee belonging to the respective defendants, but is that the garnishee is immune from service and is not obliged to respond in proceedings of these kinds. The other cases are straight actions against the Fleet Corporation. This immunity is put upon the dual or alternative ground that the corporation is the United States of America, clothed in the royal purple of sovereignty, and because of this cannot be subjected to any process, or at least that the garnishee in the attachment cases so far partakes of a public character that it is within the rule which exempts municipalities from being subjected to liability growing out of any relation of stakeholder between private litigants. Each and both these principles or doctrines of the law must be accepted. The sole question is: Is the Fleet Corporation within the application of either principle?

[4, 5] We have had neither time nor opportunity to investigate the organization of this corporation, for the purpose of getting first-hand information of what it is. We have not taken the time to make this investigation, because counsel agree upon what are the essentials of this organization. These are that the Fleet Corporation is a private corporation, in the organization of which it is provided that the United States shall own more than 50 per cent. of its stock, and may own, and the fact is that at present it does own, all of the capital stock, except a few shares, which, for organization purposes, are required to be owned by those who have certain official relations with the company. It is further organized for the purpose of acting as an agent of the United States, and doing what the United States might do direct. These things, which are expected to be thus done by the corporation, are essentially of a military character, and primarily for the welfare and protection of the people.

We have, in consequence, room for the following distinctions and the following at least possible differences: One of the distinctions is that the Fleet Corporation is, as before stated, a private corporation, and, in this sense, a private individual or a person authorized to perform a public service as an agent of the United States. One of these possible differences is that private persons or individuals may be among the ultimate owners of the assets of the corporation, and the United States is required to be also among these ultimate owners, and the property and assets of the corporation may be actually and wholly in use for public purposes, or may at least possibly not be in such

use.

There is another respect in which a distinction, which is also a difference, may exist. The Fleet Corporation may be acting as such agent of the United States, or may not be so acting, or it may so act in some of its activities, and not in others. It follows from this that when it is acting as the United States, and such of its property and assets as are in the actual use of the United States, neither it as such agent nor such property can be drawn into or jeopardized by disputes

actual use, or all such property and assets may not be in such actual

(261 F.)

between private parties. It would also follow, however, that in so far as it is acting as a private corporation, and in so far as its property and assets are and are used as its private property, it is not immune from the liabilities and responsibilities which are imposed by law upon litigants.

The foregoing observations indicate the line to be drawn. It is easy to draw the line, but not so easy to determine when and where it shall be drawn. It has been determined for us that when the corporation, through one of its activities, was fabricating ships for the United States that the property which otherwise would be the private property of the corporation was being devoted to and used in this public purpose, it might be found to be the property of the United States, and that any one who was guilty of selling any part of it was subject to indictment for stealing the property of the United States. United States v. Carlin (D. C.) 259 Fed. 904.

It has also been determined for us that, when the United States had bought and become the owner of all the property, assets, and franchises of a railroad, and there was nothing which by any possibility could be seized under an execution issued upon a judgment, and nothing upon which any part of that judgment could be a lien other than property of the United States, a proceeding having for its sole purpose and objective such a method of enforcing the payment of a claim, being thus prosecuted, could not be sustained. Ballaine v. Alaska, 259 Fed. 183, — C. C. A. —. There is authority, however, for the proposition that under some circumstances a proceeding against a corporation having these general relations with the United States can be upheld. Salas v. United States, 234 Fed. 842, 148 C. C. A. 440.

There is thus presented this broad distinction, and this general proposition, that sometimes a proceeding set in motion to have determined the obligation of a corporation of this general kind is permitted to become effective and sometimes it is not. This proposition necessarily involves the thought that there is a question to be determined, and this again necessarily carries the further thought that the corporation is not immune from process, because otherwise nothing other than such immunity could be determined. It may be that if any one of these plaintiffs secures a final judgment against this corporation, he will be unable to enforce payment of the judgment because of the fact that there is no property out of the sale of which the judgment can be paid, other than either property of the United States or property which is in use by the United States for military purposes. The futility or hopelessness of execution process does not, however, deprive a litigant of judgment process.

There is this very practical and common-sense view of the broad question here involved and of the general situation presented. Private persons and individuals must deal with this corporation as contractors or otherwise in the accomplishment of the work with which the corporation has to do. Supplies of materials must be furnished to the corporation and to those who have contracted with it. Obligations of some kind to make payment must be incurred. Congress has found it to be best to so provide that the United States shall not directly incur

these obligations. If the obligations incurred were the obligations of the United States, it has so far laid aside the robes of sovereignty as to permit the question of the existence of such obligation to be determined by the Court of Claims and within limits by the District Courts. If this remedy was pursued by any one having a claim, no matter how just that claim might be, the United States might very well interpose the defense that it had not incurred any obligation, and the foregoing remedy would be denied the claimant. If the corporation was not amenable to process, then the intolerable situation would be presented that the corporation was free to admit or repudiate its obligations at its free will and pleasure. The sovereign, it must be conceded, cannot be sued without its consent; but the doctrine must also be accepted that he may consent.

We are certainly justified in assuming that Congress, by its legislation on the subject, intended that the obligations which necessarily must be incurred will be met either by the United States or this corporation, and that it was further intended that the existence and extent of such obligations should be determined either as against the United States or as against the corporation, and as Congress has not seen fit to have the United States directly assume the obligation, and has not provided any way in which any questions which may arise may be determined in favor or against the United States, the further inference is justified that Congress intended that whatever obligations were incurred were incurred by this corporation, and has further intended that such questions as arise may be determined in favor of or against the corporation. If the above inferences are justified, then one of two things follows: Either that the corporation is not immune from the service of process by virtue of its public character, or if it is the United States, in doing whatever it does, then the United States has consented to the bringing of appropriate actions against it.

[6] Each of these cases originated in a state court. There was a petition for a removal, not upon the express ground that the United States was a party, but upon the ground that a law of the United States was involved. Whether such law was involved in the first instance, or became involved in the presentation of the defense, might have been questioned by a motion to remand. No such motion was made, and no such question raised. This is doubtless due to the recognition by the plaintiffs of the fact that the question before us would inevitably come into the courts of the United States, and hence a mo-

tion to remand would be of no practical value.

The motions in each case are denied.

In re ELK BROOK COAL CO.

(District Court, M. D. Pennsylvania. November 21, 1919.) No. 3743.

Bankruptcy €==255—Jurisdiction over leasehold property and forfeiture of lease.

Where leasehold property of a bankrupt comes into possession of the bankruptcy court could before any action by lessor to forfeit the lease under its terms for past defaults, that court has jurisdiction over the property and to determine the lessor's rights therein; but a forfeiture should not be restrained, unless lessor's just claims can be fully met and his rights protected in administration of the bankrupt estate, nor unless, after satisfying such claims, something may probably be realized for general creditors.

In Bankruptcy. In the matter of the Elk Brook Coal Company, bankrupt. On petition of trustee to restrain forfeiture of lease. Denied.

Leigh M. Morss, James E. Burr, and Frederick K. Tracy, all of Scranton, Pa., for lessors.

Wallace C. Moser, of Scranton, Pa., for trustee.

WITMER, District Judge. The trustee of the Elk Brook Coal Company, bankrupt, seeks to restrain the lessors in a certain coal lease, enjoyed by the bankrupt and constituting its principal asset, from enforcing under the terms of the lease a forfeiture thereof, for alleged default in failing to pay the royalties covenanted to be paid on coal mined by the lessee from the leased premises during a period of three months prior to bankruptcy, and failure also to pay certain taxes likewise covenanted to be paid by the lessee.

The matter comes up for determination upon petition and answer, without testimony; the controlling facts being substantially undisputed. The leasehold interest vested in the bankrupt was acquired by a certain coal lease dated the 4th day of December, 1914, executed by Merilla E. Morss et al., as lessors, to Charles E. Bradbury, as lessee, duly assigned to the bankrupt, leasing, on a royalty basis, all the merchantable and minable coal under and upon certain tracts of land therein described. By the sixth paragraph of the lease it was provided that the lessee should pay a minimum royalty of \$50 per month during the life of the lease, whether coal was mined or not. By the eighth paragraph it was provided that the lessee should pay all taxes and assessments of every kind and description assessed against the surface as well as the coal, whether removed or in the vein. By the eleventh paragraph it was provided, inter alia, as follows:

"Said lessee covenants and agrees, further, that if he fails to prosecute vigorously the work of the necessary preparation for mining of said coal for a period of 60 days after the signing of said lease, or shall fail to pay any installment of royalty for 30 days after the same shall become due and without demand by said lessors, or shall cease and discontinue mining for a period 6 months, not being excused under clause 10 herein, or shall not keep and perform any of the covenants and agreements herein required of him, or suffer any proceeding in bankruptcy to be taken against him, or shall make any as-

signment for creditors, then, and on the occurrence of any such event said lessors may at once, on written notice to said lessee, terminate and annul this lease, and thereupon this lease shall become null and void. And said lessors may resume possession of, and may re-enter the said premises and mines without legal process and at their option, and take possession of all the railroad tracks, cars, and all other improvements and all personal property in the mines or on the surface, as their own property, and no such improvements or personal property shall thereafter be removed by said lessee after reentry for such cause."

The Elk Brook Coal Company, now bankrupt, entered into possession of the leased property under the terms of the lease and commenced the mining, preparation, and marketing of coal. Subsequently it executed a trust mortgage in favor of the Scranton Trust Company, trustee, to secure a certain series of bonds issued, and continued its mining operation until December 27, 1918, when an involuntary petition in bankruptcy was filed against it in this Court. On January 13, 1919, a receiver was appointed to take charge of the property and assets of the bankrupt. Later, in April, 1919, the company filed in this court a voluntary petition in bankruptcy, upon which an adjudication was duly entered. May 25, 1919, pursuant to a petition of the petitioners in the original involuntary petition, the company was adjudged and involuntary bankrupt. In the meantime, February 14, 1919, the receiver having presented his petition, an order was secured authorizing the issuing of receiver's certificates in the sum of \$2,000 to raise funds, one of the express purposes whereof was to pay the royalties accruing under said coal lease, so as to prevent a forfeiture. It appears that the receiver sold these certificates to the amount of \$1,000.

After the involuntary petition in bankruptcy was filed the bankrupt was indebted to the lessor for royalties on coal mined by it for the months of October, November, and December, 1918. Since the cessation of mining operations—that is, since January 1, 1919—minimum royalties have been accruing at the rate of \$50 per month. The bankrupt also failed to pay the taxes assessed for the year 1918. None of these sums have since been paid. On May 24, 1919, subsequent to the adjudication and the election of a trustee, the lessors entered upon the demised premises and demanded from the trustee payment of the pastdue royalties and compliance with the other conditions of the lease. which demand was refused by the trustee. The lessors thereupon declared the lease forfeited and took possession of the demised property. At the same time the lessors served on the trustee a written notice and declaration of forfeiture, and 2 days later served also a copy of their declaration of forfeiture upon Charles E. Bradbury, the original lessee, and upon the bankrupt, by delivering a copy to its secretary and treasurer. A like copy of declaration of forfeiture was served upon the Scranton Trust Company, trustee for bondholders under the trust mortgage. Notwithstanding this re-entry by the lessors and declaration of forfeiture, the lessors permitted the trustee to keep and maintain certain property belonging to the bankrupt upon the demised premises until the 19th day of September, 1919, whereupon the trustee was required to remove such property. Since June 2, 1919, the lessors have maintained possession of said premises, having placed a watchman or caretaker thereon after the surrender by the trustee on May 24, 1919. On October 13, 1919, the trustee presented his petition seeking the restraining order enjoining the lessors from enforcing the forfeiture which is now under consideration.

On behalf of the trustee it is argued that whereas, cause for forfeiture under the terms of the lease arose prior to the adjudication in bankruptcy, yet no demand for performance was made or forfeiture declared until after the adjudication the interest and title of the bankrupt in the leasehold vested in the trustee as of the date of the adjudication; and that, by virtue of such adjudication and the proceedings in bankruptcy antecedent and subsequent thereto, the lessors were prevented by operation of law from declaring and enforcing a forfeiture of said leasehold. In other words, that the proceedings in bankruptcy operated as a caveat, preventing the lessors from interfering with the property which had passed into the custody and control of the bankruptcy court. It is further argued that it would be inequitable to permit the lessors to seize and hold the valuable improvements which had been installed and erected by the bankrupt upon the demised premises, thereby preventing an equitable distribution of the assets of the bankrupt among the several creditors. In this connection attention is called to the fact that this leasehold, with the valuable improvements erected by the bankrupt, has been mortgaged as stated to secure a bonded indebtedness in the sum of \$100,000, evidenced by a series of bonds issued by the bankrupt, and that by the enforcement of this forfeiture such secured creditors, as well as the general creditors of the bankrupt, are being deprived of the only security for the indebtedness so created.

It might be well to state the conclusion that no special equity exists in favor of the bondholding creditors. At the time of the execution of the trust mortgage, the coal lease under which the bankrupt acquired its interest in the premises and property was of record. The mortgagee, as trustee for bondholders, took title, of course, expressly subject to the terms of the lease under which the bankrupt acquired its rights. There is a conclusive presumption of law that the bondholders had notice of the clause of forfeiture contained in the lease.

The only vital question in the case is whether or not the adjudication in bankruptcy operated to prevent the lessors from pursuing the remedy for default provided by the terms of the lease, to wit, the enforcement of a forfeiture. While this same question has been heretofore presented in other cases, there does not seem to be any reported decision wherein it has been fully determined. A somewhat similar question was raised in a case recently decided in this court and appealed to the Circuit Court of Appeals. This was the case of In re Midvalley Coal Co. Bankrupt, entered in this court to No. 3258 in Bankruptcy, and appealed to the Circuit Court of Appeals under the name of Campbell, Trustee, v. Spruks, 251 Fed. 815, 163 C. C. A. 649. In that case two questions were raised: First, as to the jurisdiction of the bankruptcy court; and, second, as to the right of the owners of the leased coal property to enforce a forfeiture by reason of the default of the lessee in performing the covenants contained in the lease.

In this court the case was decided in favor of the lessor owners, on both grounds; upon appeal, the Circuit Court of Appeals affirmed the judgment, holding that under the circumstances of the case the bankruptcy court was without jurisdiction, rendering it unnecessary to pass on the second question.

In some material aspects, however, that case differed from the case at bar. In that case there was very slight, if any, evidence that the property in dispute had ever come into the manual possession of the bankruptcy court, or its representatives. In the present case, the receiver, and subsequently the trustee, were in actual possession of the property up to and at the time the forfeiture was declared. Thereafter, until the petition for restraining order was presented here on October 13, 1919, the lessors had been in undisputed possession of the property. The peaceable surrender of the property by the trustee might well be treated as an election on his part to reject the leasehold as burdensome property. Having made his election, he possibly ought to be required to stand by it.

But the real vital point in dispute here appears to have never been fully and decisively determined by any appellate court. The nearest case in point is that of Lindeke v. Associates Realty Co., 17 Am. Bankr. Rep. 215, 146 Fed. 630, 77 C. C. A. 56, where it was stated:

"Where a lease of land for a long term required the tenant, a corporation, to erect an expensive building thereon, and it fails to perform its covenant, and, prior to its adjudication, it is served with a notice of the forfeiture of the lease, as therein provided, the trustee succeeds only to the rights of the bankrupt, and takes the lease cum onere, and the bankruptcy court, on the petition of the lessor, will, by decree, enforce the forfeiture and order the trustee to surrender possession of the property to the fessor."

It will be noted, however, that in that case the notice of the forfeiture was served before the adjudication, although it did not become finally operative until after the trustee went into possession. It was further said that:

"The sevice being good at the time when made upon the corporation, the subsequent adjudication of bankruptcy and the selection of trustees did not abrogate the service already made upon the corporation, or necessitate reservice on the trustees in bankruptcy. In this respect the trustees succeeded only to the rights and stead of the bankrupt * * * at the time they succeeded to the estate."

In the case of Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, certain securities had been pledged as collateral security with a bank. It was held that the power of sale contained in the collateral pledge agreement might be exercised between the date of the filing of the petition and the date of the adjudication in bankruptcy, since the title of the bankrupt did not vest in the trustee, by operation of law until the date of the adjudication; that the court of bankruptcy could only exercise its power to determine the value of such securities and to direct their disposition when the collateral had not already been disposed of.

In this case, as well as in the case of Lindeke v. Associates Realty Company, supra, action had been taken by the adverse party prior to

the adjudication in bankruptcy, although not fully completed until after the adjudication. The same situation existed in the cases of In re West Side Paper Co., 20 Am. Bankr. Rep. 660, 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384, and In re De Lancy Stables Co. (D. C.) 22 Am. Bankr. Rep. 406, 170 Fed. 860, where, lessors having levied under landlords' warrants prior to the date of the petition in bankruptcy, it was held that while the bankruptcy court had jurisdiction to exercise custody and control over the property levied upon, yet the landlord's lien must be satisfied in full.

Other authorities might be cited to the point that a bankruptcy court, having jurisdiction and custody and control over a bankrupt's property, is vested with jurisdiction to inquire into and determine controversies of the present nature; but it has not been declared that the bankruptcy court has authority to abrogate and nullify the rights of lien claimants, pledgees, or others having interest or title in the property in dispute. Indeed, the decisions have been the other way. Thus in the case of York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, where certain property had been sold on a conditional sale contract providing that title should remain in the vendor until the entire purchase price should be paid, it was held that the adjudication of the vendee as a bankrupt did not prevent the vendors from exercising their right to reclaim the property upon default made by the vendee. There are numerous other cases along the same line.

While it may be true, as argued by the counsel for the trustee here, that it was the duty of the lessors, before declaring a forfeiture, to secure the consent of the court thereto, yet the situation, as now presented, is the same as though the lessors had pursued that course. In other words, the matter may be treated as though the lessors were now asking this court to enforce the contract and clause of forfeiture contained in the lease. If the lessors were equitably entitled to declare and enforce a forfeiture, so that the consent of the court thereto ought to have been granted, then such consent can now be granted. If it is apparent that the only adequate remedy of the lessors is by declaring a forfeiture, then this court should grant its consent thereto. If, on the other hand, it should appear that the lessors would be fully protected in their rights, that the overdue taxes, overdue royalties, and minimum royalties will be fully paid by the continued control over the property by the trustee and the sale of the leasehold, then this court could reasonably determine that the forfeiture should not be enforced. Clearly, if by an administration of the property through the bankruptcy court, the lessors are required themselves to pay the back taxes and to suffer a loss of the overdue royalties, and the accruing minimum royalties, either or all of them—in other words, if the rights of the lessors are not to be fully protected—then the court ought to permit the lessors to pursue their only adequate remedy, to wit, the enforcement of the forfeiture.

In this connection, consideration should be given to the fact that the administration of a bankrupt estate is usually a long drawn out proceeding. In the present case taxes are accumulating and becoming charges against the property all the time, and, unless paid by some

one, the reversionary interest and title of the lessors is subject to tax sale. If the trustee is to be granted authority to make sale of this leasehold interest, then a new tenant is to be foisted on the landlords. If such new tenant, going into possession, should likewise default, then the lessors would be deprived of the possession of their property, without remuneration, for a further protracted period of time.

Moreover, it has not been shown that the leasehold has any value or equity above the amount of incumbrances there against, so that a sale by the trustee would produce any fund distributable to general creditors. It is manifest that it would be not only unfair to the lessors, but would likewise be of no advantage to the general creditors, to permit the trustee to dispose of this leasehold, unless a price could be realized from said sale sufficient to pay all incumbrances, taxes, rentals, administration costs, and expenses, and then a further sum for distribution to general creditors.

At the oral argument upon this rule, the court interrogated the counsel for the parties with reference to the marketability of this leasehold interest at a trustee's sale, and the prospect of realizing therefrom any fund above the amount of incumbrances against the property. It was thereupon stated by counsel that the mortgage bondholders had been afforded an opportunity by the lessors to meet the delinquencies of the bankrupt and thereby save a forfeiture of the property, but that they declined and refused to advance the necessary moneys to accomplish the purpose, and it was further practically conceded that by a trustee's sale of the property no one would be benefited, except such bondholding creditors.

Under these circumstances, there would seem to be a doubtful propriety and lack of equity in ousting the lessors and permitting the trustee to proceed to sell the property, in the hope of realizing anything for the unsecured creditors. If no benefit or advantage is to accrue to general creditors, then, as heretofore suggested, the trustee would be warranted in rejecting the leasehold as burdensome property. If the bondholding creditors have any rights which are being prejudiced, then

they have a remedy by a plenary suit.

Under the circumstances, I am of the opinion that the petitioning of the trustee has failed to show that the enforcement by the lessors of said forfeiture operates inequitably and oppressively against the rights and interests of the general creditors whom he represents, and that therefore the rule to show cause why a restraining order should not be granted should be discharged, without prejudice to the right of any party adversely affected, to proceed by a plenary suit.

It is accordingly so ordered.

McKITRICK et al. v. McKITRICK.

(Court of Appeals of District of Columbia. Submitted October 8, 1919. Decided November 3, 1919.)

No. 3235.

DIVORCE \$\igsim 129(1, 12, 16)\$—EVIDENCE OF ADULTERY; CLEAR PROOF REQUIRED; SUSPICIOUS CIRCUMSTANCES.

In view of unreasonableness of husband's statement, evidence *held* insufficient to sustain a finding of adultery by wife, which must be established by evidence clear and satisfactory, and will not be presumed from suspicious circumstances.

Appeal from the Supreme Court of the District of Columbia. Divorce suit by John W. McKitrick against Katherine T. McKitrick; James G. Duncan being joined as corespondent. From a decree granting plaintiff an absolute divorce on the ground of adultery, defendants appeal. Reversed.

S. D. Truitt, Irving Williamson, and N. C. Turnage, all of Washington, D. C., for appellants.

J. H. Ralston, S. McComas Hawken, and George F. Havell, all of Washington, D. C., for appellee.

ROBB, Associate Justice. The parties were married in 1904. Appellant had been married before, and had one child by that marriage, a daughter Catherine, then four years of age, who became and continued to be a member of the McKitrick household until the separation of the parties in September of 1917. According to appellee's testimony, at and for some time prior to the separation, he was the proprietor of a small lunchroom and store at the Soldiers' Home. On the 6th of September, 1917, Frank C. Gass, who had been a frequenter of the McKitrick home for some time, and who married Mrs. McKitrick's daughter Catherine in September of 1918, gave appellee to understand that the corespondent, Duncan, also was a frequenter of the house, and that improper relations had taken place between him and Mrs. McKitrick. Appellee occupied the same room with his wife that night and kissed her good-bye as usual the next morning. During the day she went to the lunchroom and, according to appellee's testimony, made "a confession that Duncan had been in his house; * * * that he got this information from his son-in-law, Frank Gass, and Catherine Gass, her daughter. Just as soon as he got this information he never went back to the house." Later, under cross-examination, the witness testified that several days after he had left his wife she called at his place of business and admitted committing adultery with Duncan "in front of her child," a little girl then aged 10 or 11 years. The witness admitted that Mrs. McKitrick did not want Catherine to marry Gass, and that the marriage took place without the knowledge or consent of the mother; that he (McKitrick) supplied the girl with money and gave his written consent to the marriage, although Catherine was

under 18 years of age. The witness further admitted that Mrs. Mc-Kitrick had reared her children as churchgoers.

Frank C. Gass, who was but 19 years old at the time of his marriage, testified for appellee that he commenced calling on Catherine in 1916 and was there very frequently; that Mr. Duncan had dinner there every evening, and Mrs. McKitrick told witness not to inform Mr. McKitrick that Duncan had been at the house; that on several occasions Duncan would go upstairs, and sometimes Mrs. McKitrick also would go up. He admitted that Mrs. McKitrick objected to his marriage with her daughter Catherine, and that he did not inform McKitrick of his suspicions until just prior to his marriage. It further appeared from the testimony of this witness that after his marriage he and his wife lived with Mrs. McKitrick for several weeks. Other witnesses testified for appellants that Gass had made statements to them concerning the relations of Duncan and Mrs. McKitrick in direct contradiction of his testimony at the trial.

The daughter Catherine, on the stand for appellee, testified that Duncan always left the house between 8:30 and 8:45 p. m.; that upon one occasion Mr. McKitrick came while Duncan was upstairs, and that Duncan hid in a closet until McKitrick left the house; that her mother was downstairs on this occasion; "that her mother and Mr. Duncan always acted like a lady and gentleman should"; and that she

saw no acts of familiarity between them.

In behalf of appellants Duncan testified that he worked for McKitrick for about a year, when he was discharged for some reason unknown to him. In the latter part of 1916 he was working at the garage at the Soldiers' Home, and, as the suppers there usually were cold, he often would go downtown for a warm supper. On one of these occasions he met Mrs. McKitrick, and an arrangement was made between them under which he was to take his suppers at the McKitrick home and pay Mrs. McKitrick \$3 per week. Mrs. McKitrick then informed him that her husband objected to her taking boarders, but that later she would explain the matter to him. Witness would go direct to the McKitrick home from the garage, and "usually wash his face when he got there." He further testified:

"That he [witness] did have some trouble with Mr. Gass, and that it was just after war was declared with Germany, and that he made a remark that did not exactly suit Mr. Gass' caliber, or something, and so he took offense."

The witness denied having any improper relations with Mrs. Mc-Kitrick.

The McKitrick maid testified that she had worked for Mrs. McKitrick for about 9 years, and was working for her when Duncan took his meals there; that one night, when Mr. Duncan was in the bathroom washing his hands for supper, she heard Mr. McKitrick downstairs; that she told Duncan of McKitrick's presence, and advised him to hide in the closet, which he did; that Mrs. McKitrick took Duncan to board, because she needed the money, and witness had heard her say she was going to tell Mr. McKitrick about the matter. Witness was upstairs much of the time in the evening, and had never seen

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anything out of the way in the relations of Duncan and Mrs. Mc-Kitrick

Mrs. McKitrick denied emphatically that she ever made any statement to her husband indicating that she had been unfaithful to him. There were people in the lunchroom, and she admitted to him that she had done wrong in taking Duncan to board. She asked him to give her an opportunity to explain the matter fully, but he would not listen to her. It further appeared from the testimony that McKitrick was not prosperous, and that his wife was helping him in every way possible; that she did have serious objections to Catherine's marriage to Gass, and "that they all discussed the question of the marriage

the night before the 6th, as she remembers."

The charge against this woman is the most serious that can be formulated against a wife. If true, it brands her for all time. While the seriousness of the charge ought not to be permitted to shield her. if guilty, guilt will not be presumed from suspicious circumstances. but must be established by evidence "clear and satisfactory." Glennan v. Glennan, 3 App. D. C. 334; Krous v. Krous, 41 App. D. C. 200. In the present case the evidence leaves no room for doubt that Mrs. Mc-Kitrick was a good wife and mother. In addition to the performance of her household duties, she purchased supplies for her husband's lunchroom, did cooking for it, and, in an unsuccessful moving picture venture, helped him by playing the piano. In short, she assisted her husband to the extent of her ability. He undoubtedly provided for her as well as he could, but they were in debt and their means limited. It was not unnatural, therefore, for her to have made such an arrangement with Duncan, though she unwisely withheld information of it from her husband. By not imparting this information to her husband she laid the foundation for the trouble which ensued. We are unable to credit the testimony of the husband, when he says that his wife, whom he states had brought up her children as churchgoers, confessed to committing adultery in the presence of one of them, a girl of 10 or 11 years. The statement is so unreasonable and so inconsistent with admitted facts that it must be rejected. As to the witness Gass, he stands in no better light, and, moreover, in his testimony he went no further than to voice a suspicion. It is not difficult to find an explanation and motive for the conduct of this witness toward one who admittedly was unwilling to receive him as her son-in-law.

The facts, then, are these: This woman, who had been a good wife and exemplary mother for 13 years, took this man to board without the knowledge or consent of her husband. He came to the house at supper time and left shortly thereafter. There were present, on these occasions, Mrs. McKitrick's two daughters, Gass, and the maid. No acts of familiarity were testified to by any one, and it is inconceivable, in the circumstances, that any real wrong was committed. Of course Mrs. McKitrick ought not to have taken this boarder without her husband's knowledge and consent, but that is not ground for a divorce. Viewing the case as a whole, we are clearly of opinion that the

decree should be reversed; and it is so ordered.

Reversed, with costs, and cause remanded.

PRIOLEAU v. TRIMBLE.

(Court of Appeals of District of Columbia. Submitted October 10, 1919.

Decided November 3, 1919.)

No. 3246.

United States 50—Clerk of House; action against for failure to Print Testimony in election contest.

Declaration of contestant of seat in House of Representatives in action against clerk of that body for alleged failure to print testimony forwarded to him held bad in not showing compliance with the requirements of the statute, in the nature of conditions precedent; allegations as to notice of contest, under Rev. St. § 105 (Comp. St. § 161), being conclusions, and compliance with section 127, as amended (section 184), as to forwarding testimony, not being shown.

Appeal from the Supreme Court of the District of Columbia.

Action by Aaron P. Prioleau against South Trimble. From adverse judgment, plaintiff appeals. Affirmed.

J. H. Stewart, of Washington, D. C. (James L. Neill, of Washington, D. C., on the brief), for appellant.

J. T. Lloyd and A. L. Sinclair, both of Washington, D. C., for appellee.

ROBB, Associate Justice. In his amended declaration appellant sought to hold appellee in damages because of an alleged failure by appellee, as clerk of the House of Representatives, to print testimony in two election contests, in each of which appellant was the contestant. The appeal is from a judgment sustaining appellee's demurrer to the declaration as amended.

According to the averments of the amended declaration, appellee was clerk of the House of Representatives of the 63d Congress, and it was his duty to receive the papers and written testimony from contestants and contestees in election contests, to have such papers and testimony printed by the public printer, to forward two copies of the printed record to the parties in the contest, and to lay the printed record before the elections committee of Congress at the earliest opportunity. Appellant was the Republican candidate from the First congressional district of South Carolina in the election held on the 5th of November, 1912, and Hon. George S. Legare was the Democratic candidate. "In due time as required by law" appellant "notified Hon. George S. Legare in writing" that appellant contested the latter's election. Thereafter, on the 31st of January, 1913, Mr. Legare died, and in the following April "a pretended special congressional election, unauthorized by law," was held to fill the vacancy created by the death of Mr. Legare. Appellant again was the Republican candidate, and Hon. Richard S. Whalev the Democratic candidate. "In due time as required by law in election contests" appellant served written notice upon Mr. Whaley that he would contest the latter's election, and "in due time as required by law the necessary notices were given to each contestee and the necessary testimony as required by law was taken" in plaintiff's [appellant's] contests against Mr. Legare and Mr. Whaley, "and on or about the 27th day of October, 1913, plaintiff [appellant] forwarded by registered mail in an envelope addressed to the defendant [appellee], being clerk of the House of Representatives at Washington, D. C., the papers and testimony in plaintiff's [appellant's] contest." Appellee received these papers and testimony, but, disregarding his duty to appellant, did not have them printed and "thereby unlawfully deprived the plaintiff [appellant] of his benefits and rights of contest," etc., to appellant's damage in the sum of \$20,000.

In election contests in the House of Representatives the statute requires the contestant, within 30 days after the result of the election has been determined "by the officer or board of canvassers authorized by law," to give written notice to the member whose seat he contests, and to specify particularly the grounds upon which he relies. R. S. § 105 (U. S. Comp. Stats. § 161). Appellant, in his declaration here, does not aver that the result of the election had been so determined, nor does he aver facts from which the court might determine whether or not he had complied with the law as to the giving of notice to the contestee. In other words, the averment is a conclusion of law, and not a statement of fact.

But a more serious defect is found in the averment that appellant forwarded "the papers and testimony" to appellee. Whether those papers and testimony conformed to the requirements of the statute the court may not determine, because the pleader again has indulged in conclusions of law rather than in statements of fact; but it does clearly appear that there was a failure to comply with the statute requiring an officer taking testimony in an election contest promptly to "certify and carefully seal and immediately forward the same, by mail or by express, addressed to the clerk of the House of Representatives," and to "indorse upon the envelope containing such deposition or testimony the name of the case in which it is taken, together with the name of the party in whose behalf it is taken," and to "subscribe such indorsement," etc. R. S. § 127, amended by Act March 2, 1875, c. 119, § 1, 18 Stat. 338, and Act March 2, 1887, c. 318, 24 Stat. 445 (U. S. Comp. Stats. § 184).

Other points are made by appellee, but the judgment may be affirmed, with the observation that in no event will an action of this sort lie unless it is made to appear that there has been a compliance with every substantial requirement of the statute. Before a contestant may complain of an alleged failure of the clerk of the House of Representatives to print testimony forwarded to him, it must be made to appear that the requirements of the statute, in the nature of conditions precedent, have been complied with by the contestant, and this, as we have seen, appellant has not done.

The judgment is affirmed, with costs.

Affirmed.

LEITCH V. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted October 6, 1919.

Decided November 3, 1919.)

No. 3247.

Army and navy \$\infty 40\to Transporting liquor near military camp for use in home.

Where defendant brought liquors into District of Columbia for use in his home, held that, though he transported it within five miles of a military reservation, he was not guilty of a violation of the presidential regulation of July 3, 1918, issued under Act May 18, 1917, declaring that for purposes of regulation there shall be a five-mile zone around military camps in which liquor shall not be sold, transported, etc., for the transportation came within the proviso excepting use in private homes and transportation thereto.

In Error to the Police Court of the District of Columbia.

Frank Leitch 'was convicted of violating the presidential regulation of July 3, 1918, issued under authority of Act May 18, 1917, authorizing the Commander-in-Chief to make regulations concerning the prohibition of alcoholic liquors in or near military camps, and he brings error. Reversed and remanded.

J. A. O'Shea, of Washington, D. C., for plaintiff in error.
John E. Laskey, U. S. Atty., and T. Hardy Todd, and Morgan H.
Beach, Asst. U. S. Attys., all of Washington, D. C., for defendant in error.

VAN ORSDEL, Associate Justice. This case is here on writ of error to the police court of the District of Columbia. Plaintiff in error, defendant below, was convicted of violating a presidential regulation issued July 3, 1918, prohibiting the use of alcoholic liquors in or near military camps.

The statute authorizing the issuance of the regulation (Act May 18, 1917, c. 15, § 12, 40 Stat. 76, 82 [Comp. St. 1918, § 2019a]) among other things provides:

"That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes."

By the same act, the President, as commander-in-chief of the army, is authorized to make regulations governing "the prohibition of alcoholic liquors in or near military camps."

The regulations established by the President and Secretary of War, which the defendant is charged with violating, among other things provides that—

"Around every military camp at which officers and enlisted men, not less than two hundred and fifty in number, have been or shall be stationed for (261 F.)

more than thirty consecutive days, there shall be for the purposes set forth in this regulation a zone five miles wide, except that within the existing limits of an incorporated city or town, within which the sale of alcoholic liquor shall not be forbidden by the state or local law, the zone shall not include any territory more than one-half mile from the nearest boundary of such camp. Alcoholic liquor, including beer, ale, and wine, either alone or with any other article, shall not, directly or indirectly, be sold, bartered, given, served or knowingly delivered by any person to another, within any such zone, or sent, shipped, transmitted, carried or transported to any place within any such zone: Provided, that this regulation shall not apply to the giving or serving of such liquor in a private home to members of the family or bona fide guests, other than members of the military forces, or to the sending, shipping, transmitting, carrying or transporting of such liquor to a private home for use as aforesaid."

The information charged defendant with unlawfully and knowingly shipping, carrying, and transporting certain intoxicating and spirituous liquors into a zone five miles wide from the nearest boundary of Camp Meigs, a military camp in the District of Columbia. The information was demurred to, on the ground that it failed to state, in law, a crime. The demurrer was overruled, a jury was waived, and the case was tried before the judge of the police court. It appeared from the evidence that the defendant, a resident of the District of Columbia, on the day in question went to Baltimore and returned on the train designated as the "Bootleg Special," which stopped at the yards of the Washington, Baltimore & Annapolis Electric Railway Company at Fifteenth and H Streets, Northeast. When defendant alighted from the train, he was arrested by a police officer, without search warrant or other authority, and his suitcase was found to contain eight quarts of whisky, two bottles of gin, one bottle of brandy, and one bottle of

It was stipulated that the White House station, at which defendant was arrested, was within five miles of Camp Meigs, a camp coming within the provisions of the proclamation. The testimony adduced by the government in support of the judgment of conviction was, in substance, as above related; the government relying for conviction upon the fact that the quantity of liquor described was found in the possession of the defendant within the five-mile limit. The defendant was called upon to account for the possession of the liquor aforesaid. He testified that he was bringing it in for his own use in his home; that he purchased this quantity of whisky while in Baltimore because he believed that the price was going to advance; that the brandy and rum were for the use of his wife in cooking, and that the gin was for use medicinally by an aged relative, who from time to time stopped at his house. In all of this he was corroborated by the testimony of his wife. The government offered no testimony in contradiction of it. The mere possession of the quantity of liquors described does not even raise an inference that their use was to be other than as claimed by defendant. The uncontradicted evidence, therefore, clearly brings the defendant within the proviso to the president's proclamation.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BORDEN v. CARTER.

(Court of Appeals of District of Columbia. Submitted October 9, 1919. Decided Nov. 3, 1919.)

No. 3238.

1. WAR & 4-SALE OF LEASED PREMISES; RECOVERY BY BONA FIDE PURCHASER FOR OWN OCCUPANCY.

Under exception to Joint Resolution May 31, 1918, c. 90, 40 Stat. 593, a bona fide purchaser for his own occupancy of premises subject to a lease may, at termination of lease, before conclusion of treaty of peace, recover possession, irrespective of premises being necessarily required by him for his own occupancy.

2. Jury ⇐==17(1)—Right to jury on appeal from municipal to Supreme Court.

Code of Laws 1901, § 80, providing that on appeal to the Supreme Court from the municipal court the case shall be heard de novo, but either party may demand a trial by jury, in view of section 8 authorizing the Supreme Court to make rules regulating the practice and pleading before the municipal court and in relation to appeals from judgments therein, confers on parties to such an appeal no greater privileges than are exercised by other litigants, and so no right to jury trial, where under Supreme Court rule 19 plaintiff, the owner of leased premises, seeking recovery thereof and filing affidavit of merit, is entitled to summary judgment for failure of the affidavit of defense to raise an issue of fact.

Appeal from the Supreme Court of the District of Columbia.

Action by Phillip T. Carter against Clifford A. Borden. From judgment for plaintiff, on appeal from the municipal court, defendant appeals. Affirmed.

Chapin Brown and C. B. Bauman, both of Washington, D. C., for appellant.

Paul L. Wright and M. N. Richardson, both of Washington, D.

C., for appellee.

ROBB, Associate Justice. Appeal from a judgment for the appellee under rule 19 of the court below, in an action to recover possession of certain premises in the District of Columbia purchased by ap-

pellee for occupancy as a home.

[1] The case originated in the municipal court. In his affidavit of merit appellee alleged that the purchase of the premises in question was made in good faith as a home for himself and family. In the affidavit of defense it is averred that "the said premises are not necessarily required by the plaintiff [appellee] for his own occupancy," and it is insisted that this question should have been submitted to a jury. This question was determined by this court adversely to the contention of appellant in Maxwell v. Brayshaw, 49 App. D. C. —, 258 Fed. 957 (decided May 22, 1919).

[2] It is further insisted that either party to a suit originating in the municipal court is entitled to a jury trial, upon demand, when the case is appealed to the Supreme Court of the District, and hence that rule

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19 of the latter court is invalid. We twice have determined this question adversely to appellant's contention. Columbia Laundry Co. v. Ellis, 36 App. D. C. 583; Ganss v. Goldenberg, 39 App. D. C. 597. Counsel, however, place much stress upon section 80 of the District Code, which provides that on appeal to the Supreme Court from the municipal court a case shall be heard de novo, but that "either party may demand a trial by jury." Counsel insist that the words quoted leave no discretion in the court, so that, regardless of whether there is an issue of fact to be determined, the court must submit the case to a jury if either party demands. In Fidelity & Deposit Co. of Maryland v. United States, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. Ed. 194, the validity of rule 73 of the Supreme Court of the District was upheld. It there was said, in effect, that no one is entitled to a jury trial in a civil case, unless there is an issue of fact to be determined, and that the purpose of rule 73 was merely to formulate such an issue.

Section 8 of the District Code authorizes the Supreme Court to make rules "regulating the practice and pleading" before the municipal court "and in relation to appeals" from judgments therein. When, therefore, Congress used the words quoted from section 80, it was intended to confer upon parties to an appeal from the municipal court no greater privileges than were exercised by other litigants. If, under the rules adopted by the Supreme Court of the District, an issue of fact was raised, the determination of that issue was for the jury upon demand of either party; but, if there was no such issue of fact, the statute certainly did not require the court to go through the idle ceremony of sending the case to a jury.

The judgment is affirmed, with costs.

Affirmed.

HUTCHINS v. HUTCHINS et al.

(Court of Appeals of District of Columbia. Submitted October 7, 1919. Decided November 3, 1919. Motion for Reargument, or for Modification of Judgment or Decree, Denied November 22, 1919.)

No. 3282.

WILLS \$\ightharpoonup 392\to Authority to probate after remand, without new trial. Reversal of judgment, on verdict for caveator on the issue of testamentary capacity, with remand for further proceedings, reinstates the cause in the lower court on such issue as originally framed; and till it is disposed of, by new trial or a proper dismissal, such court has no power to order the will admitted to probate.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by Walter Stilson Hutchins and another, executors, for probate of the will of Stilson Hutchins, deceased. From an order, made without new trial, after judgment for Lee Hutchins, caveator, had been reversed, and cause remanded, said caveator appeals. Reversed and remanded.

Wm. G. Johnson and Frank J. Hogan, both of Washington, D. C., for appellant.

Henry E. Davis, of Washington, D. C., for appellees.

VAN ORSDEL. Associate Justice. This cause was here before (48 App. D. C. 495) on appeal from a verdict and judgment setting aside the will of Stilson Hutchins.

In that case a caveat to the will had been filed by Lee Hutchins, one of the executors named therein. The case was referred to the law side of the court below, and issues were framed to be tried by a jury. The jury rendered a verdict against the caveator as to two of the issues, and in his favor on the issue challenging the testamentary capacity of Stilson Hutchins at the time of the execution of the will. From that judgment the caveatees appealed. We reversed the judgment and remanded the cause for further proceedings.

When the mandate of this court was sent down, the court below entered an order adjudging that the verdict of the jury on the issue as to the testamentary capacity of Stilson Hutchins be vacated and set aside, that the judgment denying admission to probate of the will be vacated and set aside, that the will be admitted to probate, and that letters testamentary issue to the said caveatees, Walter Stilson Hutchins and Charles L. Frailey, and to Lee Hutchins, upon their giving bond in the stim of \$50,000. From this order the case comes here on appeal.

The reversal of the former case in this court and its remand for further proceedings reinstated the case in the court below upon the issue of the testamentary capacity of Stilson Hutchins as originally framed, and until it was disposed of the probate court had no power to enter the order here complained of. If the caveator insists upon a new trial, unquestionably he is entitled to it under the statute. Slo-

cum v. Insurance Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. But until the case is disposed of, either by new trial or a proper dismissal, the probate court is without jurisdiction to probate the will.

The judgment is reversed, with costs, and the cause is remanded,

with instructions to vacate the order.

Reversed and remanded.

SECURITY SAVINGS & COMMERCIAL BANK et al. v. SULLIVAN.

(Court of Appeals of District of Columbia. Submitted October 10, 1919. Decided November 3, 1919.)

No. 3249.

LANDLORD AND TENANT \$\infty\$ 167(5)—INJURY FROM DEFECTIVE SIDEWALK; OWN-ER LIABLE NOTWITHSTANDING LEASE.

The owner of a building is liable to a pedestrian, injured by defect in glass in sidewalk to light vault underneath, though all of basement and first floor are leased to one party.

Appeal from the Supreme Court of the District of Columbia.

Action by Gertrude Sullivan against the Security Savings & Commercial Bank and another. From a judgment on a verdict for plaintiff, the named defendant appeals. Affirmed.

R. J. Whitford, of Washington, D. C. (Darr, Whitford & Darr, of Washington, D. C., on the brief), for appellant.

T. H. Patterson and Crandal Mackey, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is an action brought by appellee, plaintiff below, to recover damages for injuries sustained from a fall occasioned by a defect in one of the sidewalks of the city

of Washington,

It appears that defendant Security Savings & Commercial Bank is the owner of the property adjoining the point in the sidewalk where the accident occurred. For the accommodation and use of the property a vault had been extended from the basement of the building under the sidewalk. In order to furnish light for the vault, what is known as a Hyatt vault light was placed in the sidewalk immediately over the vault. One of the glass blocks in the framework became broken or misplaced, and plaintiff, while traveling along the sidewalk, caught the heel of her shoe in the hole, was thrown, and sustained the injuries complained of. From a verdict and judgment against the bank and the District of Columbia, the bank has appealed.

At the time of the accident, and for a short time prior thereto, the first floor and basement of the building had been leased to the Associated Drug Stores. Under the terms of the lease, the drug company agreed to furnish heat for the entire building, thereby assuming control of the heating plant in the basement. The vault under the side-

walk formed part of the furnace room. The balance of the building above the first floor was under the control of the bank, and rented

by it, in part, to various tenants.

The appeal can be disposed of by consideration of the single assignment of error, to the effect that, the basement and first floor of the building being held under lease by the drug company, the tenant, and not the owner of the building, is liable. It is settled law that where the owner of premises, by lease, parts with the entire possession and control of the premises, and the tenant, either by express provision of the lease or by the silence of the lease on that subject, assumes liability for the keeping of the premises in proper repair, the tenant, and not the owner, will be liable in case of an accident due to negligence in allowing the premises, or any portion thereof, to get out of repair.

The defendant bank here retained control over a portion of the building, and we think the safe rule, and one which has been sustained by able authority, is that, where a property owner, for the benefit of his property, secures an easement from the city to construct a vault or extension of the basement under the sidewalk, with permission to place in the sidewalk basement doors, a coal hole, or, as in this instance, a contrivance for lighting the vault and basement, so long as he retains any control whatever over the premises, he should be required to see that the condition thus created is kept safe and in good

repair.

This is not a suit between landlord and tenant, nor one arising from the negligence of the tenant within the portion of the premises occupied by it, but a suit involving a member of the public, who was injured upon a public sidewalk. In determining liability, it is proper to consider the obligation which the owner of the property assumed toward the public in extending his building under the sidewalk, and creating a condition in the walk which, if allowed to become defective, would jeopardize the safety of the public.

The vault in question is an easement that belongs to the land, and the obligation of the owner to keep it in safe condition and repair—

"goes with the land, and cannot be discharged by a partial alienation of the land, at least, unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property, must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passers-by, for whose benefit the sidewalk is maintained, may be injured." Trustees of Canandaigua v. Foster, 156 N. Y. 354, 361, 50 N. E. 971, 972 (41 L. R. A. 554, 66 Am. St. Rep. 575).

But it is urged that by the terms of the lease the bank parted with all control over the basement and first floor of the building, and as the light in the sidewalk was placed there for the sole purpose of lighting the vault, which was connected with the basement, the rule of liability is the same as if the drug company had leased the entire building from basement to roof. It may be suggested, though of no importance in our view of the proper conclusion to be reached in this case, that there is nothing in the record to indicate that the bank could not have repaired the defect from the sidewalk without entering the demised premises; nor does it appear that defendant would have been a trespasser, had it, through its agents, entered the basement to repair the light, if such entry was necessary. The owner could not relieve itself of its duty to the public to keep the light in the sidewalk in repair so long as it continued to exercise control over any portion of the premises. As was said in Trustees v. Foster, supra, 156 N. Y. 362. 50 N. E. 973:

"The argument that the defendant had no right of access to repair the grate, except by consent of the tenant, is without force, for the law imposing the duty was a part of the lease, and impliedly excepted from its provisions such necessary access at reasonable times as would enable the owner to discharge that duty. The lease covered the grate by implication only, the same as it embraced the rights of the owner in the entire sidewalk in front of his premises. That would not prevent him from rebuilding or repairing the sidewalk proper, when required by municipal ordinance, nor does it prevent him from rebuilding or repairing the grate when required by the common law."

The rule announced in Trustees v. Foster, supra, is expressly approved in City of Seattle v. Puget Sound Improvement Co., 47 Wash. 22, 91 Pac. 255, 12 L. R. A. (N. S.) 949, 125 Am. St. Rep. 884, 14 Ann. Cas. 1045. We are aware that in West Chicago Masonic Association v. Cohn, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am, St. Rep. 327, a case in every respect like the New York case and the one here under consideration, the Illinois Supreme Court held the tenant only liable. But we think the court in that case went too far in applying to the facts before it the general rule that, where a tenant has the entire control of the structure which causes the injury and is required to keep the same in repair, he, and not the owner, is liable. The rule undoubtedly applies where the entire property is demised, and the tenant, being required to keep the premises in repair, allows a portion thereof to become defective, resulting in injury to a third party. It would also apply where a tenant leases a portion of a building and the accident occurs through the negligence of the tenant in keeping the portion exclusively demised to him in repair.

But the owner is not relieved where he retains control of a portion of the premises, as in this case, from responsibility for making general repairs—that is, for keeping in repair portions of the premises essential to the common use and enjoyment thereof. For example, it has been held that, where the second floor of a building is leased to different tenants, the owner is liable for defects in the stairway leading thereto. Sawyer v. McGillicuddy, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260. In Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735, an awning made for and attached to a block containing three stores was held to be for the common use of all the tenants, and the owner was liable for defects therein. In Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346, the whole building was leased to different tenants, but the owner was held lia-

ble for defects in the roof. Thus the rule seems to be that, where the owner keeps control of a portion of the premises or rents the entire building to different tenants, he is still liable for general repairs.

Readman v. Conway, 126 Mass. 374, is closely analogous to the case at bar. A platform extended in front of three tenements leased to different persons. It was constructed for the benefit and use of all. In the opinion the court said:

"Neither tenant acquired any exclusive right to use or control the part

* * in front of his shop, and there was no such leasing of the platform as
would exonerate the landlords from responsibility for defects in it."

In the present case the defect is not in the basement, or the vault under the sidewalk, but in the sidewalk, which is used in common by the public and all persons entering and leaving the premises of defendant bank. While incidentally it furnished light to the vault, it, in fact, is a part of the sidewalk, which, by virtue of its permit from the city, the bank has obligated itself to keep in repair. It is an appurtenance belonging to the premises for the use in common of the general public and all persons connected with or occupying the building, which the owner is required to maintain in safe condition as long as it retains control of a portion thereof. This obligation can only be divested by a conveyance of the entire premises. If conveyed by lease, unless the owner expressly covenants to keep the premises in repair, the duty in that respect shifts from the owner to the tenant.

The case was disposed of by the court below without error, and the remaining assignments are not of sufficient importance to require consideration.

The judgment is affirmed, with costs. Affirmed.

SWANN v. AUSTELL et al. *

(Circuit Court of Appeals, Fifth Circuit. November 25, 1919.) No. 3405.

1. WILLS \$\infty\$ \$53-Acceleration of remainder contrary to testator's in-TENT.

The doctrine of acceleration of remainders is not applicable, where its application would go counter to the testator's intention.

2. Wills \$\infty 634(12)\to Vested or contingent remainder.

Under a will devising real estate to testator's widow for life, with remainder to his children, and providing that "in the event any of my children shall die before the division of any part or the whole of my estate * * * leaving no issue or surviving children, then it is my will that the portion * * * that would have otherwise gone to such deceased child or children shall be divided among my other surviving child or children, share and share alike," the remainder held not to vest until death of the widow, and then in the surviving children, to the exclusion of the estate of a deceased child leaving no issue.

3. WILLS €==802(2)—EFFECT ON VESTING OF REMAINDER BY RENUNCIATION OF widow.

That a widow renounced under the will of her husband, which gave her a life estate in certain real estate, where the dower assigned gave her the same estate in such property, held not to affect the time of vesting of the remainder as provided in the will.

4. WILLS \$\sime 630(4)\$—CONTINGENT INTERESTS UNDER DEVISE TO EXECUTOR WITH POWER OF SALE.

Under a will vesting title to real estate in executors, with power to sell in their discretion, the proceeds to go to the then surviving children of testator and children of deceased children, where sale was deferred because of outstanding dower interest of widow, and in the meantime a child died leaving no issue, her estate held to have no interest in the

Appeal from the District Court of the United States for the Northern

District of Georgia; William T. Newman, Judge.

Suit in equity by Alfred R. Swann against W. W. Austell, executor. and others. Decree for defendants, and complainant appeals. Af-

For opinions below, see 253 Fed. 807; 257 Fed. 870.

Daniel W. Rountree and Clifford L. Anderson, both of Atlanta, Ga., for appellant.

Charles T., L. C. & J. L. Hopkins, Eugene R. Black, Sanders Mc-Daniel, and King & Spalding, all of Atlanta, Ga., for appellees.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. This is an appeal by Alfred R. Swann from a decree of the District Court of the United States for the Northern District of Georgia, dismissing his bill, which he had brought in that court against W. W. Austell as the sole surviving executor of the will of Alfred Austell, deceased, W. W. Austell, Mrs. Lelia A. Thornton, and Alfred Austell, Jr., children of the testator, and Earl Austell and Mrs. Idoline Austell Watts, children of W. W. Austell.

Alfred Austell, Sr., died testate, a resident of Fulton county, Ga., in December, 1881. At the time of his death his heirs at law were his widow, Mrs. Francina C. Austell, and his four children, W. W. Austell, Mrs. Lelia A. Thornton, Mrs. Emma Jane Swann, and Alfred Austell, Jr.

The will of Alfred Austell, Sr., was duly probated in Fulton county according to the laws of Georgia, and the executors named therein were duly qualified; but all of such executors are dead, and have been dead for a number of years, with the exception of W. W. Austell,

who is the sole surviving executor.

James Swann was the husband of Mrs. Emma Jane Swann, one of the children of the testator. Mrs. Swann died in April, 1893; James Swann, her husband, died in April, 1903; and testator's widow died

in May, 1917.

Appellant is the sole devisee of his brother, James Swann, who was the sole devisee of his wife, Emma Jane Swann, and by this bill he seeks to establish his title to an undivided one-fourth interest in three certain tracts of land which form a part of the estate of Alfred Austell, Sr., and were disposed of under the will. These three tracts of land, for brevity, may be designated: (1) The home place, on Marietta street, in the city of Atlanta; (2) the north part of what is known as the Trout House lot, on North Pryor street, at the corner of what is known as Edgewood avenue, formerly called Line street; and (3) a farm in Campbell county, Ga., called the Lathem farm—together with one-fourth of the rents, issues, and profits which have been received from said properties since the death of the testator's widow.

The theory of the bill is that a one-fourth undivided fee-simple indefeasible interest in each of said three tracts of land vested in Mrs. Emma J. Swann during her life, and therefore passed under her will to her husband, and under his will to appellant; it being conceded that if, at the time of her death, the interest had become vested in Mrs. Swann, it would pass under the successive devises to the appellant.

The home place, on Marietta street, was disposed of by item 1 of said

will, which follows:

"Item 1. After the payment of all my just debts, I give, bequeath and devise, to my beloved wife, Francina, the dwelling house and lot, whereon and wherein I now reside, which fronts on Marietta street in the city of Atlanta, in said county and state, being on the south side of said street, and is bounded on the west by the lot of the First Presbyterian Church of Atlanta, on the east by the lot of C. Kontz, except that portion of said lot which fronts on the right of way of the Western & Atlantic Railroad, and extends back from said right of way to the back line of said lot of said First Presbyterian Church.

"To have, hold, use and occupy, as a home for her and our children for and

during the natural life of my said wife, or until she shall marry again.

"Upon the happening of either of which events, said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or if any of my children shall be dead, at that time, leaving children surviving them, such last mentioned children shall take the share of their deceased parent;

"And I expressly devise and direct that the said dwelling house and lot shall not be encumbered by, or subjected to the payment of any debt, she, my said wife, may contract, or any contracts she may make, but shall remain during her life, or widowhood, a secure and unmolested home and residence for her and my said children, while they reside with her, and under her maternal

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care and protection; not meaning by this, however, that she shall be compelled to have any of our children live with her, unless she shall so desire."

The Trout House lot was disposed of by item 2 of the will, which follows:

"Item 2. It is my will and desire, and I hereby devise and direct that my executors hereinafter named, shall not sell, during the life of my said wife, any of my store houses, or other houses, on the lot known as the Trout House lot, on the corner of Decatur and Pryor streets, in said city of Atlanta, fronting on Decatur street one hundred feet, more or less, and extending back at right angles with Decatur street, and on Pryor street, to Line street, but they may build, out of any funds that may come into their hands, if they deem it best, other storehouses on the part of said lot adjoining the building known as the Austell corner.

"I direct my said executors to collect the rents of the store houses, or other houses, as may be on said Trout House lot, and out of the rents so collected, that they pay my said wife the sum of two thousand dollars, payable in equal quarterly payments, for each and every year of her natural life, whether she marries again or not.

"And my executors are directed to take the receipt for the same from her-

self alone and to pay it to no other person.

"My executors are further directed, after paying my said wife the sum of money aforesaid, to divide the balance equally between my said children, and after the death of my said wife to sell the said store houses and lot, and divide the proceeds of such sale among my children, share and share alike, the child or children of any deceased child of mine to take the share of their deceased parent."

The Lathem farm was a part of the residue which was disposed of by item 9 of the will, as follows:

"Item 9. I further will and direct that all the residue of my estate, of whatever kind or nature, whether real, personal or mixed, not hereinbefore disposed of shall be sold, or converted into money, by my executors, at such time and place and under such circumstances, as they may deem best, by public sale, such reasonable notice of the time and place of sale as they may deem best, to be given by publication and the proceeds to be equally divided between my children, share and share alike."

As having some bearing upon the construction of other items of the will, item 10 of the will should be considered. It is as follows:

"Item 10. In any item of my will, where a division of property is directed to be made, between my children, I hereby declare it to be my will and desire that if any of my children should be dead, at the time such division is to be made, leaving any child or children surviving them, that such surviving child or children shall take the portion of their deceased parent.

"And in the event any of my children shall die, before the division of any part or the whole of my estate, as provided for in this, my will, leaving no issue, or surviving children, then it is my will and desire that the portion of my estate that would have otherwise gone to such deceased child or children, shall be divided between my other surviving child or children, share and share alike."

The widow renounced the provisions of the will in her favor and elected to take dower, and, during the year 1882, some months after her renunciation, it was assigned to her as follows: (1) A life estate in the home place, on Marietta street; (2) a life estate in the north half of the Trout House lot; (3) a life estate in one-third of the Lathem farm; and (4) a life estate in one-third of a plantation in Douglass

county, Ga., known as the Gorman plantation, which was devised by item 5 of the will to Alfred Austell, Jr.

In 1883, and by a contract to which the executors, the widow, and all the children were parties, the widow relinquished to Alfred Austell, Jr., her dower estate in the Gorman plantation, and "in exchange therefor" all the other parties to the contract relinquished to the widow "all interest during her life to that part of the Lathern place which was not set apart as dower."

In 1894 W. W. Austell conveyed by deed to his three children all his interest in said three tracts of land, subject, however, to certain reservations in his favor during his life. One of his children died, and his interest was inherited by his father, brother, and sister, all of whom are defendants to said Bill.

In 1886 the following verdict and decree was made by the superior court of Fulton county, Ga.:

"W. J. Garrett et al. v. Alfred Austell et al.

"We, the jury, find that the defendant Mrs. Francina Austell has no interest in the property described in the bill as the Trout House lot, on the corner of Decatur and Pryor streets, in the city of Atlanta, fronting on Decatur street one hundred feet, more or less, and extending back at right angles with Decatur street, and on Pryor street to Line street; and we further find that the executors of Alfred Austell, deceased, shall give thirty days' notice by publication, in the Atlanta Constitution, a newspaper published in the city of Atlanta, and sell said property on the premises at public outcry for cash and divide the proceeds of the sale in equal portions among the four children of said Alfred Austell, deceased, namely, Mrs. Lelia A. Thornton, Mrs. Emma J. Swann, W. W. Austell, and Alfred Austell, Jr. This Nov. 26, 1886.

W. Hugh Hunter, Foreman.

"Whereupon it is considered and decreed that defendant Mrs. Francina Austell has no interest in said property, so described in the bill and the verdict, and it is further considered and decreed that said executors shall give thirty days' notice in the Atlanta Constitution, a newspaper published in the city of Atlanta, and sell said property on the premises at public outcry for cash, and divide the proceeds of the sale in equal portions among the four children of the testator, namely, Mrs. Lelia A. Thornton, Mrs. Emma J. Swann, W. W. Austell, and Alfred Austell, Jr. Nov. 26, 1886.

"Marshall J. Clarke, Judge S. C. A. C."

The pleadings in said case were not recorded and were lost, and because of the lapse of time, over 30 years, there was no one living by whom their contents could be proven, and these facts were shown on the hearing. However, the verdict and decree were recorded upon the minutes of said court, and were properly alleged and proven. Their admission was objected to, because unaccompanied by the proceedings on which the decree was based; but they were excluded solely on the ground of irrelevancy.

The north part of this property had been set apart as part of the widow's dower about four years before this decree was rendered, and in pursuance of the authority contained in this decree the executors in

fact sold only the part not set apart as dower.

Appellant contends that an interest in the home place and in the Lathem farm vested in Mrs. Swann under the will, and that an interest in the north part of the Trout House lot vested in her under the will, and also under the verdict and decree of November 26, 1886. Ap-

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pellees contend that no interest in either tract vested in Mrs. Swann, either under the will or under the verdict and decree, but that the entire interest in each thereof vested in testator's three children who survived the widow, to wit, W. W. Austell, Mrs. Thornton, and Alfred Austell, Jr.

The foregoing statement of the case is adopted from the brief of the appellant. The determination of the question presented by the appeal depends upon the time when the interest in the three tracts of land vested in the devisees, with relation to the time of the death of the widow

of the testator.

[1-3] 1. With reference to the "home place," the estate in remainder created by the will in the children of the testator must have been either a defeasible fee or a contingent remainder. If the former, it vested in the children of the testator, who were living at his death, subject to be divested, if any one of them died without issue before the death of the widow of the testator, or before her marriage in the event she did marry. Mrs. Swann died without issue before the death of Mrs. Austell, and while she was unmarried. Her death without issue and while Mrs. Austell was unmarried operated to divest the defeasible title that was vested in her upon the death of the testator. If the remainders were contingent, the estate in remainder devised to Mrs. Swann never vested at all, since she died without issue before the death or marriage of her mother.

We do not think that the remainder estate was accelerated by Mrs. Austell's renunciation of the provisions of the will in her favor. If the remainders were contingent, there was no such acceleration, because acceleration applies only in case of vested remainders. The doctrine of acceleration is not applicable where its application would go counter to the testator's intention. It seems plain that in this case the testator's intention was to postpone the vesting of the remainders until Mrs. Austell's marriage or death, and to distribute it among the then living children and children's children of the testator. In view of the fact that the dower estate of Mrs. Austell in the "home place" was identical in quantity and duration with that devised to her in the will of her husband (except for her second marriage, which did not happen), and so was exactly what her husband had provided for her by his will, we do not think that the fact that it came to her by operation of law, instead of through the will of her husband, should have the effect of setting aside the testator's manifest intention as to the time the estates in remainder created by his will were to take effect; i. e., after the estate devised to his wife should cease.

[4] 2. With reference to the "Trout House" property and the "Lathem farm," the will created no estate in remainder, either vested or contingent, in the children of the testator. The title to these two tracts was vested in the executors, until they were sold by the executors; and, upon sale, the proceeds of the sale were to go to the then living children and children's children of the testator. Sale of the "Trout House" property was to be deferred by the terms of the will until after the death of Mrs. Austell. Sale of both pieces was deferred until the happening of that same event, because of the dower interest

of Mrs. Austell, which was outstanding in each tract, under the laws of Georgia. Title remained in the executors until Mrs. Austell's death, in trust for the purpose of the will; and the beneficial interests did not vest in the children of the testator until the executors had sold the properties for division. No sale was made of either tract during the lifetime of Mrs. Swann, and she died without issue. Her share, therefore, went to the children and children's children, who survived her and were living when the properties were sold.

It is contended that the devise to the executors came in conflict with the law against restraints upon alienation of lands. In the case of the "Lathern farm" there was no restraint upon the power of the executors to sell at any time they chose after title vested in them. In the case of the "Trout House" property, the restraint imposed by the terms of the will was no greater in duration than that imposed by the law, by reason of the outstanding dower, which prevented an earlier sale. In each it was the duration of the life of Mrs, Austell.

The trusts conferred upon the executors by the terms of the will were active and executory, not executed, and the provision of the Georgia Code (section 3737), that "when a trust is executed the legal title and the equitable interest immediately merge into the beneficiary,"

would not, therefore, apply.

The prior case of Garrett v. Austell affected only a part of the "Trout House" property, not involved in the present case. We think it was not controlling in this case, since the effect of the case was that all the heirs, then of age and competent to act, consented that the executors might sell in anticipation of the death of Mrs. Austell, who had no interest in that part of the property that was so sold.

Finding no error in the decree of the District Court, the decree is

affirmed.

TWIN CITY FIRE INS. CO. v. STOCKMEN'S NAT. BANK OF FT. BENTON, MONT.

HOME INS. CO. OF NEW YORK v. SAME.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

Nos. 3297, 3299.

1. Courts ≈ 342 —Recovery in action at law on oral assignment without reformation of policies.

Granting recovery on fire policies on the theory that agreement between owner of equity of redemption and insurer's agent that the policies should be assigned to the purchaser at sheriff's sale then and there accomplished such assignment, and that a writing contemplated would have been only a record and evidence of such assignment does not involve a reformation of the policies, or the affording of equitable relief, without the power of a federal court in an action at law.

2. Appeal and error \$\iff 197(3)\$—Objection to variance not raised below. Variance between complaint and proof, not brought to the attention of the trial court, is not available in the reviewing court.

3. Insurance \$\sim 393\$—Estoppel to assert nonindorsement of change of the loss payable clause of policy.

Insurers are estopped to allege that modification of terms as to whom loss was payable was not indorsed on the policies; their agent having had authority and been directed by them to make the indorsement, and he retaining the policies till after the fire, having given those interested to understand that this had been done.

 Insurance ← 665(8)—Evidence showing waiver of notice and proof of loss.

Evidence as to statement and conduct by insurers' local agent and adjuster *held* to sufficiently show waiver of notice and proofs of loss.

5. Insurance \$\iff 376(2)\$—Scope of provision for indorsement on policy of waiver.

Clauses in policies, prohibiting waiver unless indorsed thereon, refer only to provisions which enter into the contract of insurance, and do not affect conditions which are to be performed after loss, as furnishing proofs of loss and giving notice.

6. Insurance 555-Manner of waiving proofs of loss.

Notice and proofs of loss may be waived by express words, or by conduct inconsistent with intention to enforce strict compliance with the conditions therefor, and calculated to lead insured to believe insurer does not intend to require such compliance.

- 7. Insurance €=>556(2)—Authority of adjuster to waive proofs of loss.

 An adjuster, sent to adjust a loss, presumably has authority to waive proofs of loss.
- 8. Insurance \$\iff 629(2)\$—Pleading issuance of policy not pleading delivery.

Allegation of complaint that the fire policies were issued does not embrace one that they were delivered, and so does not estop plaintiff to show there was no delivery.

9. Insurance \$\iff 388(3)\$—Effect of sheriff's sale on policy waived,

Fire policies are not rendered null by sheriff's sale of the insured property; the insurers knowing of the proceedings and waiving all objections thereto by instructions to their agent to attach new loss payable clauses, making loss payable to purchaser.

10. Insurance \$\infty 81-Policies not voided by agent's interest.

Contingent interest of insurer's agent in the insured property does not render the policy written by him thereon null and void, but at most voidable.

11. Insurance \$\infty\$115(5)—Right to redeem an insurable interest.

The right to redeem is an insurable interest, especially where by understanding of all parties the debt of the mortgagor continued to exist, and the holder of the sale certificate held it as security, and this, though mortgagor's right of redemption be not subject to execution.

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Actions by the Stockmen's National Bank of Ft. Benton, Montana—one against the Twin City Fire Insurance Company, and the other against the Home Insurance Company of New York. Judgments for plaintiff, and defendants bring error. Affirmed.

Freeman & Thelen, of Great Falls, Mont., and Nathan H. Chase, of Minneapolis, Minn., for plaintiffs in error.

Norris, Hurd & McKellar, of Glasgow, Mont., for defendant in error.

Before ROSS, MORROW, and HUNT, Circuit Judges.

PER CURIAM. The defendant in error was the plaintiff in two actions in the court below, one against the Twin City Fire Insurance Company and one against the Home Insurance Company, to recover on policies of fire insurance. The Saco Hotel Company mortgaged its hotel property to the Homebuilders' Investment Company, and on July 13, 1916, in a suit to foreclose the mortgage, a decree was entered for the sum of \$14,369.60, and an order of sale was made. The property was advertised to be sold on August 17, 1916. but at the instance of Dunbar and Rider, two of the stockholders of the hotel company, the sale was postponed. On the date last named Dunbar and Rider borrowed \$21,000 from the plaintiff on their joint note, secured by some chattel mortgages, and with a portion of the money so borrowed they purchased the Home-builders' judgment, taking an assignment of the same in the name of the plaintiff, as additional security for its loan of \$21,000. On September 2, 1916, Armstrong, who was president of the hotel company, recovered a judgment against that company for \$9,089.62. There was included in the judgment certain notes given by the hotel company to Armstrong, Dunbar, and Rider for money advanced by them to pay for furniture for the hotel and a note of \$1,675 given to the First National Bank of Saco for money borrowed; the notes having been assigned to Armstrong for the purpose of suit.

In November, 1916, a meeting of the directors of the hotel company was had, to discuss the question whether the hotel property should be sold under the Homebuilders' judgment or a receiver should be applied for. The former course was adopted. The attorneys for Dunbar and Rider inquired if the plaintiff would consent to the sale, and stated that it might be well to have the property bid in in the plaintiff's name. Dunbar and Rider controlled the Homebuilders' judgment, and also an interest of \$3,277.98 in the Armstrong judgment, and had to their credit in the plaintiff's bank about \$6,500, balance of the \$21,000 which they had borrowed. Shortly thereafter Rider assigned his interest in the Homebuilders' judgment to Dunbar. On December 7, 1916, when the hotel property was about to be sold at sheriff's sale, Skjerseth, the defendant's local agent at Saco, made, executed, and issued the policies in suit, to take effect December 14th. The loss payable clause in the policies ran to the Homebuilders' Company without instruction from the hotel company, following the prior policies. Upon executing the policies, in accordance with the usual custom, daily reports were mailed by the agent to the home offices of the defendants, containing duplicates of all riders and writings attached to policy contracts as issued. At that time Skjerseth knew the financial condition of the hotel company, and knew that it was unable to bid in the hotel property at sheriff's sale. On December 29, 1916, the hotel real and personal property was sold at sheriff's sale, the personal property was bid in by the plaintiff for \$1,000, the real estate was first sold to satisfy the Armstrong judgment, and bid in for \$50 by Dunbar, and immediately thereafter it was again sold to satisfy the prior judgment of the mortgagee, which had been assigned to plaintiff, and was bid in by plaintiff at \$24,000, to protect the plaintiff and Dunbar and Rider. After paying plaintiff \$14,369.60 and interest and costs, the sheriff paid the balance of \$9,341.76 to Armstrong's attorney in satisfaction of the Armstrong judgment. The right of redemption remained in the hotel company and in Dunbar.

Shortly after the sale Armstrong used a portion of the money so received by him in paying the Saco Bank the amount of its note. which had been merged in the Armstrong judgment. In the meantime, about December 7, 1916, the hotel company not knowing that new policies had been executed, decided to renew the insurance, and the secretary of the company went to the Saco Bank for that purpose. He was there informed that the policies had issued, and he was told the amount of the insurance and the amount of the premium. Before the sheriff's sale, the defendants' agent agreed with the hotel company, acting by Rider, that after the sale the policies should be assigned to the purchaser. Subsequent to the sale it was again agreed between the agent's assistant in the Saco Bank and Dunbar and Rider on behalf of the hotel company that the policies would be assigned to the purchaser. On February 17, 1917, Dunbar paid the premiums on the policies at the demand of Dychtowicz, the assistant agent. Dychtowicz entered into correspondence with the defendants and the plaintiff, inquiring whether the policies should not be payable to Dunbar as insured, and loss payable to plaintiff as mortgagee, and received affirmative answers. He then wrote Armstrong, the president of the hotel company, asking him to come to the bank and assign the policies. Armstrong went to the bank, and the assistant informed him that the papers were "fixed." He again went to the bank with Dunbar, and they were told by Dychtowicz that the papers were fixed. Dychtowicz denied these conversations, and denied that Armstrong came to the bank; but it was shown that others acted for the defendants at the bank, and it is possible that some other employé of the bank acted in this instance.

As a matter of fact, no assignment was made and no loss payable clause to the plaintiff was attached to the policies. The policies remained in the hands of the agents, as also had remained the preceding policies, which had expired. On February 28, 1917, the hotel was destroyed by fire. The loss was total and in excess of the insurance. The policies contained the provision that no agent had power to waive any provision or condition thereof, unless such waiver be indorsed thereon, and that unless otherwise provided by agreement so indorsed the policies would be void if foreclosure proceedings were commenced, or notice given of sale, or if any change should take place in the insured's interest, title, or possession; that, fire occurring, the insured should give immediate notice of any loss in writing to the insurers, and within 60 days should render statements to the insurers, signed and sworn to by the insured, stating all the latter's knowledge and belief of the time and origin of the fire, interests, incumbrances, other insurance, etc., and that no action upon the policies should be sustainable until the insured had complied with all such requirements. On June 20, 1917, the defendants directed the plaintiff's attention to the 60-day clause, and advised it that no proofs had been furnished, and denied their liability. The defendants retained the premiums until late in July, 1917, when they tendered them to Dunbar, who refused them. The hotel company assigned its claims on the policies to the plaintiff. On the trial in the court below a jury was waived in each case, and the court, upon the issues and the evidence, made a general finding for the plaintiff, on

which judgment was entered.

[1, 2] The defendants rely upon the fact that the loss payable clause in each policy ran in favor of the Homebuilders' Company. which they say possessed no interest in the property at the time when the policies were renewed, of which fact the defendants' agent was aware, and upon the fact that, although the defendants notified their agent, a few days prior to the fire, to have the policies issued to Dunbar, and new loss payable clauses attached in favor of the plaintiff, nevertheless nothing was done, and at the time of the fire, the policies remained in the same form as when issued, and they point to the fact that there is no prayer in the complaints for reformation of the policies or for equitable relief, and invoke the rule that a federal court cannot afford equitable relief in an action at law, as is permitted under the Codes of some of the states.

We do not understand that the court below by its decree attempted to reform the policies, or to afford relief that could not be obtained in an action at law. The court was of the opinion that the oral agreement between the hotel company and the defendants' agent that the policies should be assigned to the plaintiff then and there accomplished such assignment, and that, although a writing was contemplated, it would have been but a record, and evidence of the previous assignment, rather than itself the assignment, and held that the hotel company, possessing a right of redemption, had an insurable interest. If there was variance between the allegations of the complaint and the proofs, that fact cannot avail the defendants in this court, for the reason that no such variance was brought to the attention of the court below. Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791; Insurance Sav. Bank v. Anglo-American Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782; Preiss v. Zitt, 148 Fed. 617, 78 C. C. A. 56; Phœnix Securities Co. v. Dittmar, 224 Fed. 892, 140 C. C. A. 336.

[3] We are of the opinion that the defendants are estopped to allege that the modification of the terms of the policies making loss payable to the plaintiff and the hotel company were not evidenced by writing indorsed thereon. Their agent, Skjerseth, had authority to make such indorsements, and he had specific instructions from the defendants so to do. The defendants admit that he was their duly appointed and acting agent at Saco, and as such agent duly authorized to solicit the business of fire insurance, and to write, countersign, and issue policies of fire insurance for the defendants and collect the premiums therefor. He retained the policies in his possession, and the plaintiff was lulled into security in the belief, based upon the express

information which it received, that the indorsements had been made. Said the court below:

"It is putting it mildly to say that the course pursued by defendants is significant and astonishing. They and all others interested clearly intended and agreed that the insurance should be in behalf of whomever at the time was exposed to loss. They were the blunderers; and yet, with knowledge of the situation and of the insured's ignorance, they withhold information and the policies, lull the insured into inactivity and sense of security until the time limit expires, and then, and only then, deliver the policies, repudiate liabliity, and return premiums."

The salient facts are that on February 16, 1917, Dychtowicz wrote to the plaintiff, inquiring whether the insurance should be placed in the name of Dunbar, with loss payable clause to the plaintiff, or whether it should be placed in the name of the plaintiff only, to which the plaintiff answered that the policies should be made in the name of Dunbar, with clause showing loss payable to the plaintiff. On February 16th Dunbar, on the demand of Dychtowicz, paid the premiums. On February 23d the defendants wrote to Skjerseth, saying that the proper procedure was to have the policies assigned from the hotel company to Dunbar, and new loss payable clause attached, showing that the interest of the Homebuilders' Company had been satisfied or assigned, and that the loss was payable to the plaintiff. Dychtowicz testified that he had no explanation to offer why he did not attach the loss payable clause in favor of the plaintiff during the four days which intervened between his receipt of the defendants' instructions and the date of the fire. There was evidence, however, that in the meantime he gave Dunbar and Armstrong to understand that the matter had been fixed. The fact may possibly be that such loss payable clauses were attached to the policies, notwithstanding that they were not found attached thereto at the time when the policies were finally delivered. However that may be, the defendants should not now be heard to say that their instructions to their agent were not in fact carried out.

[4] The evidence sufficiently shows, also, that the defendants waived notice and proofs of loss. About a week after the fire, Rider asked Skjerseth if something ought not to be done about putting in a claim. Skjerseth answered that Mangson, the adjuster, had been there and had declared it a total loss, "and they would pay the insurance." Rider further asked whether he should not have some kind of paper to show that, and Skjerseth said that he was going to fix up "any papers himself." Rider testified that he met Skjerseth again in May, 1917, and that Skjerseth told him not to worry a bit, but that the policies would be paid. When the adjuster went to the plaintiff bank some time in March, he was furnished all the evidence the bank had in the matter, and was told that, if he wanted further proof, the plaintiff would get it. He made no request for further proof. On March 15th Rider and Dunbar, through their attorneys, wrote to the defendants, notifying them of the loss, advising them that the agent at Saco had informed them that all steps relative to notice of loss and inventory thereof had been taken, "and that you were promptly advised of the fire and loss," and inquiring "when we may expect the money." The Twin City Insurance Company answered that the adjustment of the loss was turned over to Mangson, and the Home Company replied:

"This loss has been duly reported, and our adjuster, Mangson, is working on the matter at the present time, but we cannot state definitely just when the draft will be isued."

On March 19th Skjerseth wrote to the plaintiff:

"The policies are still here, and will be until draft arrives. The adjuster advised that draft in payment will be made payable to the Stockmen's National Bank and the Saco Hotel Company; both parties being interested. * * The adjuster has been fully advised of all circumstances."

On June 27th the adjuster gave the plaintiff notice that the time for proof of loss had expired, and thereafter in July the defendants each notified the plaintiff that they denied all liability under the policies,

assigning no ground for their decision.

[5-7] Clauses in insurance policies, prohibiting waiver unless the same is indorsed thereon, refer only to the provisions which enter into the contract of insurance, and they do not affect conditions which are to be performed after loss, such as furnishing proofs of loss and giving notice. These may be waived, either by expressed words or by conduct inconsistent with an intention to enforce a strict compliance with the conditions, and which conduct is calculated to lead the insured to believe that the insurer does not intend to require such compliance. Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Wheaton v. Insurance Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Rokes v. Amazon Ins. Co., 51 Md. 512; 34 Am. Rep. 323; Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862. And an adjuster sent to adjust a loss presumably has authority to waive proof of loss. Slater v. Capital Ins. Co., 89 Iowa, 628, 57 N. W. 422, 23 L. R. A. 181; Popa v. Northern Ins. Co., 192 Mich. 237, 158 N. W. 945: Milwaukee Mechanics' Institute v. Fuguav. 120 Ark, 330, 179 S. W. 497; Lusk v. American Cent. Ins. Co., 80 W. Va. 39, 91 S. E. 1078; Wholley v. Western Assurance Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. Rep. 314; Teasdale v. Insurance Co., 163 Iowa, 596, 145 N. W. 284, Ann. Cas. 1916A, 591.

[8] The defendants rely upon Northern Assurance Co. v. Grand View Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, in which it was held that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a policy of insurance, except in cases of fraud or mutual mistake; that it is competent and reasonable for insurance companies to make it a matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms thereof as accepted and delivered; and that, where the waiver relied on is the act of an agent, it must be shown either that the agent had express authority from the insurance company to make the waiver, or that the company subsequently with knowledge of the facts ratified the action of the agent. It is to be said by way of distinguishing that case from the case at bar that here the policies were never delivered to the beneficiaries

until long after the expiration of the time for the performance of all the conditions therein expressed; that the defendants here, after receiving information from their agent as to the situation of the parties, in writing directed their agent to make the necessary changes

to protect the plaintiff.

In the present case, also, the defendants' adjuster and other agents gave the plaintiff to understand that proof of loss was unnecessary, and the defendants ratified such statement so made by their adjuster, by failing to repudiate the statements contained in the letter written to them on March 13th by the attorneys for Rider and Dunbar. They accepted that letter as stating the truth. That the policies were never delivered is made clear by the evidence. From the allegation of the complaint that the policies were issued, it does not follow that they were delivered, and the plaintiff was not estopped by that allegation to show there was no delivery. The complaint alleged that after the sale of December 29, 1916, the insured requested that the plaintiff's interest be shown upon the policies, which were then in possession of Skjerseth, and that at the time of the payment of the premium the policies were still in his possession. On March 19, 1917, Skjerseth wrote to the plaintiff: "The policies are still here, and will be until draft arrives." The draft so referred to was the draft to pay the loss under the policies. In Mutual Reserve Fund L. Ass'n v. Cleveland Woolen Mills, 82 Fed. 508, 513, 27 C. C. A. 212, 217, Judge Lurton said:

"Neither is it competent for the parties to disqualify themselves from ability to agree by parol to any contract which, under the law, need not be in writing, and an agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing indorsed thereon may itself be charged by parol."

In Ætna Life Ins. Co. v. Frierson, 114 Fed. 56, 64, 51 C. C. A. 424, Judge Lurton, referring to the language above quoted, said that there was nothing in Northern Assurance Co. v. Grand View Bldg. Assn. in conflict with it.

[9] The contention that the policies were rendered null and void by the sheriff's sale of the property, and by the advertisement of the property for sale, is answered by the fact that the defendants were well aware of the proceedings and the sale, and waived all objections thereto by their instructions to their agent to attach new loss pay-

able clauses, making the loss payable to the plaintiff.

[10] The defendants contend that there can be no recovery on the policies, for the reason that at the time of writing the same their agent, Skjerseth, was a stockholder in the hotel company, and was a stockholder and the vice president of the First National Bank of Saco, which bank was an unsecured creditor of the hotel company in the amount of \$1,700. The answers allege that these facts were unknown to the defendants until shortly prior to their denial of liability. The facts so alleged were put in issue by the replies. The evidence was that Skjerseth had been a stockholder of the hotel company, that in the spring of 1916 he sold his stock at its par value, and orally agreed with the vendee to stand back of the shares for

their face value. While his oral guaranty was not enforceable, we will assume that Skjerseth intended to make it good, and that he was therefore to that extent interested in protecting the hotel company's property. His interest in securing payment of the \$1,700 note, which the local bank of Saco held against the hotel company, was extinguished by the payment of that note early in January, and prior to the time when the plaintiff's interest in the policies attached. There is no evidence to show whether the defendants were or were not aware of the reason which their agent had for protecting the insured property at the time when the policies were written, nor is there evidence as to when or how they acquired such information when they did acquire it, as they say they did before they denied liability under their policies.

The defendants in error cite cases which hold that an agent of the insurance company may not write insurance on his own property without the knowledge or consent of his principal. We have examined the cases so cited, and others, and we reach the conclusion that the true doctrine is as stated in 14 R. C. L. 873:

"It is well settled that an agent of a fire insurance company is not authorized to write a policy on his own property, nor can he bind his principal by issuing a policy to a corporation of which he is an officer and stockholder, unless his act in issuing the policy involves no breach of duty to either party. However, a policy issued by a fire insurance agent to himself is not absolutely void, but is merely voidable at the option of either party."

Among the cases holding that the contract is not void are Mercantile Co. v. Insurance Co., 141 Iowa, 607, 120 N. W. 122, 133 Am. St. Rep. 180; British Am. Assur. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147; Pratt v. Dwelling House Ins. Co., 130 N. Y. 206, 29 N. E. 117; Northrup v. Germania Ins. Co., 48 Wis. 420, 4 N. W. 350, 33 Am. Rep. 815; Hanover Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; Mershon v. National Ins. Co., 34 Iowa, 87; Citizens' State Bank v. Shawnee Fire Ins. Co., 91 Kan. 18, 137 Pac. 78, 49 L. R. A. (N. S.) 972. The case last cited is well reasoned. The agent there was the cashier of a bank. He insured property on which his bank held a mortgage. The court held that, in the absence of fraud or collusion, the company could not deny liability on account of its agent's relation to the property, and that fraud is not necessarily to be presumed from mere duality of relation. The court said:

"Here the fact that the agent was cashier of a bank which held a mortgage for about half the amount of the insurance did not prevent his acting with fidelity to his principal, and there is no reason to suppose that the risk would have been refused, had all the facts been fully disclosed."

In the present case the defendants never attempted to avoid the policies, and never notified the insured that they elected to avoid the same. On the contrary, they made a general denial of liability under the policies, and advised the plaintiff of this defense for the first time when they pleaded it in their answers to the complaints. Their argument here proceeds on the assumption that the contingent interests of their agent in the property insured rendered the contract void ab initio. We hold that the court below would not have been

justified in finding, as requested by the defendants, that Skjerseth's

interest rendered the policies "null and void."

[11] We find no merit in the contention that the plaintiff has no interest in the subject-matter of the suit. The hotel company assigned its interest under the policies to the plaintiff, but it is argued that the company had no assignable interest after the foreclosure sale. The court below held that the right to redeem was an insurable interest in any case, and that especially was this so where, as here, by reason of the understandings between the plaintiff, the corporation, and Dunbar and Rider, the hotel company's debt continued to exist, and the plaintiff held the sale certificate as security; the sale not being intended to vest plaintiff with indefeasible title, but merely was a convenient arrangement to further the understanding between the parties, citing Carpenter's Case, 16 Pet. 501, 10 L. Ed. 1044; Insurance Co. v. Stinson, 103 U. S. 29, 26 L. Ed. 473.

It is unquestionably the settled rule that the insurable interest of a mortgagor continued after foreclosure sale and during the redemption period. 14 R. C. L. 916. In Insurance Co. v. Stinson, Mr. Justice Bradley held that the owner of the equity of redemption has an insurable interest equal to the value of the buildings on the lands. We are not convinced that the Supreme Court of Montana has ruled otherwise in Hamilton v. Hamilton, 51 Mont, 509, 154 Pac, 717, where it was held that in Montana the right to redeem after foreclosure sale is a personal privilege, and not a property right, and is not itself subject to sale under execution. It does not follow, however, that the owner of the equity of redemption has not an insurable interest. Although the mortgagor's right of redemption is not subject to execution under the laws of Montana, it is a right of such a nature that the owner thereof may suffer loss by the destruction of the property. and the total risk of loss does not rest alone upon the purchaser at the foreclosure sale.

We find no error. The judgments are affirmed.

FRANK LYNCH CO. v. NATIONAL CITY BANK OF CHICAGO.*

(Circuit Court of Appeals, Eighth Circuit. October 21, 1919.)

No. 5393.

 Vendor and purchaser €==213(1)—Contract for purchase followed by possession valid against vendor's creditors.

Despite Comp. Laws N. D. 1913, §§ 5413, 5595, 5594, defining conveyances, and declaring that conveyances not recorded shall be void as against any attachment levied thereon, or judgment obtained at the suit of any party against the person in whose name title appears of record, the possession of land under a contract for purchase on installments is notice of title, and the purchaser is protected, though the contract be not recorded.

2. Courts \$\iff 366(16)\$—Decisions of state courts on recording laws followed in federal courts.

In determining questions of notice under a state's recording laws, the question being one of local real estate law, the federal courts will follow the decision of the highest state court.

3. Judgment \$\iff 788(2)\$—Rights of assignee of vendor's rights in land contract against vendor's judgment creditor.

The possession of one who entered on land under a contract for the purchase thereof on installments is not only notice to the whole world of his rights, though the contract was not recorded as authorized by Comp. Laws N. D. 1913, § 5594, but is notice that notes given for deferred purchase money may be negotiated, and where such notes were negotiated for a valuable consideration and the contract assigned, the assignee takes priority of one who recovered judgment against the original vendor before the assignment of the contract, etc., was recorded.

4. Marshaling assets and securities \$==10—Rights of conflicting creditors.

Where the owner of two quarter sections of land, each subject to two mortgages covering both parcels, after contracting to sell one quarter section on installments and admitting the purchaser into possession, negotiated the notes representing the unpaid purchase money and assigned the contract to appellant, but before the assignment of the contract, etc., was recorded, respondent recovered judgment against the owner, held, that appellant, as against respondent, the judgment creditor, was entitled to have the original mortgages first satisfied out of the quarter section which had not been sold on installments, under the rule that, when one has a lien on several things, and other persons have subordinate liens on or interests in some, but not all, of the things, the person having the prior lien, if he can do so without risk of loss, etc., must resort first to the things on which he has an exclusive lien.

5. ESTOPPEL & 78(4)—RIGHT TO URGE DOCTRINE OF MARSHALING SECURITIES AFFECTED BY AGREEMENT.

Where a vendor who had sold on installments one of two quarter sections, each of which was subject to mortgages covering the whole, thereafter assigned the contract and notes representing the unpaid purchase money, held, that the assignee was not estopped as against one who recovered judgment against the vendor before recordation of the assignment of the contract, etc., from insisting that the original mortgagee first exhaust the security of the quarter section not sold on installments, because, when the assignee bought the notes of the purchaser, it also took a deed to the quarter section, etc., and agreed to pay the incumbrances on both, for the agreement was made on condition that there was then owing a fixed sum on the notes of the purchaser, and that the assignee should have those notes paid to it, and the judgment creditor could assert no greater rights than the vendor.

(261 F.)

Appeal from the District Court of the United States for the Dis-

trict of North Dakota; Charles F. Amidon, Judge.

Suit by Arno Kresse, in the nature of an interpleader, against the Frank Lynch Company and the National City Bank of Chicago. From a decree in favor of the latter, the former appeals. Reversed and remanded.

Edward Engerud, of Fargo, N. D. (Engerud, Divet, Holt & Frame,

of Fargo, N. D., on the brief), for appellant.

A. W. Cupler, of Fargo, N. D. (B. G. Tenneson and Ed Pierce, both of Fargo, N. D., and G. L. Wire, of Chicago, Ill., on the brief), for appellee.

Before SANBORN and STONE, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge. The Northern Trading Company, a corporation, made a contract with Arno Kresse to sell and convey to him the southeast quarter of section 19, in township 139 north, of range 53 west of the fifth principal meridian, free from all incumbrances, upon his payment of his six promissory notes given for a part of the purchase price, maturing at various dates between November 1, 1913, the date of the contract, and October 21, 1921. Kresse immediately took possession, and has since continued in the open possession of the land. When the contract was made, this quarter section and the southwest quarter of section 19, of each of which the Trading Company was the owner, were subject to two recorded mortgages, each of which covered both quarter sections. On January 21, 1916, there was owing by Kresse on his notes and contract about \$4,655 and some interest. There was owing on the first mortgage about \$4,000, and on the second mortgage about \$3,545.50. On that day, for a valuable consideration, the Trading Company indorsed Kresse's notes, sold and delivered them, a written assignment of them, and of its contract with him, and its title in the two quarter sections to the Frank Lynch Company, and delivered to it a deed thereof. On January 22, 1916, before the assignment of the contract or the deed were recorded, the National City Bank of Chicago recovered and docketed a judgment for \$15,711.50 against the Trading Company, in whose name the title, subject to the two mortgages, appeared of record at that time. Then the bank and the Lynch Company each claimed that it was entitled to the payment of the amount Kresse still owed for the purchase of his quarter, and he brought this action against each of them and against the respective holders of the two prior mortgages, offered to pay the amount he still owed on his notes, and prayed that the validity and priority of the liens on his quarter section be adjudged, and the Lynch Company be required to pay off all liens thereon and to convey to him a clear title.

After a hearing of the evidence, pursuant to the stipulations of the parties and the findings and directions of the court, Kresse paid into court the amount owing on his purchase, the liens of the mortgages and of the judgment on his quarter were released, a clear title there-

to was conveyed to him, and all the issues in the case were settled, except the disposition of the fund derived from the payment into court by Kresse of the unpaid part of his purchase price, which amounted to \$5,476.25 in September, 1918, when the court below made its special findings of fact and conclusions of law and entered its decree to the effect: (1) That the judgment lien of the National City Bank's judgment on each quarter section was prior and superior to the rights of the Lynch Company; and (2) that the fund paid in by Kresse in satisfaction of his notes for the purchase price of the southeast quarter should be applied, first, to the payment of the first mortgage, and, second, to the payment of the second mortgage upon both quarter sections.

Counsel for the Lynch Company complain of these findings and this decree, and contend that the court should have held: (1) That its right to the fund derived from Kresse's payments owing on his notes was superior to the lien of the bank's judgments; and (2) that the southwest quarter should first be applied to the payment of the two blanket mortgages in their order of priority, rather than the purchase money Kresse paid on his notes for the southeast quarter. So the real question is: Did the bank by virtue of the docketing on January 22, 1916, of its judgment against the Trading Company, the prior vendor of the southeast quarter to Kresse, who was then in open possession thereof, acquire a right to the unpaid portion of his purchase price, evidenced by his promissory notes, which had been indorsed to and assigned by the Trading Company to the Lynch Company for value on January 21, 1916?

[1] The bank insists that the court's affirmative answer to this question was right. The argument of its counsel is that the sale, indorsement, assignment, and delivery to the Lynch Company for value of Kresse's negotiable promissory notes and of the Trading Company's interest in its contract of sale to Kresse were void as against the bank's judgment lien, because the assignment of the Trading Company's interest in the contract and of the promissory notes was not recorded before the judgment was docketed. In support of this claim they cite the recording acts of North Dakota to the effect that— "every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void * * * as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance" (Compiled Laws of North Dakota 1913, § 5594); that "the term 'conveyance,' as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, * which the title to any real property may be affected, except wills and powers of attorney" (section 5595); and that "every instrument, except a will in execution of a power, even though the power is one of revocation only, is to be deemed a conveyance within the meaning of the chapter on recording transfers" (section 5413).

But there is an implied general exception to the broad statement of recording statutes that unrecorded deeds and assignments of interests in real estate shall be void, to the effect that such grantees

named therein and such judgment creditors as have actual or constructive notice of such unrecorded deeds or assignments are not protected by the recording statutes. A contract by the owner of land to convey it to a grantee upon the future payment of installments of the purchase price, followed by the immediate possession of the land thereunder by the vendee, falls within this exception, although such a contract falls clearly far within the terms of the recording statutes. It is an "instrument in writing * * * by which the title to any real estate may be affected." Counsel for the bank concede that it is unnecessary to record such a contract and that such a contract supported by the possession of the vendee thereunder is not void as against a judgment creditor of the vendor notwithstanding the clear declaration of the statutes that every such conveyance is void. And why is it not void? Because the open possession of the land by the vendee is notice to all the world of the title and of the contract under which he claims, and of all the terms thereof, and because, when a vendor makes such a contract, he holds the legal title in trust for his cestui que trust, his vendee. The subsequent judgment creditor, the bank, therefore, had notice by the possession of Kresse when it docketed its judgment that the Trading Company's title to the southeast quarter was subject to Kresse's contract and his right thereunder, that Kresse had given his negotiable promissory notes for the unpaid purchase price, that they were negotiable, and that they might have been discounted or sold, or assigned to some third person.

[2, 3] But was Kresse's possession notice of every negotiation and assignment of his notes, and of the right of his vendor to their payment that had been made, although the assignment of the notes and of the contract by the vendor was not recorded, and therefore of the Trading Company's indorsement sale and assignment to the Lynch Company on the day before the judgment was docketed? The discussion of this question has taken a wide range in the arguments and briefs of counsel and has resulted in the citation of many authorities deemed pertinent or analogous. But this is a question of local real estate law, regarding which the federal courts follow the decisions of the highest judicial tribunal of the state in which the land is situated, where, as in this case, no question of a violation of the Constitution or laws of the United States, or of commercial or general law, is involved. Orvis v. Powell, 98 U. S. 176, 25 L. Ed. 238. The issue therefore becomes: What is the answer of the Supreme Court of North Dakota to this question? for its answer must prevail in this case, whatever other courts may have decided.

Before the Supreme Court of North Dakota clearly announced its final decision of this question the Supreme Court of Minnesota had answered it in the negative in a case where there were no negotiable notes involved and the instrument evidencing the agreement between the vendor of the land and the vendee thereof was a bond for a deed. Welles v. Baldwin, 28 Minn. 408, 10 N. W. 427. On the other hand, the Supreme Court of Georgia had answered it in the affirmative. Georgia State Building Association v. Faison, 114 Ga. 655, 40 S. E. 760, 762. In that case the vendee was in possession of the land under

a contract for a deed. He had given his promissory notes to the vendor for deferred payments of a part of the purchase price. The vendor transferred the notes to another, and afterward deeded the land to a third person, who had no notice of the transfer of the notes, except the open possession of the land by the original vendee. The court held that the possession of that vendee was notice to the subsequent grantee of the vendor of the possible transfer of the notes sufficient to put him on inquiry, and therefore of the fact, if such a fact there was, that the notes had been transferred to and were held by the third person, and its conclusion was that the right of the transferee of the notes to the payment by the vendee of the unpaid part of the purchase price was superior to that of the grantee of the vendor. It stated the principle of law on which it founded its decision in these words:

"One who buys from the vendor when such a vendee is thus in possession is charged with notice of every fact which due inquiry would bring to his knowledge. Such a purchaser, in contemplation of law, not only knows that the person in possession is a vendee under a bond for titles, but he also knows, if such be the fact, that the purchase-money notes have been transferred, and that they are payable no longer to the vendor, but are payable to whomsoever the vendee is legally or equitably bound to pay them."

To the same effect were Johnson v. Equitable Securities Co., 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933; Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Curtis v. Moore, 152 N. Y. 159, 163, 46 N. E. 168, 57 Am. St. Rep. 506; Cooper v. Arnett, 95 Ky. 603, 26 S. W. 811.

After these decisions had been rendered this question arose in the Supreme Court of North Dakota in this way: Hall was the owner of the land and Quaschneck was his vendee in possession under Hall's unrecorded contract to convey, in which the deferred payments of the purchase price were evidenced by the vendee's negotiable notes payable to Hall. One of Quaschneck's notes was for \$3,700, and Hall assigned it to the Amboy Bank as collateral security for his debt to that bank. Afterwards Hall mortgaged the land to Caldwell, and Caldwell assigned the mortgage for value to Blodgett. The mortgage was recorded October 12, 1908, and the assignment was recorded December 5, 1908. Blodgett took the mortgage for value, in good faith, in reliance on the record title, and the question was whether the Bank of Amboy or Blodgett had the better right to the moneys owing by Quaschneck on his note held by the bank. The Supreme Court of North Dakota held: (1) That Quaschneck's contract for a deed was subject to the recording acts; that the recording acts were inapplicable to that case, because Quaschneck's open possession of the land under a contract gave notice to all the world of his rights; and (2) that that possession also gave notice to the mortgagee in, and to the assignee of, the mortgage, not only of Quaschneck's interest and rights in the lands, but also of Hall's pledge of Quaschneck's note to the Bank of Amboy, and of that bank's rights, and that the bank's right to the payment of Quaschneck's note pledged to it was superior in law and in equity to the claim thereto of Hall's mortgagee, or of that mortgagee's assignee. That court cited, adopted and followed the opinion and the reasoning of the Georgia court in the Faison Case, 114 Ca. 655, 40 S. E. 760, 762, and held that the mortgagee, Caldwell, "was also bound to know of the transfer by" the vendor "of the purchasemoney notes * * * and of the" vendee's "legal duty to pay such notes to the holders thereof;" that Blodgett, the assignee of the mortgage, was bound to know of the outstanding notes given by the plaintiff (Quaschneck) to Hall for the purchase price of such land, and that they had been negotiated to third persons, and that Blodgett's rights were therefore subordinate to the rights of the holders of such notes. Quaschneck v. Blodgett, 32 N. D. 603, 612, 156 N. W. 216, 218.

Counsel for the bank have earnestly argued that the facts in, and the questions decided by the court in Quaschneck's Case, so materially differ from those in the case at bar, that the decision in the former case is not controlling here. All these arguments have been read and carefully considered, but they have failed to persuade. In the opinion of this court the decision and opinion in Quaschneck's Case established this rule of law regarding the titles to real estate in the state of North Dakota. The open possession of land by a vendee under the contract of the owner to sell and convey it to him upon the payment of the part of the purchase price thereof evidenced by his negotiable notes described in the contract is notice to grantees, mortgagees, and judgment creditors of the vendor of the contract, of its terms, and of any unrecorded transfer by the vendor of the vendee's notes to a third person made before the vendor made his grants or mortgage of the land, or before the judgment against him was docketed, and the transferee of the notes has, notwithstanding the recording statutes, the surperior right to the payment of the notes to himself. The Trading Company in this case for value indorsed, sold, delivered, and assigned the promissory notes of Kresse to the Lynch Company before the judgment of the bank was docketed. The open possession of the land by Kresse under his contract of purchase was notice to the bank of that contract and of this sale and transfer when its judgment was docketed, although the assignment and deed accompanying the transfer were not recorded and the right of the Lynch Company to the notes, to the payment thereof to it, and to the fund derived from their payment. was under this settled rule of law on this subject in North Dakota superior to the right of the bank thereto and superior to the lien of its judgment either on the fund or on the land. The bank's judgment lien was subject to the liens of the two mortgages on the two quarter sections and to the right of the Lynch Company to the payment to it out of the southeast quarter section of the unpaid notes of Kresse, and to the fund such payments should produce.

[4, 5] The court below, as a result of its opposite conclusion, caused the fund derived from the payment of the notes of Kresse to be applied to the payment of the two blanket mortgages, thereby satisfying one of them and leaving \$4,049.02 owing on the other, caused the southeast quarter to be released from both mortgages, and conveyed to Kresse free from all incumbrances, leaving the lien of the second mortgage on the southwest quarter for only \$4,049.02, and thereby gave the entire benefit of the fund, \$5,476.25, derived from the payment of

Kresse's notes, to the bank. Counsel for the Lynch Company claim that, as the bank's lien on the southeast quarter was inferior to the Lynch Company's right to this fund, the latter should be adjudged to be secured by a lien upon the southwest quarter for this \$5,476.25 superior to the lien of the bank, and subject only to the payment of the \$4,049.02 due under the blanket mortgage. On the other hand, counsel for the bank insist that even if the right of the Lynch Company to this \$5,476.25 was superior to that of the bank, each of the two quarter sections should be made to pay the two prior blanket mortgages in proportion to their respective values, and that this \$5,476.25 should be applied to pay the proportion of them which the southeast quarter should bear.

The court below did not find, and the evidence does not prove, the respective values of the two quarters. Assuming that each quarter was worth \$7,500 at the time of the decree, the application of the contention of the Lynch Company would add to the prior lien of the unpaid \$4,049.02 its lien for the \$5,476.25, and would thus render the lien of the bank worthless. The application of the theory of the bank would enforce a lien for one-half of the \$9,525.27 which was due on the two mortgages, or \$4,762.63 on each quarter, would apply the fund from the notes, \$5,476.25, to the payment of these mortgage liens upon the southeast quarter, thus satisfying them, and would leave the bank with a lien on the southwest quarter, subject only to the payment of the \$4,762.63, worth the difference between \$4,762.63 and the assumed value of the quarter, or \$2,737.37. Neither of these claims appears to be in exact accord with the rules and principles of equity. When the bank docketed its judgment, Kresse was in open possession of his quarter section, and the Lynch Company was the owner of his notes for the purchase price which has produced this \$5,476.25. The lien of the bank's judgment attached to the title of the Trading Company on the southwest quarter, subject only to the two blanket mortgages. It attached to the title of the Trading Company to the southeast quarter, subject to the two blanket mortgages, and subject also to Kresse's right to the title to that quarter upon the payment of his notes, and to the Lynch Company's superior rights to the notes and to the moneys derived from their payment. As the mortgagees held security upon both quarters, while Kresse and the Lynch Company held security upon but one, either of the latter had the equitable right to compel the mortgagees first to exhaust their security on the southwest quarter before resorting to the southeast quarter for their payment.

"When one has a lien upon several things, and other persons have subordinate liens upon, or interests in, some, but not all, of the same things, the person having the prior lien, if he can do so without risk of loss to himself or injustice to other persons, must resort to the property in the following order, on the demand of any party interested: (1) To the things upon which he has an exclusive lien; (2) * * *; (3) * * *; (4) * * *." Orvis v. Powell, 98 U. S. 176, 25 L. Ed. 238; Union Bank v. Stoddard, 7 N. D. 201, 73 N. W. 527; Bank v. Tufts, 14 N. D. 238, 103 N. W. 760, 116 Am. St. Rep. 682; Savings Bank v. Creswell, 100 U. S. 630, 25 L. Ed. 713.

If this had been done at the time of the decree, and if the southwest quarter had brought its assumed value \$7,500, it would have left the southeast quarter subject to mortgage liens to the amount of \$2,025.27 and to the right of the Lynch Company to the \$5,476.25, amounting in the aggregate to \$7,501.52, leaving the lien of the judgment worthless. The conclusion of the court is that the rights and equities of these parties should be adjudged pursuant to the rule of equity and the illustration of it which has just been stated, after the respective values of the two quarter sections have been proved, and it seems unnecessary to pursue this matter further, because it is probable that either by stipulations of the parties or by a molding of the decree the indicated result will be readily attained.

The arguments against the objections to this conclusion made by counsel for the bank in argument and in brief received meditation and consideration before this conclusion was reached, but they proved either inapplicable or untenable. Their contention that the Lynch Company was estopped from enforcing the equitable principle of the marshaling of assets and from compelling the mortgagees to exhaust the southwest quarter first, because when it bought Kresse's notes it took a deed of the southwest quarter and agreed with the Trading Company to pay the incumbrances upon both quarters, overlooks this conclusive answer to it, viz. that this undertaking of the Lynch Company was made on the express condition and agreement of the Trading Company that there was then owing on Kresse's notes \$4,655, and that the Lynch Company should have these notes and have them paid to it. Under these circumstances the Trading Company was estopped from denying to the Lynch Company every equitable right available to make its ownership of the notes and of their proceeds beneficial to it, and the bank's claim, based upon a lien which attached to nothing but the equity of the Trading Company, after it had made this agreement and transferred the notes, rose no higher than its source.

Let the decree below be reversed, and let the case be remanded to the court below for further proceedings, in accordance with the views expressed in this opinion.

GRAHL V. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919.)

No. 2608.

1. ALIENS & 71½, New, vol. 7 Key-No. Series—Cancellation of certificate of naturalization issued to alien enemy; "illegally."

Under Naturalization Act June 29, 1906, § 15 (Comp. St. § 4374), making it the duty of the United States attorneys to institute proceedings in any court having jurisdiction to naturalize aliens, for the purpose of setting aside and canceling a certificate of citizenship on the ground of fraud, or on the ground that it was illegally procured, a certificate of naturalization issued to an enemy alien during time of war may be attacked on the ground that it was issued in violation of Rev. St. § 2171; the word "illegally" meaning contrary to law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Illegally.]

2. JUDGMENT \$\ifterline{\pi} 470\ldots Direct and collateral attack distinguished.

A judgment of a court that had jurisdiction of the subject-matter and the parties is impervious to collateral attack in other courts, or in the same court, though erroneous in law, but not to direct attack.

3. Aliens & 71½, New, vol. 7 Key-No. Series—Proceeding to cancel certificate of naturalization direct attack on judgment.

The procedure prescribed by Naturalization Act June 29, 1906, § 15 (Comp. St. § 4374), for attack on a certificate of naturalization on the ground that it was procured by fraud, or illegally issued, is a direct, and not a collateral, attack.

4. Aliens ६ 71½, New, vol. 7 Key-No. Series—Attack on certificate of naturalization issued by state court; protection of state sovereignty.

The naturalization of aliens is exclusively a federal function, though Congress allows state tribunals to issue certificates; hence, as Naturalization Act June 29, 1906, § 15 (Comp. St. § 4374), providing for cancellation of certificates of naturalization procured through fraud or illegally issued, places states and federal courts on a parity, one to whom was issued a certificate of naturalization by a state court, though he then was an enemy alien, cannot defeat proceedings in the federal court to cancel the certificate on the ground that the proceeding encroached on state sovereignty.

5. Constitutional law 5-74-Validity of provisions for attacking certificate of naturalization.

As Congress may properly commit to the federal courts the judicial inquiry whether an administrative act has been legally performed, Naturalization Act 1906, § 15 (Comp. St. § 4374), providing for proceedings to cancel certificate of naturalization procured illegally or through fraud, is valid, inasmuch as the issuance of a naturalization certificate may be deemed an ex parte matter of essentially an administrative nature.

6. STATUTES \$\infty\$=158—Repeals by implication.

Repeals by implication are not favored.

7. ALIENS &=61—ENEMY ALIEN NOT ENTITLED TO NATURALIZATION THOUGH HIS APPLICATION WAS FILED BEFORE WAR.

In view of the history of legislation, Rev. St. § 2171, declaring that no alien, who is a native citizen, or subject, or denizen of any country, state, or sovereignty with which the United States are at war at the time of his application, shall be then admitted to citizenship, an alien, who filed a petition prior to declaration of war between the United States and the country of which he was a subject, cannot be admitted to citizenship after declaration of war, on the theory that the Naturalization Act of 1906, requiring 90 days' notice before hearing, changed the law.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Proceeding by the United States against Henry Tador Grahl. From a decree canceling defendant's certificate of naturalization (247 Fed. 968), defendant appeals. Affirmed.

John F. Kluwin, of Oshkosh, Wis., for appellant. H. A. Sawyer, of Milwaukee, Wis., for the United States. Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellant in February, 1917, was a German subject when he filed in the circuit court of Fond du Lac county, Wis., his petition to be admitted to United States citizenship. Our government's declaration of war with Germany on April 6, 1917, gave

appellant the status of an alien enemy. In May, 1917, his petition came on for hearing, after the requisite 90 days' notice, and a representative of the Bureau of Naturalization objected on the sole ground that section 2171 of the Revised Statutes was a bar to the proceeding. The objection was overruled and a certificate of citizenship was issued.

In July, 1917, the United States by its proper attorney began this proceeding to cancel appellant's certificate of citizenship in the United

States District Court in the district of appellant's residence.

Appellant assails the decree of cancellation on two grounds:

[1-3] I. That the District Court of the United States was without authority to nullify the judgment of the circuit court of Wisconsin simply by reason of a divergence of views respecting the proper construction of section 2171.

Section 15 of the Naturalization Act of June 29, 1906 (34 Stat. 601, c. 3592 [Comp. St. § 4374]), makes it the duty of United States district attorneys to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of the bringing of the suit, for the purpose of setting aside and canceling the certificate of citizenship, "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

Did the government's allegation that appellant's certificate was "illegally procured" because it resulted from a misconstruction of section 2171, give the court below jurisdiction to consider and decide? Many citations are adduced by the parties, but we shall only state briefly

our reasons for giving an affirmative answer.

"Illegally" means "contrary to law." If section 2171 in truth forbids the admission of alien enemies to citizenship, the action of the court in admitting them is contrary to law; and the decree of the court, based on a misconstruction of the statute involves an error of law, for which the decree should be vacated. And if a court's misconstruction or misapplication of the naturalization statute with respect to the requirement of a hearing in open court (Ginsberg Case, 243 U. S.

¹ By appellant: 2 Corpus Juris, 1126; United States v. Lenore (D. C.) 207 Fed. 865; United States v. Stoller (D. C.) 180 Fed. 910; United States v. Jorgenson (D. C.) 241 Fed. 412; United States v. Luria (D. C.) 184 Fed. 643; United States v. Butikofer (D. C.) 228 Fed. 918; United States v. Anderson (D. C.) 169 Fed. 201.

By appellee: Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066; Luria v. United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101; United States v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; United States v. Ness, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. 321; United States v. Kolodner, 204 Fed. 241, 124 C. C. A. 1 (C. C. A. 3d Cir.); United States v. Mulvey, 232 Fed. 513, 146 C. C. A. 471 (C. C. A. 2d Cir.); United States v. Cantini, 212 Fed. 926, 129 C. C. A. 445 (C. C. A. 3d Cir.); United States v. Schurr (D. C.) 163 Fed. 648; United States v. Van Der Molen (D. C.) 163 Fed. 650; United States v. Nisbet (D. C.) 168 Fed. 1005; United States v. Simon (C. C.) 170 Fed. 680; United States v. Mansour (D. C.) 170 Fed. 671; United States v. Meyer (D. C.) 170 Fed. 983; United States v. Plaistow (D. C.) 189 Fed. 1006; United States v. Nopoulos (D. C.) 225 Fed. 656; United States v. Leles (D. C.) 236 Fed. 784; United States v. Griminger (D. C.) 236 Fed. 285; United States v. Leles (D. C.) 227 Fed. 189.

472, 37 Sup. Ct. 422, 61 L. Ed. 853), or the requirement that the Department of Commerce and Labor's certificate of entry be filed with the clerk (Ness Case, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. 321) is an error of law that vitiates the decree and certificate of admission, certainly a misconstruction or misapplication of the statute on an alien enemy's having any right at all to admission to citizenship is a vital

A court that has jurisdiction of a stated subject-matter and has the necessary parties before it is empowered to act honestly upon a mistaken view of the law as fully as upon a correct view; and its judgment, though based on errors of law, is impervious to collateral attack in other courts or in the same court, but not to direct attack. Direct attacks, through motions for rehearing, bills of review, and appeals, are usual and of old-time familiarity. Procedure under section 15 is new and unusual. But none the less it is plainly a direct attack.

Picturing our dual form of government, state sovereignty over exclusively state matters, national sovereignty over exclusively national matters, zones of concurrent jurisdiction, and the necessity that each sovereign should respect the dignity, rights, functions, and offices of the other, appellant contends (and some of his citations support his urge) that Congress could not have meant to set up the federal courts as re-

viewing tribunals over the state courts.

So far as Congress had the power, it placed the two kinds of courts on an equality. By the terms of section 15 (in connection with other provisions of the act of 1906) one federal trial court may review the grant of a citizenship certificate of another federal trial court or of a state trial court, and one state trial court may review the grant of another state trial court or of a federal trial court. No discrimination was made.

But naturalization of aliens, like exclusion or deportation, is exclusively a federal function. So what Congress really did was to tender to the state court a power of attorney to exercise national authority, and the state court accepted and acted. But we do not know of any grant of power to Congress to force a state to use its treasury, courthouses, judges, and clerks in the administration of a purely national law, and undoubtedly a state could compel its officers to decline to act. So the state court's issuance of appellant's certificate was not a judgment of a state court, protected by the ægis of its sovereign, and the present proceeding is merely an inquiry by the United States government into the action of its own agent under a power of attorney.

If the suggestion should be made and accepted that the issuance of a naturalization certificate is an ex parte matter, of essentially an administrative nature, and not properly committed to the judiciary, manifestly appellant would not be aided in holding on to his certificate. Nor would that hypothesis affect the jurisdiction of the District Court under section 15, for Congress may properly commit to the federal courts the judicial inquiry whether an administrative act has been legally performed, as is shown in deportation and like cases.

We find no sound basis for appellant's assault upon the jurisdiction

of the District Court.

[4-7] II. That the District Court erred in its construction of section 2171.

For convenient reference we identify the several parts of that section by letters.

"(A) No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; (B) but persons resident within the United States, or the territories thereof, on the 18th day of June, in the year 1812, who had before that time made a declaration, according to law, of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject; (C) nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien."

Part (A) was brought forward from the naturalization statute of 1802 (Act April 14, 1802, c. 28, 2 Stat. 153). Other parts of that statute, in connection with part (A), show that "application" had reference to the alien's request in open court for admission, that the court "then" acted upon his request, and that, if "then" the United States was at war with his country, his request was to be denied.

Part (B) was brought forward from an act adopted on July 30, 1813 (3 Stat. 53, c. 36), during the War of 1812. This, clearly, was an act of special grace in favor of aliens who were alien enemies during that war, and who when that war ended no longer needed the grace.

The reference in proviso (C) to the removal of an alien enemy "agreeably to law" is to Act July 6, 1798, c. 66, 1 Stat. 577 (preserved as section 4067 of the Revised Statutes [Comp. St. § 7615]) which authorized the President, whenever there is a declared war between the United States and any foreign nation, by public proclamation to make all subjects of such foreign nation, who had not been "actually naturalized," subject to apprehension and removal as "alien enemies."

Against the historical background section 2171 stands out in unmistakable meaning: (A) No alien shall be admitted to citizenship while the United States is at war with his country; (B) but British subjects who have met certain conditions may, between July 30, 1813, and the end of the War of 1812, be admitted to citizenship; (C) provided that executive control of such British subjects as alien enemies shall not be interfered with until they shall have been actually naturalized.

Part (B) was transitory. Part (A) and the general statute referred to in proviso (C) expressed the permanent policy—a policy which appellant admits has been continually in force until after the disposition of this proceeding in the District Court, unless Congress abrogated that policy in the Naturalization Act of 1906.

But that act left section 2171 standing unchanged in language. In lieu of the hearing of the alien's request in open court made at the time of the hearing, the act of 1906 provided that no hearing should be had until after a formal petition by the alien had been on file and notice given for 90 days. From this change in procedure appellant in effect argues that, if he saw that the United States was on the verge of war

with Germany, he could, by filing his petition before war was declared, acquire a vested right to a hearing during war and to a certificate, if the court should find him otherwise qualified, as fully as could an alien from a friendly country. Citations pro and con are collected in the footnote.²

1. The meaning given to part (A) from 1802 to 1906 should still be given, unless Congress intended, and took sufficient means to effectuate its intent, to overthrow the policy therein declared. No express repeal is found. Repeals by implication are not favored. In the procedural changes of 1906 we fail to find any necessary implication that Congress intended to give the same privileges to alien enemies as to alien friends.

2. In 1798 Congress established executive control of alien enemies. The procedural changes of 1906 that are relied on by appellant to free him from executive control do not directly even touch the subject, and

yet they are counted on to force an implied repeal.

3. Under an act approved May 9, 1918 (40 Stat. 542, c. 69), certain classes of alien enemies may be admitted to citizenship during war, but hearings of their applications cannot be had without executive approval and consent; and that act, after fully covering the subject, explicitly repeals section 2171. While subsequent legislation cannot be a controlling factor in the construction of prior statutes, which must speak from their own dates, it may have value as an interpretive aid. It seems clear to us that Congress in 1918 entertained the view that the act of 1906 had not impinged upon the prior denial of citizenship to alien enemies and the prior executive control of them.

The decree is affirmed.

BENEDICT et al. v. SETTERS et al.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1919.)

No. 5135.

- 1. Appeal and error \$\iff 323(1)\$—United States marshal as necessary party.

 Where plaintiff sued to enjoin the assignees of a judgment, as well as the United States marshal, from further proceeding under an execution issued on the judgment, whereby it was sought by the assignees to exercise a claimed right of redemption of real property which once had belonged to the judgment debtor, an appeal by the assignees from an adverse judgment will not be dismissed, because the marshal did not join, for in any event the assignees were the real parties in interest.
- 2. Courts ⇐= 264(2)—Ancillary jurisdiction of federal court.

 When a United States marshal, under an execution issued by the federal court, seizes property, the state courts have no jurisdiction to protect the property so illegally invaded, and the remedy of one whose property is taken is by ancillary proceeding in the federal court.

2 By appellant: United States v. Meyer, 241 Fed. 305, 154 C. C. A. 185, Ann. Cas. 1918C, 704 (C. C. A. 2d Cir.); In re Nannanga (D. C.) 242 Fed. 737; In re Kreater (D. C.) 241 Fed. 985; In re Lindner (D. C.) 247 Fed. 138.

By appellee: In re Jonnasson (D. C.) 241 Fed. 723; In re Haas (D. C.) 242 Fed. 739; In re Naturalization of Subjects of Germany (D. C.) 242 Fed. 971; Ex parte Borchardt (D. C.) 242 Fed. 1006; In re Duus (D. C.) 245 Fed. 813.

3. Courts @=264(2)—Ancillary jurisdiction of federal court.

Where defendants, proceeding under execution on judgment of the federal court, attempted to exercise asserted rights of redemption of real property, which had once belonged to the judgment debtor, but which plaintiffs had acquired under mortgage foreclosures, held that, though all the parties were residents of Colorado, proceeding by plaintiffs to restrain defendants from further exercising such rights is ancillary to the judgment of the federal court, and so within its jurisdiction.

4. Courts \Longleftrightarrow 262(2)—Adequate remedy at law as defeating ancillary suit in equity in federal court.

Where defendants, assignees of a judgment of the federal court, attempted under execution issued on the judgment to exercise claimed rights of redemption as to lands which once belonged to the judgment creditor, and which had been acquired by plaintiffs after mortgage foreclosure, held, that plaintiffs had no adequate remedy at law, and might by ancillary suit in the federal court restrain defendants from further proceeding.

5. Injunction \$\infty\$ 114(2)—Vendor proper party to suit to protest title.

A vendor of land, who had acquired the same on mortgage foreclosure, etc., is a proper party plaintiff to a proceeding by his grantee, who had refused to pay the balance of the purchase price, to restrain third persons from asserting claimed rights of redemption in the land, by virtue of execution on a judgment rendered by the federal court against one who had originally owned the property, and who lost the same on mortgage foreclosure.

6. COURTS €=343—WAIVER OF OBJECTIONS TO PARTIES UNDER FEDERAL EQUITY RULES.

Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), where defendants filed a plea of misjoinder of parties, thus raising a question of law, and proceeded to trial on the merits without having that question set down for hearing in accordance with the rule, defendants waived the right to object to such misjoinder.

7. APPEAL AND ERROR \$\ightarrow\$1009(3)—Review of findings of fact by chancel-

Findings of fact by a chancellor on conflicting evidence will be deemed to be presumptively correct on appeal, and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in consideration of the evidence, they will not be disturbed.

The Colorado statute, giving judgment creditors the right to redeem from foreclosure sales land which had belonged to the judgment debtor, gives judgment creditors only the right of the judgment debtor.

9. Mortgages 599(1)—Time for redemption by judgment creditor after foreclosure.

Where the owner of an interest in land which was subject to deed of trust had conveyed same to the president of a national bank to secure a loan, and the deed was foreclosed as a mortgage, and the property bought in by the president for benefit of the bank, and the owner quitclaimed to the bank any interest which he might have, and thereafter the bank acquired the original note secured by a deed of trust, and had the same foreclosed, held, that judgment creditors of the owner could not thereafter redeem the property; the nine and six months period allowed for redemption having long since passed, and any title of the judgment debtor having been divested years before the first deed of trust was foreclosed.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit by Jacob W. Setters and another against James D. Benedict and others. From a decree for plaintiffs, defendants Benedict and Brown appeal. Affirmed.

Horace Phelps, of Denver, Colo., for appellants.

Gerald Hughes, of Denver, Colo. (Clayton C. Dorsey and E. I. Thayer, both of Denver, Colo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and EL-LIOTT, District Judge.

ELLIOTT, District Judge. This is an appeal from a decree of the District Court of the United States for the District of Colorado, wherein appellees were plaintiffs and appellants were defendants, and will be hereinafter referred to as plaintiffs and defendants, respectively.

By decree of the trial court the defendant, together with the United States marshal and one N. Maxcy Tabor, were perpetually enjoined from further proceedings under an execution issued in that court upon a judgment in favor of the Robert Mitchell Furniture Company against said Tabor, whereby it was sought by appellant Benedict, as assignee of such judgment, to exercise a claimed right of redemption of certain real property described in the bill of complaint, under the statutes of Colorado. This property consists of an undivided one-half interest in lands located in Pueblo county, Colo.

More than 200 pages of the record in this case were devoted to a statement of the issues as they were framed in the trial court in the way of various pleadings. While it is impossible to even concisely state these issues as thus presented, the facts involving the transfers and title to the lands in controversy, as found by the trial court, briefly

stated, are as follows:

May 26, 1886, George W. Skinner, Daniel T. Skinner, and N. Maxcy Tabor were the owners of the land in controversy in fee, and on that date executed a trust deed thereon to Mahlon D. Thatcher, as trustee, for the use of John George Haas, to secure the payment of \$40,000.

January 31, 1888, by warranty deed, subject to trust deed to Thatcher, Daniel T. Skinner conveyed to George W. Skinner and N. Maxcy

Tabor an undivided one-third interest in said premises.

July 7, 1893, Tabor conveyed to David H. Moffat his undivided one-half interest in the land, subject to said deed of trust, which, though a deed absolute on its face, was in fact a mortgage given to secure a large indebtedness of said Tabor to the First National Bank of Denver, of which Moffat was then president.

July 14, 1893, Tabor executed to Frank C. Young a general assignment for the benefit of creditors, conveying his undivided one-half interest in said lands, subject to the deed of trust in favor of

Haas and to the warranty deed or mortgage to Moffat.

December 3, 1896, the Robert Mitchell Furniture Company brought an action on a claim it held against William H. Bush and N. Maxcy Tabor in the United States Circuit Court of Colorado. January 29, 1898, the furniture company recovered judgment against the defendants in said action for \$26,500.

February 21, 1898, a release of the trust deed to Thatcher as trustee was duly executed and properly recorded, releasing the undivided one-half interest of George W. Skinner only, and George W. Skinner and Daniel T. Skinner were thereby released from all liability on the Haas indebtedness secured by the Thatcher deed of trust.

March 14, 1898, the judgment in favor of the furniture company against Bush and Tabor, above referred to, was filed for record in

the office of the clerk and recorder of Pueblo county, Colo.

June 14, 1899, George W. Skinner by quitclaim deed conveyed his undivided one-half interest in the lands in question to the George W. Skinner Investment Company, a Colorado corporation organized June 1, 1899; Tabor being then the owner of the other undivided one-half interest therein, subject to the Thatcher deed of trust and the mortgage in form of warranty deed, above referred to, in favor of Moffat, to secure the indebtedness to him and the bank of which he was then president.

October 10, 1900, Moffat, as trustee, and the First National Bank of Denver, brought an action against Tabor, the Robert Mitchell Furniture Company, Frank C. Young as assignee of Tabor, and others, as defendants, in the district court of Pueblo county, Colo., the object of which was to foreclose as a mortgage the said warranty deed, dated

July 7, 1893.

The complaint in the action contained proper recitals as to the incorporation of the furniture company, the indebtedness of Tabor to the bank and to Moffat in the sum of \$228,354.34, and that to secure the payment of the same Tabor by said warranty deed had conveyed the lands in question to Moffat, as trustee, and that the same was, in fact, a mortgage to secure the indebtedness due and to become due the bank, that a portion of the debt had been paid, and reciting the balance due and unpaid. It was also therein alleged that the furniture company, one of the defendants, claimed some right, title, interest, demand, or lien in and to said property, or some part or portion thereof, by virtue of a judgment alleged to have been recovered against the defendant Tabor, which is the judgment above referred to as having been rendered in the United States Circuit Court in favor of the Company and against Tabor and Bush on January 29, 1898. In said complaint it was further alleged that the right, title, interest, estate, claim, demand, or lien, if any ever existed, or if valid at all, in favor of said defendants, or any of them, was subsequent in time, inferior, and subject to the lien of the plaintiffs as therein stated, and to the rights of the plaintiffs in and to the property in controversy. It was further alleged that said Frank C. Young, by virtue of said general assignment. claimed some right, title, and interest therein.

Relief was prayed for the foreclosure of the deed as a mortgage, that special execution issue in favor of the plaintiff against said Tabor, that the property therein named be sold, and that if it should not bring enough that a deficiency judgment should be entered for the balance against Tabor, and further that the defendants, and each and all of them, and all persons claiming under them, or any of them, be barred and forever foreclosed of any and all right, title, estate, claim,

lien, or right of redemption in and to said premises, or any part or portion thereof, and that said defendants, and each and every and all of them, be forever enjoined and restrained from setting up or asserting any estate, right, title, lien, or demand in or to said premises, or any part or portion thereof.

The notes upon which this foreclosure suit was begun were owned by the said bank, and Moffat had no interest therein. October 18, 1900, a lis pendens in due form was duly filed in the office of the re-

corder of said Pueblo county in said foreclosure suit.

March 6, 1901, defendants Tabor, the furniture company, and Frank C. Young as assignee, all having been theretofore duly served with process, on that date duly entered their respective appearances in said foreclosure suit, and filed a stipulation whereby they and each of them agreed to plead to the complaint therein on or before March 16, 1901, and an order of court was duly entered on that date pursuant to said

stipulation.

June 6, 1901, a decree of foreclosure was entered in said foreclosure suit, reciting the entry of default against the defendants Tabor, the furniture company, and Young, and further found that the allegations of the complaint were true in all respects; that the defendant Tabor was indebted to the plaintiffs in the sum of \$103,767.81; that the same was secured by said deed, adjudicated a mortgage, covering the undivided one-half interest in the premises in controversy; that said mortgage was a first and prior lien in favor of the plaintiffs as to any and all claims, interest, right, title, or estate of either or any of the defendants; and ordered that special execution issue, and that the premises be sold in the manner required by law upon foreclosure of mortgage, said decree further reciting that:

"Each of the defendants be thereupon barred and forever foreclosed of any right, title, interest, estate, claim, demand, or right of redemption in or to said hereinabove described real property or any part, parcel, or portion thereof, and forever enjoined and restrained from claiming or asserting any estate, right, title, interests, claim, or demand in, to, or against said real estate or any part or portion thereof."

It was further ordered therein that upon sale the sheriff should issue a certificate that, if not redeemed within nine months from the date of said sale, a deed would issue to the purchaser of said property or his assigns, and thereafter at the expiration of said term, if the same be not redeemed in accordance with the provisions of the statutes providing for the redemption of property from sheriff's sales, the said sheriff should make and deliver to the purchaser or his assigns a good and sufficient deed.

July 6, 1901, foreclosure sale, pursuant to said decree, was made to David H. Moffat, who was then the president of the First National

Bank of Denver, for \$80,000.

July 6, 1901, Tabor gave the bank three notes, aggregating \$80,000, which were renewed from time to time, the interest being added to the principal, and in 1904 a note for \$100,000 was given by him, and in 1911 one for \$110,000. These notes were all simple memoranda made, carrying out an oral agreement that the amount paid for the land, with the interest and taxes thereon, should be kept track of, and that

Tabor could purchase the land from the bank at any time. It was, however, specifically understood at all times that Tabor had no interest in the property after the sheriff's deed upon said foreclosure sale to Moffat.

A cattle and land company, theretofore organized and controlled by George W. Skinner, agreed with said bank to pay the taxes as rental for the occupancy of the property in controversy, and such company did pay the taxes for the years 1901 to 1912, inclusive, and took the receipts pursuant to their agreement in the name of D. H. Moffat. During all of this time the property was assessed to D. H. Moffat, and for the years 1913 and 1914 the tax receipts were taken in the name of the estate of D. H. Moffat, to whom it has been assessed; Moffat having died in the meantime.

July 8, 1901, sheriff's certificate of purchase was issued in the name of David H. Moffat upon said foreclosure sale. As a fact, while this property was bid in in his name and the certificate was issued to him, he made such purchase and held such certificate for

the bank of which he was the president.

March 26, 1902, Tabor and Moffat entered into a lease with the Denver & Pueblo Oil Company of the land in controversy for 20 years, which lease recited that Tabor was the owner of the legal title to said half interest, subject only to deed of trust to Thatcher, and that Moffat held sheriff's certificate of purchase covering said undivided one-half interest, subject to said deed of trust, upon which the period of redemption for Tabor had expired and would expire as to his creditors April 6, 1902.

April 7, 1902, a sheriff's deed was issued and delivered to David H. Moffat upon said mortgage foreclosure sale for the property in controversy. That said David H. Moffat was trustee thereof for the First National Bank, and said bank thereupon took possession of

all of the property in controversy.

November 22, 1905, Tabor was examined in supplementary proceedings, and it appears in the record that he then testified on oath

that he had no interest in the property in question here.

December 6, 1907, a petition was filed by the Robert Mitchell Furniture Company in its action against Wm. H. Bush and others in the circuit court to revive the judgment entered January 29, 1898, which petition was filed as against Tabor only, and an order to show cause was served on Tabor December 9, 1907.

December 23, 1907, an order was entered that the judgment of January 29, 1898, should be revived as to \$21,898.89, and interest from June 14, 1898, as against N. Maxcy Tabor only.

March 18, 1911, David H. Moffat died testate.

June 14, 1911, the George W. Skinner Investment Company by quitclaim deed conveyed its undivided one-half interest in the premises in question to George W. Skinner.

In September, 1912, A. V. Hunter, who had succeeded Moffat as president of the First National Bank of Denver, learned of the Haas note, secured by trust deed in favor of Thatcher, and on November 2, 1912, said Hunter, president of the First National Bank, at

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the request of said bank and for its benefit, purchased for \$11,000 the Haas note, secured by trust deed of May 26, 1888. That there existed an agreement with the bank by which Hunter was to hold title thereto for the bank, and turn over the note to it at any time on receipt by him from the bank of \$11,000 and interest.

April 4, 1913, a quitclaim deed was executed from Tabor to the bank, covering all of the property described in the sheriff's deed of April 7, 1902, and all of the property in controversy here. That the bank thereupon accepted this deed in connection with the return to Tabor of his notes. At that time options were granted for the sale

of the premises, the details of which are immaterial here.

June 30, 1914, a quitclaim deed to said premises was executed and delivered by the executor under the will of Devid H. Moffat, deceased, to the First National Bank of Denver, pursuant to an order of the county court of the city and county of Denver, theretofore duly issued in the matter of the estate of David H. Moffat, deceased, and thereby conveyed the undivided one-half interest acquired by Moffat under the sheriff's deed to him of April 7, 1902, held by him as trustee for the said bank.

January 22, 1915, the First National Bank was the owner of the lands in controversy here and covered by the Haas trust deed. As above set forth, it was also the owner of the Haas note, secured by the Thatcher trust deed, and it brought a foreclosure suit by M. D. Thatcher, trustee, and A. V. Hunter, plaintiffs, against Tabor and the First National Bank, defendants, in the district court of Pueblo county, Colo. It conclusively appears by the record that this action was brought by the bank under supposition that it was further perfecting and protecting its title to the lands in controversy. The complaint recited, in addition to the usual recitals upon foreclosure, that on February 21, 1898, Haas released George W. Skinner and Daniel T. Skinner; that prior to the commencement of this suit Tabor conveyed all his interest in the lands described in the deed of trust to the First National Bank; that said bank had acquired, by various conveyances, the right, title, and interest of Tabor in said land, and that the bank was the owner of the undivided one-half interest in the lands therein described, the same being the lands in controversy here, subject to this deed of trust to Thatcher; and that prior to the commencement of the action Haas, for value, had indorsed and delivered the notes secured thereby to Hunter, and that the balance due was \$17,500, with interest at 8 per cent. from November 26, 1910.

October 7, 1915, default was entered against the defendants in the last-named foreclosure suit and a decree was entered finding, among other things, that the said bank was the owner in fee simple of the premises in controversy, formerly owned by Tabor. The court thereupon ordered the sale of the premises, with the usual provisions as to certificate of purchase and redemption, etc.

November 5, 1915, the bank paid Hunter \$12,985.52, being \$11,000, with interest thereupon at 6 per cent. per annum for 2 years and 3 days, and Hunter, in fulfilment of his agreement with respect to the Haas note, indorsed and delivered the same to the bank, and then

and there promised that, when the sheriff's deed was issued, he would execute a quitclaim deed to the bank in accordance with the terms of his letter to the bank's cashier, dated October 10, 1914.

December 13, 1915, sheriff's certificate of sale upon such foreclosure was duly issued to the premises in question, in favor of A. V. Hunter, for the full amount due on the note, with costs. February 12, 1916, this certificate of purchase was duly assigned and delivered by Hunter to the said First National Bank.

July 7, 1916, a warranty deed was executed and delivered by the bank to J. W. Setters, covering the property in controversy, Setters having previously purchased the same from the bank for a consideration of \$75,960; and at the time of the delivery of said warranty deed by the bank to Setters, the bank as part of the same transaction duly assigned and delivered to him the certificate of purchase previously assigned by Hunter to the bank.

All the foregoing instruments, except as otherwise stated, were duy filed and recorded in the proper offices, and for brevity that feature is not repeated as to each instrument; such filing being imme-

diately after the dates of the respective instruments.

It appears from the record that, beginning about the 1st of August, 1916, one Silverstein, an attorney representing Tabor, T. H. Hood, an attorney representing the furniture company, and others, began negotiations with reference to the judgment of the furniture company against Tabor, revived as above stated. These negotiations were carried on throughout the month of August, and on September 2, 1916, an instrument was signed in Cincinnati by the officers of the furniture company, purporting to be an assignment from the Robert Mitchell Furniture Company to James D. Benedict (with a stated consideration of \$100) of the judgment obtained by the furniture company against Tabor and Bush on January 29, 1898, in the United States Circuit Court, and such proceedings were had by Tabor, Benedict, the land and cattle company, and others that possession was received of said purported assignment, dated September 2, 1916, and the same was filed in said suit of the furniture company against Tabor and Bush in the United States District Court, and writ of execution was issued by the clerk of said court and delivered to the United States marshal, who thereupon signed a certificate of levy upon the property in question, and also signed an instrument purporting to be a certificate of redemption from the foreclosure sale last above set forth, and filed the same with the clerk of the trial court on September 13, 1916. This writ of execution commanded the United States marshal "that of the goods and chattels, lands and tenements of N. Maxcy Tabor, defendant, in your district, you cause to be made the sum of \$21,898.-89, to satisfy a judgment" rendered January 29, 1898, revived as to Tabor on December 23, 1907. This writ was returnable to court in 90 days, but was never returned. Plaintiff Benedict deposited with the United States marshal a certified check of one Brown for \$26,340.50, to redeem from the sheriff's sale to A. V. Hunter.

October 19, 1916, this suit in equity was commenced by Jacob W. Setters and the First National Bank of Denver against Samuel J.

Burris, United States marshal, and James D. Benedict, in the District Court of the United States for the District of Colorado, for the purpose of enjoining and restraining the said defendants from advertising or selling the premises under the attempted redemption, etc.

October 23, 1916, a temporary injunction was granted. Thereafter such proceedings were had that the trial court found all of the issues in favor of the plaintiffs and against the defendants, and granting the relief demanded by the plaintiffs. Thereupon the defendants

Benedict and Brown perfected their appeal.

[1] We are first met by the contention of the appellees that a reversal as to the appealing defendants would be ineffectual, because in the court below the United States marshal was the only indispensable party defendant, and without his action redemption by appellants cannot occur.

It is true that as against the marshal the plaintiffs in the court below by the final decree were awarded full relief. The issues were found in favor of the plaintiffs. It was adjudged and decreed that the attempted redemption, the marshal's certificate of attempted levy, and the marshal's certificate of an attempted redemption, were and are illegal and invalid, and should be and were canceled as clouds upon the title. Plaintiff Setters' title to the property in question was declared and decreed free and clear of all claims in each and all of the defendants, and the title quieted in him. It is shown upon the face of the pleadings that the marshal was not interested personally in the result of the action, and we do not think it can be seriously urged that by not joining in the appeal he could deprive the plaintiff Setters of the right to redeem, if that right existed.

We think the other defendants were entitled to maintain the appeal separately in their own interest, although it may have been deserted by the other, the United States marshal. The proper rule in cases of this sort, where there are various defendants, seems to be that all of the defendants affected by the joint decree should be joined in the appeal. However, the rule is otherwise where the defendants have separate and distinct interests, and the decree is several, and does not jointly affect all. In the latter event, if either defendant refuses or declines, upon notice and process issued in the court below, to become a party to the appeal, then the other defendant or defendants are at liberty to prosecute the appeal for themselves and upon their own account. Todd v. Daniel, 16 Pet. 523, 10 L. Ed. 1054. This procedure was followed by the appealing defendants and severance was allowed. We think clearly the appealing defendants are the real parties in interest, that they are the defendants the decree affected adversely, and that the other defendant, the United States marshal, had no interest therein, and the defendants Benedict and Brown have properly brought the issues into this court for determination.

[2-4] The next question that is presented by the record is that of jurisdiction. It is contended by the defendants that the court below was without jurisdiction; there being no diversity of citizenship and no federal question involved, and the suit being in no proper sense

ancillary to or dependent upon the action in which the writ of execution issued.

This entire question is involved in the determination of whether or not there was in the court below a controversy ancillary and dependent, or was it a new controversy. It is argued by the defendants that the fact the redemption sought to be made was by the holder of and upon a judgment of the federal court, instead of by the holder of a judgment of a state court, was a mere fortuitous circumstance; that it had no relation whatever to the debt in controversy between the furniture company, the judgment creditor, and Bush and Tabor, judgment debtors; and therefore that their exception to the jurisdiction of the court is well taken.

This position of appellants cannot be sustained. The money judgment was entered in the court below, and such court had jurisdiction in equity to restrain further action by the marshal under the writ of execution that had been levied upon the real estate in controversy.

The question as to what facts are necessary to constitute jurisdiction of the national courts has been frequently discussed. For a compilation of citations, see Ralston v. Sharon (C. C.) 51 Fed. 709. A review of the citations in this case clearly sustains the rule that the ancillary jurisdiction of the court can be maintained where the parties to a former suit are before the court, or the facts are such as to make the case a continuation of the former suit, or where the court is called upon to enforce or vacate its judgment or decree or set aside its process, or give relief with reference to property in its possession or under its control, or to bring in outside parties having an interest in the litigation, or where the property involved is in the custody of the court or its officers and the rights of parties thereto could not be determined in any other court without a conflict of jurisdiction between the courts. Clearly, the form of proceeding must in every case be determined by the particular facts alleged in the bill, and we are of the opinion that in this case this proceeding is supplementary and ancillary, and under no rational construction can be considered a new and original proceeding, in the sense in which federal courts have sanctioned with reference to the line which divides the jurisdiction of federal courts from that of state courts.

When the United States marshal under the execution in question here seized the property of the plaintiff, as alleged in the bill, then the state courts had no jurisdiction to protect the property so illegally invaded, and plaintiff's remedy was by ancillary proceeding in the federal court, whose process had been made the instrument of the alleged wrong. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Covell v. Heyman, 111 U. S. 179, 4 Sup. Ct. 355, 28 L. Ed. 390.

We further conclude that, although all parties to this litigation are citizens of the state of Colorado, yet the plaintiffs were not remediless in the federal court. They were entirely within their rights in filing a bill on the equity side of the court from which the process of execution issued, which bill was not an original suit, but supplemental merely to the original, in which the execution had been issued and

levied upon the property in controversy, and the property thereby placed in the custody of the court. Freeman v. Howe, 24 How. 451, 16 L. Ed. 749.

When the property of which plaintiff claimed ownership was levied upon by the marshal upon execution in the court below, as the property of the execution defendant, a citizen of the state of Colorado, the plaintiff claiming the property being a resident of the same state, the plaintiff had no adequate remedy against the United States marshal in the state court, and rightfully sought redress in the court below, having custody of the property by this ancillary proceeding. Krippendorf v. Hyde, supra.

This disposes of the contention, so earnestly urged in the brief of the defendants, that the plaintiffs, if entitled to any relief at all, had a speedy, adequate, and complete remedy at law. The trial court, therefore, committed no error in assuming and maintaining jurisdiction of

this proceeding.

[5, 6] Defendants' next contention is that it was error to permit plaintiffs to jointly maintain the suit and obtain joint relief; it being manifest that the plaintiff bank had parted with all interest that it ever had or claimed, and that plaintiff Setters had succeeded to all interest of the bank. The plea of misjoinder of parties on behalf of the defendant raises a question of law, and not a question of fact, and the record discloses that during the entire pendency of the action in the court below this question was not set down for hearing, was never heard or presented to the court, and no motion appears in the record with respect thereto. On the contrary, it affirmatively appears that all of the defendants participated to final hearing, without urging such question of misjoinder.

It may be said that the First National Bank of Denver was not a necessary party plaintiff, or that it was not the owner of the land in dispute or interested therein; but it cannot be said that it was not necessarily interested in preventing the clouding of Setters' title by attempted redemption. Setters could hold the bank by action upon the covenants of its warranty deed, and it appears by the record that he had refused to pay the bank the balance of the purchase price on ac-

count of the unlawful acts of the defendants.

Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) this question, arising upon the face of the bill, is required to be made by motion to dismiss or answer, and—

"every defense in point of law * * * may be called up and disposed of before final hearing at the discretion of the court. * * * If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice."

This not having been done, and the case having been tried through upon its merits, with no action on the part of the defendants, it was clearly nonprejudicial, and the right to object at this time was waived by the appellants, and the question is not here for determination by this court upon this appeal. The trial court did in its decree find all of the issues in the case in favor of the plaintiffs, and if it be admitted that by the defendants' answer this issue was properly joined, the

court thereby held that the bank was at least a proper party. The record clearly justifies this finding of the court, and defendants' exception is denied.

Consideration of the specification of error by defendants that by their evidence the plaintiffs failed to make out a case entitling them to equitable relief, or to any relief, brings us to a consideration of the entire record, to ascertain and determine whether or not the record

supports the judgment of the court below.

[7] The trial court made general findings in favor of the plaintiffs and based its decree thereon. Thereby every fact in issue under the pleadings and evidence was found in accordance with the plaintiffs' allegations. It cannot be seriously contended that there is not evidence in the record to support plaintiffs' allegations in their pleadings upon every material issue involved. It is true there is conflict between different witnesses upon different issues. Clearly, however, there is substantial testimony sustaining every material issue found by the trial court, and where a chancellor has considered conflicting evidence. and made his findings and decree thereon, they must be deemed to be presumptively correct by this court, and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they will not be disturbed. Thallman et al. v. Thomas, 111 Fed. 283, 49 C. C. A. 317; De Laval Separator Co. v. Iowa Separator Co., 194 Fed. 425, 114 C. C. A. 385; U. S. v. Porter Fuel Co., 247 Fed. 773, 159 C. C. A. 627.

A review of the evidence in this case convinces us that the trial court committed no obvious error in the application of the law, and that no mistake has been made in its consideration of the evidence, and we therefore find that its findings of fact should be, and they are, affirmed.

This brings us to the real contention of the parties to this record as to the law applicable to the facts as found by the trial court. Did the trial court err in holding and decreeing that Benedict, as assignee of the Robert Mitchell Furniture Company, under the circumstances disclosed by the record, had no right to redeem the property in question? The answer to this question is decisive of this case, independent of the propositions heretofore discussed, excepting that of jurisdiction.

[8, 9] Upon this issue, the rule above announced as to the presumption of the correctness of the findings of fact by the trial court obtains, and at the outset a due consideration of the entire record impels us to affirm his findings, a brief statement of which preceded this opinion. Reference to this memorandum of transfers shows that the real question here hinges upon the right of the defendants to redeem the property in question under and by virtue of the furniture company judgment, dated January 29, 1898, as judgment creditors of Tabor.

It will be noted that Benedict claims to be the assignee of a judgment originally entered in the circuit court of Colorado on January 29, 1898, in favor of the Robert Mitchell Furniture Company and against Tabor and Bush, in the sum of \$26,500. Under the statutes of Colorado this judgment ceased to be a lien against the property of the judgment debtors in six years from the date of entry, or January 29, 1904. On December 23, 1907, a judgment of revivor was entered

as against the defendant Tabor only, and judgment ordered against him for \$21,898.89, with interest from June 14, 1898. The assignment under which Benedict claimed was dated September 2, 1916.

Briefly, Tabor and two others were owners of the property in question on May 26, 1886, and on that date gave a note in the sum of \$40,000, and secured the same by mortgage deed thereon, naming Thatcher as trustee, and Tabor on January 31, 1888, by deed from one of his co-owners became the owner of an additional one-sixth interest therein, making his total ownership an undivided one-half interest, which is the property in controversy here. July 7, 1893, Tabor conveyed his interest in said property by deed, intended to operate as a mortgage, to Moffat, who was the president of the First National Bank of Denver, and on July 14, 1893, Tabor by general deed of assignment, pursuant to the statutes of Colorado relating to insolvent debtors, conveyed all of his property of every kind, including whatever redemption right he had in said undivided one-half interest in the land, to Frank C. Young, as assignee. Such proceedings were thereafter had that Young, as assignee, was discharged; but this property in question was never deeded back to Tabor. Thereafter Moffat brought suit to foreclose said deed of July 7, 1893, as a mortgage, making Tabor, the furniture company (holder of the judgment under which defendants now claim), and Frank C. Young, grantee in Tabor's deed of general assignment, parties defendant in said action.

It will be seen by reference to the above statement of facts that these defendants, who appeared in said action, entered into a stipulation that they would answer within a certain time. Thereafter they defaulted, and an order of default was taken, and judgment was rendered against them, recounting, among other things, the recitals above set forth, barring and forever foreclosing all right, title, interest, claim, demand, or right of redemption in and to the property in controversy, or any part thereof, and the defendants were thereby enjoined and restrained from claiming or asserting any estate, right, titie, interest, claim, or demand in or to or against the real estate in question, or any part or portion thereof. Upon this foreclosure sale and in accordance therewith a sheriff's deed was issued by which Moffat, then president of the First National Bank of Denver, took title and held the same as trustee for the bank, which was the real owner there-The legal title, it is true, rested in Moffat, and after his death his heirs transferred that title to the bank, on June 30, 1914, by deed, pursuant to an order of the proper court.

The first consideration then, is the effect of that deed. This was an action in a court of general jurisdiction, competent to determine the issues presented. It is conceded that the Moffat mortgage was foreclosed, subject to the first mortgage for \$40,000 secured by a deed to Thatcher, trustee. It will be noted by the statement of facts above set forth that these defendants in this foreclosure suit were called up in to assert any right, title, or interest they claimed, with notice of the purpose to foreclose any interest they had or claimed. The furniture company, assignor of Benedict, with the other defendants,

had the right to redeem, each under the provision of the statutes of Colorado applicable to his or its particular situation. Likewise a failure upon the part of these defendants to exercise that right and that privilege, before issuance of sheriff's deed, gave to Moffat, as trustee of the bank, all of the title of the defendant Tabor, relieved of the lien, claim, or interest in or to the premises on the part of the other defendants, including the furniture company. Tabor by said sheriff's deed was entirely divested of all right, title, or interest in or to the premises. Tabor thereafter never had any interest whatsoever in the lands in controversy, and from that time on they were owned by and were the property of the First National Bank, for whom Moffat acted in taking the sheriff's deed.

A suggestion is made by counsel for the defendants that after the First National Bank, through Moffat, acquired title to the property, the defendant Tabor had some understanding with the bank whereby he might reacquire the property upon the payment of certain sums of money, a memorandum of which was kept by notes. Admitting that such arrangement existed, it is not contended by the defendants that this would constitute a transfer of the ownership of the property, either legally or equitably. Title and ownership remained in the bank, and it is not even suggested that Tabor ever complied with any oral agreement whereby he became entitled to transfer of any title or interest therein.

The fact that this mortgage deed given to Moffat, the then president of the First National Bank of Denver, was given to him as trustee, that he held the title in trust as security for the payment of indebtedness to the bank, and that the bank was the real owner thereof—all of these facts, rightfully found by the trial court, as above suggested, determine the bank's ownership as dating from the date of the sheriff's deed to Moffat, April 7, 1902.

The plaintiffs, however, were not content to rest the title upon that sheriff's deed alone, and on April 4, 1913, Tabor executed, and, prior to July 21, 1914, delivered to the First National Bank his quitclaim deed, running to the bank, conveying the property in controversy to the bank. It therefore appears that Tabor first incumbered the title to this property by a mortgage for \$40,000, secured by deed of trust to Thatcher, trustee; that he thereafter gave the deed intended to secure his indebtedness to Moffat and the bank; that thereafter a judgment was entered in favor of the furniture company, and against Tabor and another; that foreclosure was had in a court of competent jurisdiction of the mortgage given to Moffat for the benefit of the bank, in which Tabor, the furniture company (judgment creditor), and Young (the assignee under his assignment, which had been made in the meantime) were made defendants; that judgment was entered, forever barring all three defendants from asserting any claim of right, title, or interest in or to the premises in controversy; that sheriff's deed was duly issued to Moffat for the benefit of the bank, and that the bank leased the premises to the cattle and land company, upon an oral agreement that they would pay the taxes; that the lands were assessed to Moffat for a series of years, and to his estate after his

death; the title which had been held in trust by Moffat being duly conveyed by deed under order of proper court to the plaintiff the First National Bank.

Remembering that the sheritff's deed to Moffat was dated April 7. 1902, and that on April 4, 1913. Tabor executed his deed to the First National Bank, and that whatever estate Young received under and by virtue of the assignment by Tabor to him had been foreclosed by the mortgage, it would seem that there could be no question as to where the title to the property in controversy rested. After April 7, 1902, Tabor had no right, title, or interest in the property what-soever. The decree in foreclosure perpetually barred all three defendants therein, and forever enjoined and restrained them from claiming or asserting any claim, including any claim to the right of redemption of the premises in question. The title to this land, however, was held by the bank, subject to the first mortgage for \$40,000 given to Thatcher as trustee, and on November 2, 1912, A. V. Hunter, who had succeeded Moffat as president of the First National Bank, at the request of the bank and for its benefit, purchased that note, and with it the deed of trust or mortgage, which constituted a lien upon the property in question, which had once been owned by Tabor, but which had for years prior thereto been the property of the bank. This note and mortgage, so taken in the name of Hunter, became and remained the property of the bank. On January 22, 1915, at the instance of the bank and for its benefit, suit to foreclose said mortgage was instituted in the said district court for the county of Pueblo, as above set forth in the statement of facts.

As appears from the the dates of the transfers set forth in the statement herein, Tabor not only had no interest whatsoever in the property in controversy herein at the date of the commencement of this suit to foreclose this mortgage, but he had been without any such interest for a period of more than 12 years; that time having elapsed since the date of the sheriff's deed to Moffat. He was made a party to this suit solely on the ground that he was the sole remaining obligor. for the purpose of obtaining deficiency judgment in case the mortgaged property brought less than the amount of the debt—not only this, but it appears upon the face of the record that the complaint in this foreclosure suit alleged that Tabor was not the owner of the property concerning which foreclosure was sought, and it also alleged affirmatively that the First National Bank was the owner. This was repeated, also, in the prayer, and the decree in this foreclosure suit specifically found and adjudged that the First National Bank was, and that Tabor was not, the owner of the property on which foreclosure was decreed, and by such foreclosure decree it was further adjudicated and decreed that said trust deed be foreclosed, and that the interest in the property in controversy of the First National Bank of Denver be sold at public auction, etc.

Thereafter such proceedings were had that the property was duly sold upon foreclosure, and sheriff's certificate duly issued to A. V. Hunter, who became in name the purchaser at said foreclosure sale; but whose purchase was made for and on behalf of and in the interest

of the First National Bank, which then became the owner of such certificate of purchase and all rights attending the same, and on February 12, 1916, such certificate of purchase was by Hunter duly assigned and delivered to the plaintiff the First National Bank.

Thereafter, on June 30, 1916, the First National Bank, being the owner of the entire title to the property in question, first, by sheriff's deed under foreclosure of the Moffat mortgage; second, by deed from Tabor to the bank; and being then the owner of the certificate of purchase on the last-named foreclosure sale—sold said lands in controversy here, together with other lands, to the plaintiff J. W. Setters, and duly executed and delivered its deed to him therefor,

with full covenants of warranty.

Under the statutes of Colorado, upon redemption from judicial sales, six months from the date of sale is allowed for redemption by the owner whose property is sold. In this particular case that provision of the statute could not possibly refer to Tabor, because it was not his property that was sold upon the last foreclosure of the mortgage. Long prior thereto he had been divested of all of his title, and whatever title he had upon the date of the giving of the mortgage to Moffat had by the foreclosure of mortgage and sale upon foreclosure passed to and become the property of the plaintiff, the First National Bank. In addition thereto, Tabor on April 4, 1913, deeded the property to said bank. Therefore there was no

right of redemption resting in him.

Under the statutes of Colorado, three months after the expiration of the time for debtor to redeem from foreclosure sale is given for redemption by judgment creditors. We think under this statute necessarily the judgment creditor therein referred to is the creditor of the owner of the land at the date of the beginning of the foreclosure, where the judgment constituted no lien upon the land, as in this case. Under the facts here, this mortgage foreclosure sale occurred on December 13, 1915. The period provided for redemption by the owner expired on June 12, 1916, while the right of redemption by the judgment creditor expired on September 12, 1916. It was the 12th of September, 1916, that this assignment of the judgment of the Robert Mitchell Furniture Company against Tabor in favor of James D. Benedict was filed in the office of the clerk of the United States District Court; the original judgment being dated January 29, 1898, and revived as to Tabor on December 23, 1907. It is not pretended that under and by virtue of said judgment there was any lien upon said land. Under the peculiar statutes of Colorado, a judgment creditor has the right to redeem, even though there is no lien, either by reason of the statute of limitations, failure to file records in the proper county, etc. It is under and by virtue of this assignment of this judgment, and under these circumstances, that the defendants here insist that Benedict was a judgment creditor within the meaning of this Colorado statute.

We have carefully reviewed the cases cited by the appellants, and find no decision of a court of last resort of Colorado that intimates a construction of this statute that would give defendant Benedict

the right to redeem that he here claims. Under the provisions of the Colorado statutes, a judgment creditor redeems under and by virtue of an execution issued upon his judgment, and by the payment of the amount necessary to redeem to the officer. The execution issued to the defendant the United States marshal in the case here (under which the right to redeem is claimed) specifically recited that the marshal should proceed only against the property of the defendant Tabor. The claim of the defendants here resolves itself into the proposition that, admitting that the property is not the property of Tabor, the judgment debtor if he ever had title thereto, no matter how long before it had been conveyed to another, the property of such other can be redeemed by such creditor of the original owner, and thus the property of another taken to pay the debt represented by such judgment. Certainly a court would not construe a statute giving to the defendants the right claimed here, unless the language of the legislative act is clear and imperative—so clear that it is not susceptible of any other construction. This statute, in our judgment, is not of that character. A rational, reasonable construction of the statute gives to judgment creditors of the owners of the land, or some interest therein, the right to redeem and make their judgment claim out of such ownership, right, title, or interest of the judgment debtor. This construction is entirely consistent with the decisions cited by the appellants, and we find persuasive language used in Hartsock v. John Wright Hardware Co., 16 Colo. App. 48, 64 Pac. 245, sustaining this construction. In Ohio & Colorado Smelting Co. v. Barr, 58 Colo. 116, 144 Pac. 552, the facts involved were not unlike the record here, and it is decisive of this issue. The Supreme Court of Colorado (In re Stevenson v. Sebring, 164 Pac. 308) determined, in construing this statute, that:

"The evident purpose of the statute which provides for redemption by judgment creditors was to enable them to subject the debtor's property to the payment of his debts."

It is not intimated that it was the intent or purpose to subject the property of another to the payment of the debtor's debts. The trial court therefore committed no error in holding that the judgment debtor, Tabor, had no right, title, or interest in or to the lands in controversy at the time of the commencement of the suit to foreclosure and for years prior thereto, and therefore that no right of redemption existed under an execution issued on the judgment in the trial court against the property of the defendant Tabor.

Finding no error, the judgment of the trial court is affirmed.

FRYER et al. v. WEAKLEY.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1919.)

No. 5398.

1. Equity \$\insertmu 422\$—Final decree where interests of persons not parties will be affected.

A court of equity ought not to and will not render a final decree, which cannot be made without seriously affecting the interest of one who is not a party to the suit, or without leaving the controversy pleaded in such condition that its final determination might be inconsistent with equity and good conscience.

2. COURTS \$\improx 310\top-Indispensable parties affecting jurisdiction of feder-

Where a resident of Tennessee, who had been granted life estate in Missouri lands, the grant at the same time appointing a resident of Tennessee as agent and attorney, authorizing him to lease the lands, collect the rents, and deliver to the life tenant one-half of the proceeds, sued in the federal District Court for Missouri tenants holding under such agent, held that, as the agent, who was a resident of Tennessee, was an indispensable party, the federal court for Missouri was without jurisdiction, particularly where the agent, the resident of Tennessee, and one to whom he had sold his beneficial interest, were substituted as defendants.

8. Courts €=313—Substitution of parties affecting jurisdiction of federal court.

Where residents of Tennessee were substituted as defendants in a suit wherein plaintiff, a resident of Tennessee, sued residents of Missouri, held that, though the suit involved title to Missouri land, the federal court for Missouri was without jurisdiction.

4. QUIETING TITLE \$\infty\$13-Nonpossession of defendant as essential.

Nonpossession by defendants is an essential to the maintenance in a federal court of an action to quiet title; so, where defendants were in possession by tenants claiming under them, plaintiff cannot maintain a suit to quiet title.

5. QUIETING TITLE \$\ightarrow\$4-ADEQUATE REMEDY AT LAW.

Where plaintiff had an adequate remedy at law, either by ejectment, or by actions against defendant's tenants, or for the use of the premises, title to which plaintiff asserted was in her exclusively, action to quiet title cannot be maintained.

6. Receivers &=189—Costs; effect of appointment without jurisdiction.

Where a federal court appointed a receiver at the instance of plaintiff, though it was without jurisdiction to entertain the suit, plaintiff is responsible for the costs and expenses of the receivership, and all property seized must be redelivered to defendants.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by Bettie G. Weakley against George C. Harris and others, in which W. S. Fryer and another intervened, being substituted as defendants. From an order appointing a receiver, the substituted defendants appeal. Reversed and remanded, with directions.

This is an appeal from an order of the District Court made on December 12, 1918, appointing a receiver of a certain tract of land in Dunklin county, Mo., worth about \$75,000, and of the rents and profits thereof, worth about \$5,000 annually, on the petitions for such a receiver of the plaintiff below, Bettie G. Weakley, and also on the opposing affidavits of the defendants W. S. Fryer and G. L. Fryer. The defendants appealed, and they assailed the order on the

grounds: (1) That at the time it was made the District Court was without jurisdiction of the subject-matter of and of the parties to the suit, because the plaintiff and the defendants were all citizens and residents of the state of Tennessee; and (2) that on the proof presented to the District Court the appointment of a receiver was contrary to the rules and principles of equity jurisprudence. The proof on the part of the plaintiff consisted of several affidavits made by the single affiant, T. F. King, the agent and attorney in fact of the plaintiff, to her complaint, and to her petition and supplemental petition for a receiver, and it consisted on the part of the defendants of separate affidavits of the defendants W. S. Fryer and G. L. Fryer. There was no denial of any fact alleged in the affidavits of the Fryers, except by some counter statements in the complaint or in the petitions verified by King. There is nothing in the record to indicate that King was more familiar with the facts or more truthful than either of the Fryers.

The burden of proof of the facts requisite to sustain the order for the receiver was on the plaintiff, and therefore, where King's affidavits aver, and the affidavit of one or the affidavits of both of the Fryers contradict such averment, it must be deemed to be unproved. For example: One of the pleadings verified by King alleges that each of the Fryers is insolvent; another that the plaintiff was in possession of the land when this suit was brought. Each of the Fryers avers in his affidavit that he is solvent, and that he is worth at least \$6,000 above his liabilities, and W. S. Fryer testifies that he has been in possession of the land ever since the death of Dr. R. N. Fryer on April 7, 1915, and still is, together with his brother, G. L. Fryer, so in possession thereof; that he has rented it to tenants during this time, who were in possession under his leases at the time this suit was commenced, tenants who have made and delivered to him or G. L. Fryer annual rental notes payable to the plaintiff and himself, which he or G. L. Fryer have collected. The plaintiff admits and charges that the Fryers have collected these rents and have failed to account for some of them, and the Fryers have testified in their affidavits that they have collected the rents and fully accounted for and paid over to the plaintiff her full share of them. In this state of the evidence the Fryers must be found to be solvent, and the possession of the land to have been in W. S. Fryer or G. L. Fryer through the tenants, who were in possession and were attorning and paying the rents to them, when this suit was commenced and ever since. Considering the evidence according to this rule, and laying aside matters irrelevant to the issues presented here, the pertinent facts are these:

W. S. Fryer was the nephew of G. N. Fryer, who was a capitalist. He lived with his uncle, G. N. Fryer, from 1909 until some time in 1914, when he went to Hot Springs, Ark., for his health. He had devoted his labor and energies to the development of his uncle's property, who had paid him nominal wages under an understanding between them that he would provide for him in the final disposition of his property. Pursuant to this arrangement Dr. Fryer executed and delivered a written instrument on November 13, 1913, which was recorded on November 15, 1913, whereby he leased, demised, and let to his sister-in-law, Bettie G. Weakley, the plaintiff, the land in controversy, to have after his death for her natural life only, and appointed his nephew W. S. Fryer "agent and attorney in fact to take charge of said lands after my death, and manage the same, rent out, and collect the rents, taking notes in the name of said Bettie G. Weakley and his name, and keep up the land, making necessary repairs and pay the taxes out of the rents. After all expenses are paid as above mentioned, he, the said William S. Fryer, is to have and retain one-half of the net amount of the rents as his own, and to pay to the said Bettie G. Weakley the other one-half, and make annual settlements with her."

About October 1, 1914, while W. S. Fryer was ill at Hot Springs, the plaintiff conveyed back to Dr. Fryer her interest in this land, and on the same day he executed an instrument whereby he demised, leased, and let the same land to her after his death for her natural life only, and appointed his son-in-law, T. F. King, agent and attorney in fact to do the same things W. S. Fryer was appointed to do in the instrument of November 13, 1913, and provided that he

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should be allowed his necessary expenses in so doing "and any additional compensation she [the plaintiff] may see fit to allow him." On January 26, 1916. the plaintiff brought suit in equity against W. S. Fryer, in which she pleaded the instruments of November 13, 1913, and October 1, 1914, made similar allegations regarding these instruments to those made by her in this suit, and prayed that the former be adjudged void, the latter valid, and that the management and control of the land and of all the rents and profits be decreed to belong to T. F. King. On November 22, 1916, the plaintiff, through her attorneys in that suit, in consideration of \$1,606 then paid to her, through her attorneys of record in that suit, by W. S. Fryer, made a written contract of compromise and settlement of all matters in controversy between them to this effect: That the instrument of November 13, 1913, should be recognized as a valid instrument with these changes: (a) That plaintiff, instead of being paid by W. S. Fryer annually one-half of the remainder of the proceeds of the rents and profits of the land after the payment of the taxes, repairs, etc., should be paid by him annually \$2.750, commencing on November 15, 1917; (b) that W. S. Fryer or his agent or attorney should collect and have for his own all the rents for the years 1915 and 1916, except those which had been already received by the plaintiff, and should pay the plaintiff \$115 and the cost of that suit. W. S. Fryer paid to the plaintiff's attorney of record, and she received, the \$1,-606, and the Dunklin county court on November 22, 1916, rendered a decree in which the terms of this compromise were embodied. Thereupon, on November 27, 1916, W. S. Fryer sold his beneficial interest, under the compromise agreement and the instrument of October 13, 1913, to G. L. Fryer for 80 acres of land and other valuable considerations. In December following the plaintiff filed a petition in the compromised suit in the Dunklin county court to set aside its decree: that petition was granted over the objection of W. S. Fryer, and he excepted to that ruling. The plaintiff then dismissed that suit, and thus deprived W. S. Fryer of his exception.

In 1917 the plaintiff brought a suit in the federal court below against W. S. Fryer and G. L. Fryer and some of the tenants on the property, in which she made the same claims that she had made in her Dunklin county suit, and that she now makes in this suit, and alleged that the Fryers had collected and appropriated to their own use \$4,000 or \$5,000 of the rents collected from the tenants on the property, and later she dismissed that suit. On April 17, 1917, she brought this suit against George C. Harris, C. L. Harris, Walter L. Carey, and D. C. Julian, tenants on the property, who were residents and citizens of the state of Missouri, while she was a resident and citizen of the state of Tennessee. She pleaded in her complaint the instruments of November 13, 1913, and October 1, 1914; the plaintiff's conveyance of her interest in the land to Dr. Fryer on October 1, 1914, before he executed his instrument of that date; that she took possession of the property, rented it to the defendant tenants, and put them in possession through her agent, King, after the death of Dr. Fryer, an allegation which, in view of the affidavits of the Fryers, cannot be held to have been established when the order for the receiver was made; that in 1916 W. S. Fryer and G. L. Fryer procured from the defendant tenants rental notes, wherein they agreed to pay the rent for the year 1917 to William S. Fryer and George L. Fryer, an averment regarding which the proof is that the Fryers took rental notes to the plaintiff and W. S. Fryer for the year 1917 in accordance with the exact terms of the instrument of November 13, 1913, and the compromise agreement; that the action of the defendant tenants in contracting to pay rent to W. S. Fryer and G. L. Fryer was a fraud upon the plaintiff's rights; that unless restrained by the court the defendant tenants would pay their notes, and make notes for future years, and pay the rental to the Fryers in breach of their obligation to the plaintiff to pay rent to her, allegations regarding which the weight of the evidence is that the defendant tenants would and did make rental notes to the plaintiff and W. S. Fryer, and pay them to him or to G. L. Fryer, who paid the repairs and taxes, and accounted for and paid to the plaintiff one-half the remainder of the proceeds of the rents pursuant to the instrument of November 13, 1913. The plaintiff further alleged that the defendants were insolvent. The relief the plaintiff asked was that the defendant tenants be enJoined from paying their rental notes to the Fryers, or to any one but a recelver appointed by the court; that at the final hearing she have a decree (a) that she is the sole owner of the land during her life; (b) that the defendant tenants have no right to pay rent to W. S. Fryer, or any other person than the plaintiff; (c) that the claim of the defendant tenants through Fryer is a cloud on her title, that it be removed, and that they be enjoined from paying any rents or executing any rental notes for future rents to Fryer, or any one but the plaintiff or her agent; (d) that the plaintiff have an accounting of rents wrongfully paid by the defendant tenants to the Fryers; and (e) that a receiver of the property and the rents due and to become due be appointed.

On April 24, 1917, the defendant tenants answered that they had no interest in the outcome of the suit, that they would pay the rents in the year 1917 and thereafter to whomsoever the court should direct them to pay them, and that the rents for 1916 had been paid. On July 14, 1917, W. S. Fryer and G. L. Fryer filed their intervening petition in this suit, in which they asserted their right to the share of the rents granted to W. S. Fryer by the instrument of November 13, 1913, and prayed that they might be made defendants in lieu of the tenant defendants. Thereupon, on the same day, by consent of the parties to the suit, the court ordered that W. S. Fryer and G. L. Fryer be permitted to intervene and be substituted in place of the tenant defendants. On February 14, 1918, the plaintiff filed a petition for a receiver. On December 6, 1918, she filed an amended petition, and on December 14, 1918, the receiver was appointed. The petitions for the receiver charge that the Fryers have rented and collected the rents of the property, and have not accounted for or paid over even one-half of the surplus proceeds thereof above the taxes, repairs, etc., according to the provisions of the instrument of November 13, 1913, while the plaintiff was and is entitled to all of that surplus under the provisions of the instrument of October 1, 1914. The weight of the evidence at the hearing, and hence the fact proved, was that the Fryers have rented the property and taken annual rental notes payable to the plaintiff and W. S. Fryer for the years 1916, 1917, 1918, and 1919, and that they had collected these rents for 1916, 1917, and 1918, had paid the taxes, etc., on the land, and had accounted for and paid over to the plaintiff all that she was entitled to receive according to the terms of the instrument of November 13, 1913, but that they had retained one-half of the surplus to which they were entitled thereunder, but which the plaintiff claims.

G. L. Fryer, of Paris, Tenn., for appellants.

J. J. Lynch, of Chattanooga, Tenn. (Allison, Lynch & Phillips, of Chattanooga, Tenn., on the brief), for appellee.

Before SANBORN and STONE, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). The first question in this case is: Did the court below have jurisdiction thereof? The foregoing statement of facts demonstrates the conclusion that the real issue in the case was and is whether the Fryers were entitled to one-half of the surplus rents of the land under Dr. G. N. Fryer's grant of November 13, 1913, and the compromise of 1916, in view of the reconveyance to him by the plaintiff and his granting on November 1, 1914, of all the surplus rents to the plaintiff. The real parties in interest in that issue were and are the plaintiff and King on one side, and the Fryers on the other. All these parties were and are residents of Tennessee. The plaintiff, in commencing this suit, however, was careful not to make the Fryers parties to it. She brought it against tenants in actual possession of the land under rental contracts which they made with W. S. Fryer, and for which they

had given their rental notes to him, payable to the plaintiff and W. S. Fryer, according to the provisions of Dr. G. N. Fryer's instrument of November 13, 1913, which he or his brother have collected. She prayed for a decree that she was the sole owner of the property during her natural life, that these tenant defendants had no right to pay, and should be enjoined from paying, any rents or executing any rental notes to W. S. Fryer or George L. Fryer, and that the claim of the tenant defendants through Fryer—that is to say, the instrument of November 13, 1913—be adjudged a cloud upon her title and be removed. There are two other prayers in the complaint—that the plaintiff have an accounting with the tenant defendants of the amount of rents wrongfully paid by them to the Fryers for the year 1916, and that a receiver be appointed; but these prayers are negligible, because there was no allegation in the complaint that these tenant defendants had made any such payments, and because the grant of each of these prayers was conditioned by the adjudication prayed that the claim of Fryer of one-half of the surplus rents and to the management and control of the property under the instrument of November 13, 1913, through which the tenant defendants claimed, should be adjudged invalid.

[1, 2] There is a fundamental principle of equity jurisprudence that a court of equity ought not to and will not render a final decree, which cannot be made without seriously affecting the interest of one who is not a party to the suit, or without leaving the controversy pleaded in such a condition that its final determination might be inconsistent with equity and good conscience. As the indispensable condition of the decree sought from the court below against these tenant defendants was its adjudication that the grant of the management and control of the property and of one-half of the surplus rents to W. S. Fryer by the instrument of November 13, 1913, was ineffectual, and that his claim thereto was unfounded, and as she demanded a perpetual injunction against any agreement to pay and any payment of any rents to him or to G. L. Fryer by any of these tenant defendants, there is no escape from the conclusion that no final decree against those defendants could be rendered in favor of the plaintiff upon this complaint without substantially affecting the interest of the Fryers in the subject-matter of this litigation. While such an adjudication and such a decree of an injunction would not be res adjudicata as against the Fryers while they were not parties to the suit, it would nevertheless deprive them of all the benefits of their claim, of all the fruits of the grants to W. S. Fryer on which they relied, at least until they should bring independent suits against these tenants and recover judgments or decrees against them upon the rental contracts.

If there were any doubt of the proposition that the Fryers and King and the plaintiff were the real parties to this controversy, and the decree sought against the defendant tenants would seriously affect their rights, the subsequent course of the parties to this suit and the subsequent action of the court below must dispel it. The tenant defendants answered the plaintiff's complaint that the rents for the year 1916

had been paid in full, that they had no interest in the outcome of the suit, and that they would pay the rents of 1917 and those arising thereafter to whomsoever the court should direct. About three months after this answer was filed, W. S. Fryer and G. L. Fryer filed a petition, in which they set forth their interest in the property, the rents, and the controversy, and prayed that they be permitted to intervene and to defend this suit in their own right in lieu of the defendant tenants, and the court below granted their petition and ordered that they "be permitted to intervene and be substituted as defendants in place of the defendants named in the bill." Thereafter the real parties in interest in this controversy, the plaintiff, King, and the Fryers, were the parties to this suit, and each of them was a citizen and resident of the state of Tennessee. So it is that W. S. Fryer and G. L. Fryer were indispensable parties to the suit below by the plaintiff here, without whose presence as parties thereto she could not maintain it. As they were and are citizens and residents of the same state as the plaintiff, and as their joinder as parties would necessarily oust the jurisdiction of the court, this suit cannot be maintained in the federal court, and the order appointing a receiver was made without jurisdiction.

[3-5] If the suggestion occurs of the possibility of the maintenance of this suit as a suit to quiet title against the tenant defendants without joining the Fryers, the answer is (1) that since the substitution of the Fryers for the tenant defendants, and therefore at the time of the appointment of the receiver, all the parties to the suit and all the real parties to the controversy have been and are residents and citizens of the same state; (2) that nonpossession by the defendants is essential to the maintenance in a federal court of an action to quiet title, and the possession was in the defendant tenants holding under the Fryers when this action was commenced and ever since, and has not been during that time in the plaintiff; and (3) that the plaintiff had an adequate remedy at law, either by ejectment for the possession of the land or at the plaintiff's option by an action on the leases between her and the defendant tenants, if there were such leases, and, if not, for the use of the premises.

[6] The conclusion is that this case falls clearly without the jurisdiction of this court, under the opinion of Judge Carland in Hawes v. First National Bank, 229 Fed. 51, 143 C. C. A. 645. The order of the court below appointing the receiver must therefore be reversed, and the case must be remanded to the District Court, with directions to cause all the moneys and property and all the proceeds of the property seized or collected by the receiver to be paid over and delivered to the defendants W. S. Fryer and G. L. Fryer, and to tax the costs and expenses of the receiver against the plaintiff below. The court, being without jurisdiction, has no property to pay them. As was well said by Judge Carland in the Hawes Case:

"Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment. * * * Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court."

PARTAN V. UNITED STATES (261 F.)

PARTAN et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 1, 1919.)

No. 3386.

1. CRIMINAL LAW \$\igchip 37-Defense of entrapment.

If an officer of the law has reason to believe that a crime is being committed, he may lawfully proceed to ascertain whether those charged with the commission are actually committing it or are otherwise criminally implicated; the detection of crime being distinguished from inducing the wrongdoer to commit the crime detected.

- 2. CRIMINAL LAW \$\ightharpoonup 371(1)\$—EVIDENCE OF OTHER OFFENSES AS SHOWING INTENT.

 On trial of defendants for violating the Espionage Act of June 15, 1917, as amended by Act May 16, 1918 (Comp. St. 1918, § 10212c), by publishing and distributing seditious literature, admission of other publications distributed by them held not error, as limited to the question of intent.
- 3. CRIMINAL LAW \$\iiint 1158(3)\$—Review of competency of jurors.

 The finding of the trial court upon the strength of a juryman's opinion, and his partiality or impartiality, will not be set aside by a reviewing court, unless error is manifest.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Criminal prosecution by the United States against A. J. Partan and W. N. Reivo. Judgment of conviction, and defendants bring error. Affirmed.

Thomas Mannix, of Portland, Or., and Austin Lewis, of San Francisco, Cal., for plaintiffs in error.

Bert E. Haney, U. S. Atty., and Barnett H. Goldstein, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Plaintiffs in error were convicted under one of several counts of an indictment which charged them, together with two others, with violation of section 3 of the Espionage Act of June 15, 1917, 40 Stat. 219, c. 30, as amended by the Act of Congress of May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c). We quote the material part of the statute:

"Whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about * * * the military or naval forces of the United States, * * * intended to bring * * * the military or naval forces of the United States * * into contempt, scorn, contumely, or disrepute. * * *"

The substance of the charge is that in October and November, 1918, defendants, with intent to violate the statute, gave away, sold, and distributed among certain persons, some of whom are named, a written document entitled "Bees and Butterflies," in which was contained the following reading matter:

"Young man; the lowest aim in your life is to be a soldier. A good soldier never tries to distinguish right from wrong. He never thinks; never reasons; he only obeys. * * * If he is ordered to fire down a crowded street when the poor are clamoring for bread, he obeys and sees the gray hairs of age

stained with red and the lifetide gushing from the breasts of women, feeling neither remorse nor sympathy. If he is ordered off as a firing squad to execute a hero or benefactor, he fires without hesitation, though he knows the bullet will pierce the noblest heart that ever beat in human breast. A good soldier is a blind, heartless, soulless, and murderous machine. He is not a man. He is not even a brute, for brutes only kill in self-defense. All that is human in him, all that is divine in him, all that constitutes the man in him, has been sworn away when he took the enlistment roll. * * * No man can fall lower than a soldier. It is a depth beneath which we cannot go. Keep the boys out of the army; it is hell. Down with the Army and Navy. We do not need killing institutions. We need life-giving institutions."

The principal point urged is that there is no substantial evidence of guilt. Omitting detailed statement, the testimony tended to show that the defendant Partan, a Finn by birth and naturalized American citizen, was the general manager of the Western Workmen's Publishing Society at Astoria, Or., and had general control of sales made from a bookstore kept by the Publishing Society, where the book "Bees and Butterflies" was sold. The defendant Reivo was editor of a paper in the Finnish language, called "Toveri," published at Astoria, and had an interest in the Workmen's Publishing Society already referred to, was employed by the members of that society, wrote articles upon the subject of Socialism, and had connection with the affairs of the society. Whether Reivo aided in the sale of the books, knowing their contents, was a question properly submitted to the jury. There was testimony that the Western Workmen's Publishing Society was a corporation at Astoria, Or., and that it published much literature wherein soldiers were described as hired mercenaries, used to kill all persons who dared to oppose the merciless and outrageous schemes of conquest of the masters of the soldiers, the capitalist class. Twenty-six copies of "Bees and Butterflies" were seized upon the book shelves of the Publishing Society. "Toveri" was the principal organ of the Western Workmen's Publishing Society, and advertised that it had a large circulation. Certain other publications were admitted in evidence as having been sold by the Western Workmen's Publishing Society; one was entitled "War-What For," published in the Finnish language, and under a heading of "A Confidential Word" contained such advice as the following:

"Follow the flag sounds brave and grand, very. Follow the flag stirs a savage passion, cunningly called patriotism. It is bait laid for fools, rot fed to mules by every tyrant, king, czar, and president at the head of governments used by the industrial ruling class."

The evidence was that Reivo was a Finn, naturalized, a member of the Socialist party, and was against the policy of sending soldiers abroad during the war with Germany, and was responsible for the

policy of editorials appearing in "Toveri."

[1] We are asked to reverse the conviction upon the ground that the representatives of the United States induced the defendants to commit the crime charged. It is true that employés of the United States did inquire at the bookstore of the Publishing Company whether the book could be bought, and said they wanted to buy it; but there is evidence tending to show that the sales were made voluntarily by the clerks at the bookstore, and by the authority of defendants

and with their knowledge. We have had occasion before now to say that, if an officer of the law has reason to believe that a crime is being committed, he may proceed to ascertain whether those charged with the commission of the crime are actually committing it or are otherwise criminally implicated. The detection of a crime in its commission is far from inducing the wrongdoer to commit the crime detected. The District Court in its charge to the jury was very careful to protect the rights of the defendants by pointing out this distinction. Jung Quey v. United States, 222 Fed. 766, 138 C. C. A. 314.

[2] It is said the court erred in admitting in evidence a certain book upon Socialism, and various articles from newspapers which were published and distributed by the Western Workmen's Publishing Society after the United States and Germany were at war. Inasmuch as the evidence was limited in its bearing as tending to show the state of mind of the defendants, and the intention with which they may have done the particular acts charged against them, we find no error in the ruling. Herman v. United States, 257 Fed. 601, — C. C. A. —; Shidler v. United States, 257 Fed. 620, — C. C. A. —; Wells v. United States, 257 Fed. 605, — C. C. A. —; Rhuberg v. United States, 256 Fed. 865, — C. C. A. —; Coldwell v. United States, 256 Fed. 805, — C. C. A. —;

[3] Error is assigned upon the refusal of the court to allow challenges of defendants to certain jurors. After counsel had examined the jurors, the court, at some length, tested their state of mind, and found that each could weigh the testimony and render verdict without bias or prejudice of any kind. As the record clearly justifies the court in the overruling of the challenges, there is no merit in the assignment.

"The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court, unless the error is manifest, which it is far from being in this case." Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Dimmick v. United States, 121 Fed. 638, 57 C. C. A. 664.

A careful examination of the record shows that the jury was specially charged that the gist of the inquiry in relation to the circulation of the pamphlet was what responsibility the defendants or either of them sustained for putting the pamphlet into circulation, if it was found that the same had been circulated in the community about Astoria. The question of intent was analyzed, and the jury was charged that the specific purpose must have been to bring the military or naval forces of the United States into contempt, scorn, contumely, or disrepute, and that unless there was such specific intent acquittal must follow. Again, the court very properly instructed that the defendants were not charged with being Socialists, and could not be convicted merely because they were Socialists, and that the question whether they were or were not Socialists could have no consideration, except in so far as the jury might determine that the fact of their being Socialists might tend to evidence their intent to violate the statute under which they were being tried.

We cannot see that any rights of the defendants were in any way disregarded, and, as the record shows they had a fair trial, the judgment against them must be affirmed.

Affirmed.

UNITED STATES v. HINKLE et al.

(Circuit Court of Appeals, Eighth Circuit. September 1, 1919.) No. 5167.

 Indians ⇐==15(1)—I ands; begulation of mineral rents and profits of Indian lands in control of Secretary of the Interior.

Under Act April 26, 1906, c. 1876, §§ 19, 20, and Act May 27, 1908, c. 199, § 2, and the regulations thereunder, the exclusive custody and control of mineral rents and profits derived from restricted lands of full-blood tribal Indians of the Five Civilized Tribes is vested in the Secretary of the Interior as a trust fund, separate and distinct from the trust estate in the land itself, and the right to such rents and profits accruing during the term of restriction cannot be conveyed by the allottee or his heir.

2. Indians &=27(7)—In suit for cancellation of conveyance of mineral lands, accounting for profits proper.

The United States, in a suit for cancellation of conveyances of Indian lands made in violation of restrictions upon their alienation, may have an accounting of mineral rents and profits unlawfully received by defendants.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by the United States against John Hinkle and others. Decree for defendants, and complainant appeals. Reversed.

W. P. McGinnis, U. S. Atty., and Alvin F. Molony, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

Farrar L. McCain, Edward H. Chandler, Gray Carroll, and H. D. Mason, all of Tulsa, Okl., and J. R. Cottingham and S. W. Hayes, both of Oklahoma City, Okl., for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. [1] This action was originally commenced by the United States on January 2, 1909, for the purpose of canceling a real estate mortgage executed March 16, 1908, by J. S. Mullen to John Hinkle, on real estate situated in Carter county, Okl. This land had theretofore been allotted as a portion of the surplus allotment of Wallace Cash, a full-blood Choctaw citizen and allottee enrolled opposite No. 2871 upon the final roll of citizens of the Choctaw Tribe of Indians as an Indian of the full blood, pursuant to a selection made by said allottee on November 24, 1903.

A patent for the land was issued in the name of said Wallace Cash December 14, 1905. Hinkle filed a demurrer to the complaint, which was overruled. November 20, 1914, Mullen and Hinkle answered. December 23, 1914, the United States filed an amended and supplemental complaint, wherein it was alleged that Wallace Cash

died on or about December 29, 1903, leaving as his sole and only heir at law, his daughter, Sophia Cash, a full-blood Choctaw Indian citizen, enrolled as such opposite roll No. 2872 upon the final roll of citizens of the Choctaw Tribe. By the amended supplemental complaint the Crystal Oil Company, M. Gorman, Twin State Oil Company, C. L. Anderson, and Sinclair Gulf Oil Company were made defendants, and about 14 different deeds, leases, and assignments and other claims affecting the title to the land in controversy were sought to be canceled. It appears from the record that at some time during the proceedings the case was dismissed as to Hinkle and as to the mortgage sought to be canceled by the original complaint. The real estate in controversy at the time of the trial below was the south half of the northeast quarter, the northwest quarter of the northwest quarter of the southeast quarter, and the north half of the northeast quarter of the southeast quarter, all in section 4, township 4 south, range 3 west, Carter county, Okl. Among the instruments sought to be canceled by the supplemental amended complaint were a deed for the above land executed by Sophia Cash to E. O. Butler on or about August 19, 1904, a conveyance by Butler to J. P. Mullen and others, and a conveyance by the latter to the defendant J. S. Mullen; also a deed by Sophia Cash, dated September 22, 1913, to said defendant J. S. Mullen.

On February 3, 1916, the defendants filed what is called in the record a motion to dismiss. The ground of this motion was that Sophia Robert, née Cash, had on January 5, 1916, conveyed the land in controversy for a consideration of \$10,000 to the defendant I. S. Mullen and that said deed of conveyance had been duly approved by the county court of McCurtain county, Okl.; the court having jurisdiction of the settlement of the estate of Wallace Cash, deceased. June 8, 1917, the defendants Anderson and M. Gorman filed separate amended answers in which the deed of January 5, 1916, was pleaded as a defense. July 3, 1917, the Crystal Oil Company and Sinclair Gulf Oil Company filed their separate amended answers, setting up the same deed as a defense. September 18, 1917, the Twin State Oil Company filed its separate amended answer making the same defense as the other defendants. October 8, 1917, the United States filed a replication to the separate amended answers of the defendants. In this replication the United States attacked the conveyance of January 5, 1916, by Sophia Robert, née Cash, to J. S. Mullen, as fraudulent and void for reasons specified.

On the same date the case came on for trial, upon the request of the defendants that the court hear and determine the defense set up in the amended answers as a plea in abatement to the action, and dispose thereof before a trial of the principal case. The record shows that what was meant by this language was that the court proceed to try the validity of the deed of January 5, 1916. Pursuant to the request of defendants the court proceeded to decide that question. The defendants introduced in evidence the deed of conveyance for the land in controversy from Sophia Robert, née Cash, to J. S. Mullen. his heirs and assigns, for the expressed consideration of \$10,000, "to-

gether with all claims and demands for rents, revenues, and profits of whatsoever kind and description that have theretofore accrued from said land to J. S. Mullen, his grantees or lessees"; also duly certified copies of a petition filed by Sophia Robert, née Cash, in the county court of McCurtain county, Okl., praying that said deed might be approved, and of the order of said court approving said deed. The United States introducing no testimony, the court entered a judgment dismissing the supplemental complaint and the cause of action alleged therein, to which judgment the United States excepted and appealed to this court from the same.

Counsel for the United States concede that the court did not err in adjudging that the deed of Sophia Robert, née Cash, of January 5, 1916, to J. S. Mullen, was a valid conveyance, but insist that the court erred in not retaining jurisdiction of the action for the purpose of hearing the case for an accounting of the mineral rents and profits received by the defendants from the lands in controversy down to January 5, 1916, the date of the last conveyance. The original complaint contained no allegation with reference to rents and profits, nor was there any prayer for a receiver or an accounting. The supplemental complaint, however, did ask for an accounting of the rents, profits, royalties, and revenues derived from said lands while in the possession of said defendants, and a receiver was asked for to take charge of the land and collect such rents, royalties, and revenues derived therefrom by reason of the operation of said land by the defendants for oil and gas. The complaint also contained allegations that the defendant Mullen and his lessees had been in possession of the land since 1904, and had collected and received the rents and profits issuing from the said lands.

We are of the opinion, from the recital in the judgment of the court as to the question that was taken up for trial, that the trial did not involve a trial of the whole case, and that therefore the United States could not be said to be in default in not offering any proof upon the subject of the accounting. It does not appear that a receiver was ever directly applied for, otherwise than in the prayer of the complaint, or that a receiver was ever appointed. In the attitude now assumed by counsel for the United States, we take it that the title of the land in controversy passed by the deed of January 5, 1916, from Sophia Robert, née Cash, to J. S. Mullen; therefore the right of a receiver to take charge of the land is gone, if any ever existed. The right to an accounting, however, for the mineral rents and profits received by the defendant Mullen and his codefendants, still remains, unless the language quoted from the deed of conveyance had the effect to deprive Sophia Robert, née Cash, and the United States, of all right to an accounting for the mineral rents and profits alleged to have been unlawfully received by the defendants from 1904 to January 5, 1916.

We are of the opinion, however, that under sections 19 and 20 of the Act of April 26, 1906, c. 1876 (34 Stat. 137), and section 2 of the Act of May 27, 1908, c. 199 (35 Stat. 312), and the regulations of the Secretary of the Interior promulgated July 7, 1906, June 11, 1907,

and April 20, 1908, the exclusive custody and control of mineral rents and profits derived from restricted lands of full-blood tribal Indian citizens of the Five Civilized Tribes is vested in the Secretary of the Interior, subject only to such rules and regulations as he may prescribe, as an independent trust fund, separate and distinct from the trust estate in the land itself, and that the rules and regulations referred to show that the Secretary has elected to administer this trust and to retain the custody and control of such funds "until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs" (Reg. Sec. Int.), and therefore the language quoted from the conveyance of January 5, 1916, of Sophia Robert, née Cash, to J. S. Mullen, was ineffective to release the grantee, Mullen, and the other defendants, from the claim of the United States in behalf of the grantor to the mineral rents and profits which had been unlawfully received by the defendants prior to said date; nor did the approval of the county court affect the matter of mineral rents and profits, as that was a matter beyond its jurisdiction. It was determined by the Supreme Court of the Urited States in the case of Gabe E. Parker, Superintendent, et al., Appellants, v. Eastman Richard and R. D. Martin, Coadministrators, etc. (June 2, 1919) 250 U. S. 235, 39 Sup. Ct. 442, 63 L. Ed. 954, that the proviso contained in the act of 1908 (35 Stat. 312), providing "that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," was a restriction upon the conveyance of the land, notwithstanding the other language of section 9, which provides that the death of any allottee should operate to remove all restrictions upon the alienation of the allottee's land.

[2] So far, therefore, as the present record is concerned, the land in controversy was restricted land down to January 5, 1916. Gannon v. Johnson, 243 U. S. 108, 37 Sup. Ct. 330, 61 L. Ed. 622; Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600. This being so, the defendants must account to the United States for any mineral rents and profits unlawfully received by the defendants or either of them during that period. We say unlawfully received, in view of the fact that on the question of accounting the validity of the conveyances other than that of January 5, 1916, may arise. The last restriction on the alienation of the land was removed by the sale thereof with the approval of the county court. Whether Sophia Robert, née Cash, would be now entitled to the mineral rents and profits arising from the land during the period of restriction, if they were in the possession of the Secretary of the Interior, or whether the Secretary could retain them "until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs," we need not determine, as we are clearly of the opinion that the United States may, in a suit to cancel conveyances made in violation of restrictions upon the alienation of Indian lands, have an accounting of the mineral rents and profits unlawfully received by the defendants; the disposition of the same to be determined later, if any such rents and profits are recovered. In this connection we may properly quote from the opinion in Parker v. Richard et al., supra, as follows:

"The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary, the supervision naturally falls to the Secretary of the Interior. R. S. §§ 441, 463 [Comp. St. §§ 681, 716]; West v. Hitchcock, 205 U. S. 80, 85 [27 Sup. Ct. 423, 51 L. Ed. 718]. And see Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166 [15 Sup. Ct. 779, 39 L. Ed. 931]."

Just when the United States shall cease to sustain the relation of guardian to this full-blood Indian seems, under the decisions, a matter for Congress to decide. Brader v. James, supra; United States v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192; Tiger v. Western Investment Co., 221 U. S. 286, 316, 31 Sup. Ct. 578, 55 L. Ed. 738; Heckman v. United States, 32 Sup. Ct. 424, 56 L. Ed. 820. The rules and regulations of the Secretary of the Interior as to the collection, control, and custody of mineral rents and profits, made within the power granted by the acts of April 26, 1906, and May 27, 1908, supra, have the force and effect of law upon the subject, and persons dealing directly with a tribal Indian in violation thereof cannot retain the fruits of such unlawful agreement. Heckman v. United States, supra; United States v. Eaton, 144 U. S. 688, 12 Sup. Ct. 764, 36 L. Ed. 591; Wilkins v. United States, 96 Fed. 837, 37 C. C. A. 588; United States v. Gray, 201 Fed. 291, 119 C. C. A. 529; United States v. Law, 250 Fed. 218, 162 C. C. A. 354.

It results from what has been said that the decree below should be reversed, and a decree entered establishing the validity of the deed of January 5, 1916, from Sophia Robert, née Cash, to J. S. Mullen, so far as it conveys the title to the land in controversy, but without prejudice to the right of the United States to have an accounting in this action as to the mineral rents and profits unlawfully received by the defendants, or either of them.

And it is so ordered.

UNITED STATES v. MOORE.

(District Court, E. D. Oklahoma. November 1, 1919.)

No. 2713.

 Judgment \$\iff 702\$—Persons concluded; subsequent action by United States.

An action brought by an individual, though conclusive as to him when finally adjudicated, is not a bar to an action brought by the government in its governmental capacity, if the government has the authority to bring such action.

2. Indians \iff 16(7)—Disposal of royalties under mining lease; action by United States to recover.

Where an Indian allottee, authorized by statute to execute a mining lease for ten years, with the right to collect and dispose of the royalties accruing thereunder without restriction, paid over to defendant one-half of such royalties after they had accrued, either voluntarily or pursuant to judgments of a state court, she being at the time a citizen and subject to suit, the United States cannot maintain an action at law to recover such payments, although they were made pursuant to an assignment executed before the royalties accrued, and which was void and could have been canceled at suit of the government on behalf of the allottee.

At Law. Action by the United States against James K. Moore. Judgment for defendant.

W. P. McGinnis, U. S. Atty., and Alvin F. Molony, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

Riddle, Bennett, Wilson & Mitchell, of Miami, Okl., for defendant.

WILLIAMS, District Judge. The patent referred to in plaintiff's petition, issued September 26, 1896, under Act Congress March 2, 1895 (28 Stat. 876, c. 188), contains the following clause:

"* * But with the stipulation and limitation contained in the aforesaid act, that the land embraced in this patent shall be inalienable for the period of twenty-five years from and after the date hereof, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Wat-tah-nobabe and to his heirs forever, provided, as aforesaid, that said tract shall be inalienable for the said period of twenty-five years."

This is an action at law, commenced on September 2, 1917, after the expiration of certain leases which embraced the land described in said patent, and as to which the assignment of the royalties was executed, not for cancellation of said assignment affecting said land, but for recovery of moneys resulting from said royalties. The prayer of the plaintiff's petition is that—

"It have judgment against the defendant, James K. Moore, for the said sum of \$40,061.44, together with appropriate interest thereon from the date of the receipt of the said sum, or any part thereof, for all other appropriate relief, and for its costs."

By Act June 10, 1896 (29 Stat. 331, c. 398), power for the allottee to lease such land for farming and grazing purposes "for a term not exceeding three years," and "for mining or business purposes" not to

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

exceed five years was granted. By Act June 7, 1897 (30 Stat. 72, c. 3), a further authorization to lease for a term not exceeding 10 years for business or mining purposes was given. Under this power, Wat-tahnoh-zhe made certain mining leases upon her allotment, under which there accrued as royalty, payable to said allottee, from and after July 18, 1907, and prior to April 10, 1915, the sum of \$80,122.88. On July 18, 1907, Wat-tah-noh-zhe, joined by her husband, Francis Q. Goodeagle, executed and delivered to James K. Moore assignment of one-half of the mining royalties to be derived from and under said leases, all of which expired by limitation by May 22, 1917, and said Moore has received \$40,061.44 therefrom. Said assignment of royalties was void and could be canceled by suit of the United States in behalf of the allottee. United States v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844. In United States v. Noble, 197 Fed. 292, 116 C. C. A. 654, the court said:

"They [Quapaws] were the owners of the lands subject to this restriction, and, when they were authorized to lease them for farming and grazing purposes for three years and for mining and business purposes for ten years, that was a distinct emancipation of them for the periods and the purposes named, and for such periods the Government surrendered all guardianship over the Indians with reference to the specified leases of their lands." (Italics mine.)

The acts of 1895, 1896, and 1897-

"put it beyond the power of him [Quapaw allottee] or of them to alienate the land or any interest therein in any manner except as permitted by the acts of 1896 and 1897. * * * The comprehensiveness of the restriction was modified only by the power to lease; and while the allottee could make leases, as provided in these acts, they gave him no power to dispose of his interest in the land subject to the lease or of any part of it. The rents and royalties were profits issuing out of the land. When they accrued they became personal property [italics mine]. * * " U. S. v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844.

In National Bank of Commerce v. Anderson, 147 Fed. 87, 77 C. C. A. 259, it is said:

"The purpose of the statute evidently is that lands inherited from deceased allottees, by heirs who had and were living upon allotments of their own, might be sold and converted into money, rather than remain untilled and unoccupied. It may be admitted that if the intention of the statute is to terminate the trust as to all lands so sold, and to give the proceeds to the heirs free from restriction, the Secretary of the Interior had not the power to frustrate that intention in this instance by imposing the terms which were inserted in the petition for leave to sell, and that such terms, notwithstanding that they were assented to by the petitioners, were not binding upon them."

In United States v. Gray et al., 201 Fed. 291, 119 C. C. A. 529, it is said:

"It [United States] has capacity to sue to avoid conveyances made by Indian allottees in violation of restrictions upon alienation, although it has no pecuniary interest therein, or in the land conveyed. It has this right to sue, because such conveyances violate its governmental rights and hinder or prevent the execution of its governmental policy. * * * On the same ground it may maintain suits to cancel leases procured from Indian allottees without the required approval of the Secretary of the Interior. * * *"

In United States Fidelity & Guaranty Co. v. Hansen et al., 36 Okl. 459, 129 Pac. 60 (Ann. Cas. 1915A, 402), paragraphs 2 and 3 of the syllabus are as follows:

"2. Where allotted lands of a deceased Indian were sold pursuant to the provisions of section 7 of the Indian Appropriation Bill of May 27, 1902, c. 888, 32 Stat. 275 [U. S. Comp. St. § 4223], the purchase price remained a trust fund so long as the United States government retained possession or control, but the trust character ended when the possession and control was relinquished by the government.

"3. Under the provisions of said act the government had the option either to retain the control of the purchase money or to end its trusteeship by relinquishing its control, and the Secretary of the Interior had the authority to

exercise the option."

In Mandler v. Rains (Okl.) 174 Pac. 240, paragraph 2 of the syllabus is as follows:

"Where W., a full-blood Indian, makes a contract with M., wherein he agrees to pay M. all money in excess of a certain sum for which M. may sell his interest in an inherited allotment, and such contract is withheld from the knowledge of the county court, who has jurisdiction to approve such sale under Act Cong. May 27, 1908, c. 199, 35 Stat. 312, which contract had the effect, if not the purpose, of securing the approval of the county court to a conveyance for a less consideration than would have secured the approval of the court, had it been aware of the contract, would render such contract void as between the parties, and W. would have a right to recover any sums of money paid M. under said contract, whether paid voluntarily or otherwise."

There the action was between the full-blood member of the tribe, for himself, against the party receiving the money under the void contract.

- [1] Here the action is brought by the government for the benefit of the allottee and member of the tribe. A judgment in an action brought by a member of the Quapaw Tribe, though conclusive as to him when finally adjudicated, is not a bar to an action brought by the government in its governmental capacity, if the government has the authority to bring such action. Wiley v. Edmondson, 43 Okl. 7, 133 Pac. 38; Bowling et al. v. United States, 191 Fed. 19, 111 C. C. A. 561; Heckman et al. v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820.
- [2] This action at law is to recover moneys paid to defendant, said payments having been made either by the allottee, Wat-tah-noh-zhe, or her agents, "now pursuant to and in consequence of said assignment," the consideration received by said allottee from said defendant for said assignment being \$1,000, which she still retains, nor has any offer been made to return same to him.

At the time the said allottee and her husband executed and delivered to the defendant the assignment of royalties, there had been some drilling upon her allotment, some of the holes showing ore; but the defendant did not know of any assays of the cuttings taken from said holes. Only one shaft on said land was down to the ore about one foot into a light grade of ore where further progress was seriously hampered by water. The defendant had taken no part in the drilling or development. When the royalties first began to accrue unto said Wat-tah-noh-zhe under said mining lease or leases, she paid to the defendant, out of such royalties as the same were received by her, a sum equal to $2\frac{1}{2}$ per cent.

upon said ores which had been taken from said lands and sold, and in this manner down to July 7, 1907, she had paid to the defendant the sum of \$3,462.37. From July 7, 1909, until March 17, 1913, no further payments were received by the defendant. In the meantime the lessee or lessees withheld the royalties claimed by defendant on account of said assignment, and deposited the same in the First National Bank of Miami in the name of Wat-tah-noh-zhe, to be held subject to the claim of the defendant.

On June 13, 1911, the defendant filed in the district court of the state of Oklahoma for Ottawa county an action against Wat-tah-noh-zhe, Francis Q. Goodeagle, her husband, C. M. Harvey, Baxter Royalty Company of Arizona, Baxter Mining Company, Baxter Royalty Company of Oklahoma, and J. F. Robinson, setting up said assignment of royalties and alleging that the defendants had conspired together to deprive him of his said royalties under said assignment, and asking for appointment of receiver to collect and hold said royalties accruing under said assignment, and praying for an accounting and that he be adjudged to be the owner of such royalties. W. H. Trapp was appointed receiver, and as such receiver collected \$3,550.60 as royalties. March 17, 1913, by stipulation on the part of the plaintiff and defendants, judgment was rendered in said action, adjudging the plaintiff (defendant herein) to be the owner of said royalties in said sum, and decreed that he was entitled to said \$3,550.60, and said sum was paid to the plaintiff (defendant herein) by the receiver on said date "with the consent and in accordance with the stipulation of said Wat-tah-nohzhe," and said sum is a part of the money sued for and sought to be recovered in this action.

On June 13, 1911, the defendant, as plaintiff, commenced an action in the district court of Ottawa county, state of Oklahoma, No. 545, against Wat-tah-noh-zhe, Francis Q. Goodeagle, her husband, First National Bank of Miami, C. M. Harvey, and J. F. Robinson to recover the unpaid royalties accrued under said royalty assignment since May 1, 1909, such royalties having been deposited in said bank as aforesaid. On April 21, 1913, stipulation was filed in said cause, signed by W. H. Kornegay, as attorney for the said plaintiff (defendant herein), J. K. Moore and S. C. Fullerton, attorney for the First National Bank of Miami, and A. Scott Thompson, attorney for Wat-tah-noh-zhe, Francis Q. Goodeagle, J. F. Robinson, and C. M. Harvey, that said action should be dismissed at the plaintiff's cost and that the money in the hands of the defendant bank at the close of business of April 18, 1913, to the credit of Wat-tah-noh-zhe, in the sum of \$17,882.10, should be paid to the plaintiff, James K. Moore (the defendant herein). Said cause was accordingly dismissed and the said sum of money was paid by said bank to the said plaintiff (herein defendant), James K. Moore, "upon the stipulation and by the directions of the said Wat-tah-nohzhe," and said sum is a part of the money sued for and sought to be recovered in this action.

"The balance of the moneys sued for and sought to be recovered in this cause were paid to the defendant by the lessees under the Robinson and Harvey lease, or their assigns, with the full knowledge and consent and without any (261 F.)

objection from the said Wat-tah-noh-zhe; * * * the last of said payments being made on or about the 10th day of April, 1915."

In Goodrun et al. v. Buffalo, 162 Fed. 817, 89 C. C. A. 525, the judgment under consideration was rendered in 1899. In the opinion it is said:

"The Indian who consented to the stipulation for submission to the judgment of the court for such purpose was not a person sui juris. The submission required, as the very basis of its recognition, the acquiescence and consent of the Indian thereto. The effect of the act of Congress, under which the patent was granted, was to deny to the Indian the exercise of any consent whereby the restriction upon the power of alienation could be removed. If the Indian could create no estoppel against himself or herself by deed of conveyance, how could be or she create an estoppel, by consenting to a judgment as the basis of an estoppel, effectual to alienate the land, in direct contravention of the act of Congress? The allottees of these lands, during the probationary period of 25 years, were under as much disability to alienate them by contract, or deed, or voluntary submission to a court, as if they had been under the disability of coverture or minority. The disability of the minor to do these things is imposed by the common law. The disability of these Indians is imposed by statute. It must therefore logically and necessarily follow that the record and judgment of a court, disclosing on their face that the disqualified Indian was entering into an agreement for submission of the question of his right to dispose of these lands, was in no wise different from such a proceeding participated in by a minor infant,"

Members of the Quapaw Tribe of Indians became citizens of the United States on March 3, 1901. 31 Stat. c. 868, p. 1447. See, also, Wiley v. Edmondson, 43 Okl., at page 5, 133 Pac. 38. In Goodrun et al. v. Buffalo, supra, the Quapaw Indian was neither a citizen of the United States nor did he have power to alienate such land within the 25-year period—was held not to be a person sui juris or capable of as-

senting to such submission. In the case at bar the Quapaw Indian is authorized to execute the mining lease for a period not exceeding 10 years, and to collect the royalties and spend them or dispose of them as she may elect. Under the agreed facts as to the money sued for, \$3,462.37 had been paid by the lessee or lessees as royalties or rentals to Wat-tah-noh-zhe in person, and then she paid said amount to the defendant; \$21,432.70 had been placed by the lessee or lessees to her credit in the First National Bank of Miami, Okl., to be held subject to the claim of the defendant; and by her agent it was thereafter stipulated that said bank should pay the same to the defendant. The balance, to wit, \$15,166.37, was paid by the lessee or lessees to the defendant "with the full knowledge and consent, without any objections from the said Wat-tah-noh-zhe." She had the capacity to consent for said sum of \$15,166.37 to be paid to defendant after such royalties or rents had accrued. Wat-tah-noh-zhe is sui juris, or capable of suing or being sued, and where the court has jurisdiction of her person, as well as the subject-matter, such judgment would be binding on her. But, if it related to a matter in such a way as to violate its governmental policy, the United States may bring an action to have the same adjudicated in its own courts, and such prior judgment against her would not be a bar to such action brought for her benefit by the government. But the lease was not made in violation of any act of Congress, nor is there any act of Congress authorizing federal regulations that would prevent Wat-tah-noh-zhe from disposing of in any manner she saw fit such royalties or rentals after the same had accrued and became personalty.

This is not an action to cancel the assignment on the ground that it attempts to transfer royalties and profits from restricted land which have not accrued. Nor is it such an action for cancellation and an accounting. United States v. Hinkle et al. (by Eighth Circuit Court of Appeals) 261 Fed. 518, — C. C. A. —. Such claimed royalties and profits had accrued and were paid by her or her lessee to the defendant, or by the lessee's agent to the defendant with her knowledge and consent after same had accrued, and had under all events become personal property when paid to the defendant. The Secretary of the Interior had no power or authorization to approve the form of the lease or to exercise supervision over the execution of the same or the collection of the royalties and rents thereunder. As to such mining leases not exceeding the term of 10 years, Wat-tah-noh-zhe was free from restrictions or supervision of the Secretary of the Interior, and is remitted for remedy to the laws of the state of Oklahoma governing the collection of rents and royalties and profits after the same have accrued. Dickson v. Luck Land Co., 242 U. S. 371, 37 Sup. Ct. 167, 61 L. Ed. 371; United States v. Waller et al., 243 U. S. 452, 37 Sup. Ct. 430, 61 L. Ed. 843; United States v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192.

As to such leasing, the United States gave to this allottee an emancipation to the extent of leasing such allotments for a term not exceeding 10 years for mining purposes without any supervision. When this allottee received the money, either in person or through her agent, and paid it to this defendant, that was an emancipated act, over which the plaintiff had no supervision. Act June 7, 1897 (30 Stat. 72), after granting the additional authorization for leasing the allotted lands for not exceeding 10 years for mining or business purposes, provides:

"That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or disability, any such allottee can not improve or manage his allotment properly and with benefit to himself, the same may be leased, in the discretion of the Secretary [of the Interior], upon such terms and conditions as shall be prescribed by him."

It is not contended that the Secretary of the Interior by virtue of said section has determined that the said Wat-tah-noh-zhe "by reason of age or disability could not" improve or manage his (her) allotment properly and with benefit to himself (herself). If such were the case, then the supervision as to such leasing and the collecting of royalties having been resumed by the Secretary of the Interior the question would arise as to whether the United States government may not maintain for her benefit an action concerning the transactions of the said Wah-tah-noh-zhe concerning such leasing and royalties collected during such emancipated period. U. S. v. Fitzgerald, 201 Fed. 295, 119 C. C. A. 553; U. S. v. Gray et al., supra; U. S. v. Boylan (D. C.) 256 Fed. 469; Regulations for Leasing as to Such Incompetents Approved April 7, 1897. That question is neither presented by the record nor here considered. The case of United States v. Apple et al., 262 Fed. 200 (No. 110

Equity, United States Court for District of Kansas, Third Division), by Judge Pollock, has come to our attention. The power of attorney therein involved related at least to some not accrued royalties, and the transactions therein sought to be revised and accounted for were incidental to said instrument. Further, it is obvious that the Secretary of the Interior had determined that the two Indian lessors, members of the Quapaw Tribe, were incompetents within the terms and authority of the act of April 7, 1897, supra. In the opinion it is said:

"* * * The government contends and urges the Indian lessors were both in fact and law incompetent to make a valid mining lease of said properties without the approval of the accredited representative of the government."

The question as to whether the government may maintain an action to cancel the assignment, and for an accounting, after the leases have expired, has not been presented, and is not considered.

An order will be entered in accordance with this opinion, rendering

judgment in favor of the defendant.

THE HERCULES. THE FRANCES DOHERTY. DOHERTY et al. v. PENNSYLVANIA R. CO.

(District Court, E. D. New York. October 16, 1919.)

Shipping \$\infty\$ 54—Liability of charterer for injury to vessel in Windstorm.

A railroad company, having charge of a chartered coal barge for loading at its dock, which it moved with its own tugs, and which, when partly loaded, placed the barge at the end of a pier, in disregard of storm signals displayed by the Weather Bureau but a few hundred feet distant, and left it there, exposed to a severe windstorm for several hours, after being notified by its captain that it was in danger, held liable for its injury while in such position.

2. Shipping 654—Liability of charterer for injury to vessels in windstorm.

A railroad company, having charge of a fleet of chartered coal barges to be loaded at its dock, which moored them in tiers to stakes in the open bay, held to assume the risk from storms to which they were exposed, and liable for injury to one which broke loose and came in collision with others during a heavy windstorm.

In Admiralty. Libels by Mary F. Doherty, owner of the barge Hercules, and by Mary F. Doherty and William H. Doherty, owners of the barge Frances Doherty, against the Pennsylvania Railroad Company. Decrees for libelants.

Macklin, Brown, Purdy & Van Wyck and W. F. Purdy, all of New York City, for libelants.

Burlingham, Veeder, Masten & Fearey, of New York City, and G. W. P. Whip, of Baltimore, Md., for respondent.

CHATFIELD, District Judge. These libels have arisen from injuries received on the night of April 5, 1917, by the barge Frances Doherty and the barge Hercules, during a severe windstorm which began late in the afternoon of that day and increased in severity as night came on. In the morning the wind had been blowing from the west. During the day it shifted, and around 4 o'clock in the afternoon it set in strongly from the east, and then more toward the southeast, so that during the early part of the night the full strength of the wind swept across the lower New York Bay and through Raritan Bay, in an unobstructed course from Sandy Hook to the Pennsylvania docks at Port Johnson, South Amboy, where the injured boats were moored. The day had been threatening, and experienced men upon the barges anticipated bad weather. Rain also was indicated during much of the day, and began with the shift in the wind. Both boats had been chartered to carry cargoes of coal to ports up the bay.

The Frances Doherty had been taken from mooring stakes in upper New York Harbor on the 3d of April, by a Pennsylvania tug, and placed with a large number of other barges in tiers, moored to a line of stakes at South Amboy. On the 4th she was taken to Pier B, where she was partly loaded on the south side of the pier. On the afternoon of the 5th she was taken to the end of Pier B, where she was left next to the barge W. S. Keeler, which also received injuries and sank during the

storm.

At about 7:30 in the evening, the captain of the Frances Doherty went to an office of the Pennsylvania Railroad upon the pier and asked that his boat be moved, as she was in danger. At about 10:30 he went again to this office and repeated his request, with the result that at about 11 o'clock a tug came to the end of the pier and moved the Frances Doherty to a sheltered berth alongside the railroad pier, where she lay during the night. The next day she was again taken under the dumper, took on two more cargoes of coal, and was towed to Jersey City with her cargo. The captain of the Frances Doherty made some objection to being left at the end of Pier B, when placed there late in the afternoon of the 5th, but was told that the tug was acting under orders. Before the Frances Doherty was removed from Pier B, she sustained injuries which caused her to leak, so that the captain was compelled to pump continuously until after his load of coal had been delivered and she could be repaired.

The barge Hercules had also been brought by a Pennsylvania tug from stakeboats in the upper harbor to the racks at Port Johnson, and was moored in the fleet of barges by the customary lines to the barge ahead, and by three cross-lines to the barges alongside. These lines were all new, and broke during the storm. The weather was so rough that they could not be replaced, and the Hercules received injury by bumping against and riding upon the other boats in the fleet. This fleet consisted of some 10 or 12 tiers, with as many as 8 or 9 boats in some of the tiers. When one of these boats was ready to be placed under the dumper, a tug removed the boat, usually from the head tier, and the boats behind then changed their lines, so as to move up into the space or to make fast to the next boat in line. All the work of moving

these barges from the upper harbor to the stakes, placing them under the dumpers, and replacing them when loaded, was done by tugs of the Pennsylvania Company, which made a charge for towing, filling, and trimming the boats. The only work done by the captain of the barge was to look after his lines and to keep an eye upon the trimming done by the employés of the railroad, in order to see that his boat was

properly loaded.

It appears from the testimony that after the storm commenced it was impossible for the captain of the Hercules to leave his boat or to move her in any way, and the fleet of boats fastened to the line of stakes was subjected to the full force of the storm from the southeast. A number of boats in the fleet received some injury from bumping into the other boots and from the breaking of lines. Most of the witnesses testify that the storm was the most violent which they had ever experienced while lying at South Amboy, and the captains of the Pennsylvania tugs all agree that during the height of the storm it was impossible to do more than to lie by in order to save life, if necessary. One of the tugs was unable to leave the sheltered slips during the storm, while another of the tugs was compelled to cast off the lines which it then had to the Keeler, and to seek shelter, in order to avoid danger to the tug itself. Storm signals had been raised in Perth Amboy, only a few hundred feet away from the offices of the men in charge of the terminal at South Amboy, on the morning of April 5th; but these storm signals were not observed by any of these officials, and no precautions were taken by any of the servants of the railroad company during that day to protect the boats from the approaching storm, other than to have the usual equipment of tugs in readiness for use at the piers. During the evening it was realized from the weather conditions, as well as from the complaints of the captains, that the boats were in danger. Some attempt was then made to move those boats which could be moved, and the Frances Doherty was taken on this account from the exposed end of Pier B, while the captains of the three Pennsylvania tugs, of sufficient size to undertake the work, were ordered to go out near the boats attached to the stakes and see what they could do.

The libelants charge negligence on the part of the railroad company in failing to anticipate and to realize fully the danger (which was apprehended by the captains of the barges) in time to move those which had been left in an exposed position at the end of the pier. Negligence is also charged against the railroad company in failing to properly care for the boats in its charge, which had been left lying at exposed positions in the fleet attached to the line of stakes, in the face of a storm threatening danger, not only to the boats in the fleet themselves, but to other boats in the neighborhood, if moorings were broken, as was

reasonably to be expected.

It has been held in Wasson v. The William Guinan Howard and the Philadelphia & Reading Railway Co., 252 Fed. 85, 164 C. C. A. 197, that keeping a large string of barges swinging from a short row of stakes, in a gale of a kind to be expected once or more during the winter, was actionable negligence. The case was distinguished from

The Media (D. C.) 132 Fed. 148, affirmed 135 Fed. 1021, 68 C. C. A. 127, where the injury was received during an extremely low tide, occasioned by an unusual gale. In the Howard Case the court held that the railroad should reasonably expect in such a storm trouble from the barges breaking adrift, and that the proximate cause of this danger was the improper nature of the mooring and the choice of location for that mooring, in view of the likelihood of such a situation as was presented when the storm arose. In the case at bar a contractual relation with the railroad company was shown, which could only be inferred in the Guinan Case, and the absence of which was the basis of the dissenting opinion therein.

The case of the Frances Doherty is much like that of Nicholson et al. v. Erie Railroad Co., 255 Fed. 54, 166 C. C. A. 382, in which disregard of storm signals, delay in furnishing assistance, and failure to realize responsibility for a barge in the care of the railroad, were held sufficient to place liability for injury upon the company owning the tugs in charge of the boats, although in that case a different tug had by direction of the railroad company placed the barge

at the point in question.

[1] There is little room for argument with respect to the liability of the Pennsylvania Railroad Company for the injuries to the Frances Doherty. The testimony shows clearly that the injuries were received as a result of this storm; that the Doherty was finally rescued without more serious injury, from which the Keeler did not escape. Warning of the situation was earlier brought to the attention of the employés of the railroad company, and it was not until the day superintendent had returned to the pier, after going home from his work, that any efforts were made to find out whether the boats in the railroad company's care were in danger under circumstances which, from the physical location of the piers, would naturally be expected in a storm coming up from the direction in which the storm upon the 5th

of April was setting in.

[2] In the case of the Hercules, the situation was somewhat different, for unless the entire fleet of boats could be protected or removed to a more sheltered anchorage, nothing could be done to help the boats in the fleet after it was found that the storm was increasing to such an extent as to make their situation dangerous. If the storm had proved no more severe than that which was customarily undergone with safety, the boats could have been left tied to the When the storm signals and weather conditions indicated danger to the fleet, the captains of the individual barges could do nothing unless orders were given to the tugs to take the boats from the stakes. It is impossible to expect that every time a storm arises the tugs of the company will take all of the boats moored to the stakes and tow them to more protected points, and if the railroad company finds it is necessary to use the stakes in question as a mooring place, it runs the risk of misjudging the intensity of storms which may arise, and is liable for the consequences resulting to boats in its care, to the same extent as if the railroad company used these stakes to moor its own boats and found the mooring insufficient. Certainly

neither the owner of the boat nor the charterer of the boat was responsible for maintaining the boats at the mooring stakes, while the boats were in charge of the railroad company for the purpose of load-

ing with a cargo of coal.

Responsibility for the care of these boats, in this sense, rests upon the railroad company, and it is not necessary to go so far as to hold them insurers against loss while in that position, although the boats are as substantially in their control as if chartered to the railroad company. The railroad company is responsible for the consequences of the negligent acts of its servants, which cause damage other than that resulting from the ordinary risks of navigation. To moor a boat in an exposed position, where she is liable to be subjected to damage from violent storm, and then to allow the storm to come on, in the face of indications both by storm warnings and by observable changes in the weather, and to do nothing to remove the boat from its dangerous situation, places upon the person responsible for the boat liability for damage, which cannot be excused by showing that the storm was a little more severe than that which could be ridden out safely by the boat in this position. The risk from the violence of the storm is a risk assumed by the person responsible for the boat, if that risk is one which can reasonably be expected, and is not purely and simply an occurrence in the nature of ordinary risk at sea. Care of a fleet of boats calls for care differing from that caused by the navigation of a single boat. Collecting the boats in a fleet increases the responsibility of the person handling the fleet, in situations where a single boat might safely ride the waves which are likely to result during a storm.

In the cases at bar the railroad company was responsible under the circumstances for maintaining the safety of the boats in question, under the conditions which the railroad company created, and is therefore responsible for the damage incurred. Libelants may have a decree.

BATCHELLOR v. OLMSTED et al.

(District Court, W. D. New York. October 15, 1919.) No. 150-B.

Corporations \$\infty 316(1)\$—Powers of directors in settlement of claims.

A transfer by order of the directors of a corporation of stock in a subsidiary corporation, organized to exploit a patent, to an officer of the company as agreed payment for services in organizing the subsidiary and conducting its business, *held* within the scope of their authority and valid.

In Equity. Suit by Fred G. Batchellor, receiver of the Buffalo Pitts Company, against John M. Olmsted and Margaret P. Olmsted. Bill dismissed, and decree for defendants on counterclaim.

Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y., for complainant.

White, Babcock & Means, of Buffalo, N. Y. (Edward P. White, of Buffalo, N. Y., of counsel), for defendants.

HAZEL, District Judge. This action in equity was brought by the receiver of the Buffalo Pitts Company to have canceled as null and void the transfer of certain shares of the capital stock of the Ætna Combustion Company by the Buffalo Pitts Company to the defendants, and for an accounting of dividends paid. The answer avers that the shares of stock so issued consisted of 400 shares, of the par value of \$100 per share, transferred in consideration of services performed by the defendant John M. Olmsted in organizing the Ætna Combustion Company, and for services performed prior thereto in connection with the exploitation and development of the Vraalstad & Doyle patent, No. 829,779, relating to hydrocarbon furnaces—a patent owned by the Buffalo Pitts Company. A counterclaim is also alleged of \$2,100-04, the balance of a credit on the books of the Buffalo Pitts Company for services rendered and expenses incurred.

Since the submission of this case for decision, the receiver, having rendered his account in the action in which he was appointed, has been finally discharged, the claims against the insolvent estate, except the claim in controversy, have been paid in full, and the Buffalo Pitts Company repossessed of the plant, assets, and all property in the custody of the receiver. Hence an order has been entered, on stipulation, substituting the Buffalo Pitts Company as plaintiff herein in place of Fred G. Batchellor, as receiver, and providing that such company abide by and perform any judgment which shall be recovered herein by John M. Olmsted, precisely as if it had been the original plaintiff

in the action.

The evidence substantially discloses that during the ownership by plaintiff in 1908 of the Vraalstad & Doyle patent in question there arose a desire to exploit and develop the hydrocarbon furnaces therein described and with that end in view a license was granted to one Martin, who thereafter sublicensed certain railroad companies, for which the plaintiff company afterwards received royalties. At that time the defendant Olmsted, an officer of the plaintiff, was instructed to perform services with relation to existing claims for royalties against the Southern Pacific Railway Company and the Santa Fé Railroad Company, which claims were finally paid. Differences regarding the settlement of royalties arose between the plaintiff and Martin, its licensee, with the result that the existing license agreement was terminated, and in 1910, after negotiations conducted largely by Olmsted, a new company was organized to exploit the patent—the Ætna Combustion Company—the defendant Olmsted becoming the president thereof. In recognition of the services rendered in the formation of such company, and in consideration of his promotion of the enterprise, it was stated by Carleton Sprague, chairman of the board of directors of the Buffalo Pitts Company, now deceased, that Olmsted should receive capital stock in the company amounting to \$40,000 out of an issue of \$200,000, exclusive of stock amounting to \$100,000 which was to be held in the treasury of the plaintiff. Certificates of stock were thereafter issued and dividends paid to defendant in conformity with this arrangement.

While president of the Ætna Combustion Company, the defendant Olmsted had charge of its affairs at Buffalo, carried on correspondence

with Martin, the general manager, who lived in California, counseled and advised with reference to licensing locomotives to use the patent turnaces, endeavored to acquire the Heintzelman & Camp patents for hydrocarbon furnaces, which were interfering with the licensing of the Vraalstad & Doyle patent, and performed other services of a substantial nature. The Buffalo Pitts Company, however, did not transfer the 400 shares of stock to the defendant Olmsted until January 21, 1914, when a resolution was passed at a meeting of the board of directors of the Buffalo Pitts Company to make such transfer, and transfers to Gomez and Moen, who also performed services in the development of such patent and in the organization of the Ætna Combustion Company. The resolution states that the transfer of such stock was made pursuant to a previous arrangement that the defendant Olmsted, Gomez, and Moen should exploit such letters patent outside of their general business relations with the plaintiff company; that through their efforts an agreement was entered into with Martin, the licensee, which led to the organization of the Ætna Combustion Company, which had taken over the patents and had issued its capital stock to the Buffalo Pitts Company. Reference was made to negotiations for adjustment of the claims of the defendant Olmsted, Gomez, and Moen in connection with the services rendered, namely, "The exploitation and development of such letters patent through the medium of the Ætna Combustion Company," for which they had consented to accept the stock allowed to them in the resolution as compensation in full for their services.

It is now contended by plaintiff that the admissions contained in the resolution with reference to the performance of services in developing the patent were untrue, that the plaintiff was incapable of entering into such an agreement, that its board of directors was without power to distribute such stock for services, that no services were in fact rendered by Olmsted entitling him to the transfer of any stock, or that no agreement existed to compensate him for his services, which in reality were rendered as officer and director of the plaintiff company. These various contentions, however, are not maintainable, under the proofs. There is abundant evidence showing that Olmsted performed the specified services pursuant to an understanding between him and Carleton Sprague that he was to be remunerated in shares of stock substantially as provided in the resolution of the board of directors.

The assertion that the stock was intended to compensate for selling the patent right to outside parties, and that, since such patent rights were not actually sold, no compensation was earned, is not substantiated. Nor is it proven that Olmsted was to direct his efforts to uniting the Heintzelman-Camp interests with the interest of the plaintiff in the development and exploitation of such oil-burning furnaces, for which he was to receive such compensation. It is true that in the proposed agreement, prepared by John B. Olmsted on the day before the adoption of the specified resolution, it was stated that other patent interests were to be united, and that Olmsted should use his efforts to unite conflicting interests to form a new corporation, which should own and control such patents, but from such embodiment in the proposed

resolution the court cannot determine that the transfer of the stock depended upon such a consummation since in another paragraph it is stated that pursuant to the understanding John M. Olmsted had succeeded in organizing the Ætna Combustion Company for the purposes named, and "which had been successful in securing said contracts, which have proved profitable." It is not to be assumed that it was intended that the stock should be transferred only in case Olmsted brought together conflicting interests or sold the patent right to outside parties. Certainly the resolution passed on the day after the preparation of the proposed resolution, and which was unacceptable in phrase-

ology, plainly negatives any such assumption.

As indicative of the intention to transfer the stock for services rendered in forming the new company and acquiring a surrender of the Martin license, Olmsted testified that Mr. Carleton Sprague, though having promised a bonus in case the patent rights were sold to the American Locomotive Company, had in addition voluntarily said that for defendant's past and future efforts he was to have an interest in the corporation equal to Martin's, to whom 400 shares were also transferred. It seems to me that Mr. Sprague's letter to Mr. Gomez of January 24, 1912, is somewhat corroborative of Olmsted's claim. In the letter of the following day, true enough, allusion is made to Olmsted's selling "the whole thing, or stock, etc. * * * * * *" but it must be conceded was nothing definite ever talked; that subsequently Mr. Carleton Sprague unqualifiedly agreed to the passage of the resolution upon which Olmsted places reliance in substantiation of his claim. The passage of the resolution by the board of directors and the transfer of stock in pursuance thereof were corporate acts, which cannot be repudiated, in view of the services rendered. The action of the board of directors was unquestionably within the scope of their authority, and for what they at the time considered the best interests of the company. In re Watertown Gaslight Co., 127 App. Div. 462, 466, 111 N. Y. Supp. 486.

The remuneration in question may have been, and doubtless was, most generous, perhaps far in excess of the value of the services rendered; but this court cannot concern itself under the proofs with an estimate thereof. The acceptance of the shares of stock was a closing of the transaction, and an accord and satisfaction of any claim existing against both the plaintiff and the Ætna Combustion Company by the defendant Olmsted for services rendered. There was credited to Olmsted on the books of the plaintiff the sum of \$5,177.87, of

which \$2,100.04 is still due him.

It follows, from the foregoing, that the complaint against the defendants should be dismissed, and that the defendant John M. Olmsted should have a decree upon his counterclaim against the complainant, besides costs. So ordered.

UNITED STATES v. MARKEWICH.

(District Court, S. D. New York. October 8, 1919.)

CONTEMPT 5-70-INFLAMMATORY SPEECH BY MEMBER OF BAR.

Case considered of a contempt of court committed by a member of its bar in making a public speech, in which he openly imputed corrupt motives to the judge in his action in a pending case and advocated impeachment, where he pleaded guilty to the charge and fully retracted and apologized, and held to call for severe censure and transmission of record of proceeding to Bar Association.

Proceeding for contempt by the United States against Samuel Markewich. Defendant censured.

On October 2, 1919, this court made an order that the United States attorney "advise the court by formal information concerning the conduct of one Samuel Markewich on September 18, 1919, at which time he is reported to have made remarks at a public meeting concerning the orders of this court in a pending cause." On October 3, 1919, the United States attorney filed an information against defendant. Defendant voluntarily appeared.

The allegations of the information were, in substance, as follows:

(a) That there was pending in this court a suit docketed as equity consoll-dated cause No. E 16-151, entitled "American Brake Shoe & Foundry Company, Plaintiff, against New York Railways Company, defendant; Farmers' Loan & Trust Company, Trustee, Complainant, against New York Railways Company, Job E. Hedges, as Receiver of the New York Railways Company, and the American Brake Shoe and Foundry Company, defendants," the pleadings, orders, papers, minutes, and dockets of which are on file in this court.

(b) That Job E. Hedges was appointed receiver and took possession as such.

(c) That on or about September 5, 1919, the receiver petitioned the court for instruction respecting certain so-called storage battery lines.

(d) That on September 12, 1919, the court duly made an order directing the receiver, for the time being and until the further order of the court, to dis-

continue the operation of said storage battery car lines.

(e) That on September 18, 1919, Samuel Markewich, having knowledge of the above cause and the proceedings therein respecting said storage battery car lines, during the course of a speech at a public meeting of citizens in Public School No. 62, in the community served by said lines, after referring to the situation and conditions which would arise upon the discontinuance of operation of said storage battery car lines, did willfully, knowingly, falsely, and contemptuously say and state in substance and tenor the following: "The people have been discriminated against. They are being trampled upon, and the traction interests have supreme control of the court and of everybody else. The decision regarding the withdrawal of the storage battery cars was not honestly rendered, but was in the interest of the traction trusts. I am in favor of the adoption of the recall of judges. Any judge who discriminates in favor of the railroads and against the common people does not deserve to be Recall would be entirely too mild a remedy. What ought to be recalled. done was what was done in the days of Charles II. The noose! The noose! In those days they hung judges. If that cannot be accomplished at this moment, impeachment is the next step, and Congress should impeach him, and we should ask Congress to impeach him. We should petition Congress with that purpose in mind. A judge who works for public service corporations, instead of the public, should be impeached."

(f) That said remarks tended and were calculated and intended by the said Samuel Markewich to influence the court in its consideration of the said cause of the American Brake Shoe & Foundry Company, plaintiff, against New York Railways Company, defendant: the Farmers' Loan & Trust Company, trustee, complainant, against New York Railways Company, Job E. Hedges, as

receiver of New York Railways Company, and the American Brake Shoe & Foundry Company, defendants, then and still pending in this court, to intimidate the court in the exercise of its lawful functions, to incite and cause public disregard of and resistance to the said order and other orders of this court in the said cause, to obstruct the enforcement thereof, and to impede the administration of justice in said cause and in other causes in said court, and generally to bring said court into public ridicule, contumely, and contempt, and to destroy public confidence in said court and in the judicial system of the United States—against the peace of the United States and their dignity, and contrary to the form of the statute in such case made and provided, and in contempt of this court.

To the information defendant interposed a plea of guilty, and admitted in open court the statements attributed to him, except that his recollection of the language in regard to the noose was somewhat different from that set forth in the information. However, defendant did not take any technical position in that regard, but frankly stated that the facts as set forth in the information were correct in substance. Defendant, according to his own statement, has been a member of the New York bar for 17 years, and was admitted to practice in this court on September 27, 1904.

In open court defendant read a full and complete apology, retracting each and every statement, and expressing profound regret that in the excitement of a public speech he gave utterance to statements and sentiments for which there was no justification. In addition, defendant stated without reservation that he did not entertain in any manner any belief in the truth of the utterances thus unhappily indulged in at the public meeting in question.

As further proof of his sincerity, defendant, with the co-operation of honorable counsel, did not seek by means of any technicalities to delay his plea of guilty, nor in any manner to obscure the issues presented by the information. His manner clearly indicated the mental anguish under which he was laboring and his keen appreciation of the humiliating position which his wrongdoing had visited upon him.

Francis G. Caffey, U. S. Atty., and Ben A. Matthews, Asst. U. S. Atty., both of New York City.

John M. Minton, Jr., of New York City, for defendant.

MAYER, District Judge (after stating the facts as above). The court does not entertain any doubt as to the sincerity of defendant in his apology and in his desire to make amends for his wrongful conduct. Such utterances, opposed to good citizenship and to the calling and training of a member of the bar, can only be accounted for in this case by the intoxicating effect which public meetings have on some speakers. There are those who, in search for popularity, find it easier to say what is false than to speak the truth. The conduct of defendant apparently was not deliberately planned, but misstatements of fact and so gross an appeal to passion, inviting disrespect for the court, however impulsively indulged in, can neither be justified, nor excused, nor does defendant seek so to do. Indeed, defendant has indicated an understanding which goes beyond this incident by his observation in his written apology:

"Now is the time, more than ever, when the integrity of and respect for the courts must be upheld by all good citizens; for it is in times like these, when disorder shows its threatening hand, that the courts stand out as the bulwark of orderly and organized society, and unfair and unjust criticism of our courts and judges at this time, above all times, cannot be productive of any good."

In determining the disposition of defendant's plea of guilty, it is desirable to state some fundamental and simple principles:

Courts are not concerned in a personal way with unjust reflections upon judicial action; but, to preserve respect for law and order, courts must at all times vindicate their dignity, however unpleasant the particular task may be. The United States attorney and his assistant have rendered a distinct service in making it clear that contempts of court will not go unheeded, but will be prosecuted promptly and vigorously. Full and fair criticism of courts and their decisions is a right consistent with that freedom which our form of government has secured; but false and inflammatory statements concerning courts and their decisions, calculated to swerve courts from their duty or to deceive and mislead the uninformed, strike at the very foundations of orderly government and must not be tolerated.

Section 268 of the Judicial Code (Act March 3, 1911, c. 231, 36

Stat. 1163 [Comp. St. § 1245]) provides:

"Sec. 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

In construing this section, Mr. Chief Justice White, in Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186, said:

"The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations, nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly."

The learned Chief Justice also points out the duty of courts when he refers to—

"the sacred obligation of courts to preserve their right to discharge their duties free from unlawful and unworthy influences, and, in doing so, if need be, to clear from the pathway leading to the performance of this great duty all unwarranted attempts to pervert, obstruct, or distort judgment."

In the Toledo Newspaper Co. Case, supra, the defendant was a newspaper corporation, but the opinion of the Chief Justice, when referring to the freedom of the press, necessarily covers in principle the same question when the contempt is committed by the spoken, instead of the written, word. Taking up "the asserted inapplicability of the statute, under the assumption that the publications complained of related to a matter of public concern, and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press," the Chief Justice said:

"We might well pass the proposition by, because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom therefore does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."

The case at bar is not without value for the opportunity it gives of restating vital and settled principles, adhered to in thought and action by those who believe in and respect a constitutional government founded on law and order. When dealing with a particular defendant, however, the court must take into consideration all the facts and circumstances. It is desirable to make clear that courts are impersonal, and not vindictive, no matter how grave may be the attack on the individual judge concerned.

In the case at bar defendant has made the fullest apology which words can convey. The publicity of the proceeding, the humiliation which has come upon him, both as a citizen and a public officer, the great regret which I am satisfied he genuinely feels, have measured out to him a punishment severe within itself. He has frankly stated that he has learned a lesson bitterly taught, and fine or imprisonment will do no more. As it is, the files of this court will permanently contain the record of his wrongful conduct—an ever-unhappy reminder.

In view of his contrite attitude and his complete apology, it will meet the ends of justice that his conduct, so far as concerns his contempt of court, be severely censured, and such censure is herewith administered. Were the incident merely personal to the court, the matter could stop here: but there is an aspect of the case which cannot officially be passed by. Defendant has been a member of the bar of this court for 15 years and of the bar of the Supreme Court of the state of New York for 17 years. The oath of office administered to an applicant for admission to the bar of this court requires him to demean himself "uprightly and according to law and support the Constitution of the United States." Of all men, none owes a more scrupulous allegiance to law and order than the lawyer. If he advises and encourages disrespect for the courts, and indulges in false statements concerning them, he helps undermine the very government to which he has sworn to be loyal. He thus forgets his obligations, both as a citizen and as a member of the bar. The wrong he does affects not only the courts, but the bar as

The New York bar has always striven to preserve its honorable traditions, and has been rightly jealous of its good name. The right to discipline members of the bar rests with the courts, but it has been the established practice that the bar itself shall first investigate acts of a member of the profession, claimed to be violative of his duties and obligations.

It is deemed proper, therefore, that the conduct of the defendant should be brought to the attention of the bar, and to that end the United States attorney is instructed to transmit a copy of the record of these proceedings to the Association of the Bar and to the New York County Lawyers' Association.

UNITED STATES v. FRICKE.

(District Court, S. D. New York. January 16, 1919.)

JUDGES 51(3)—DISQUALIFICATION TO ACT; SUFFICIENCY OF AFFIDAVIT OF BIAS OR PREJUDICE.

Where an affidavit of bias and prejudice of the judge, filed by a defendant under Judicial Code, § 21 (Comp. St. § 988), fails to state any facts supporting the charge, as required by the statute, but is based solely on refusal to grant defendant's counsel so long an extension of time to plead as requested, it is the duty of the judge to decline to act thereon.

Criminal prosecution by the United States against Albert Paul Fricke. On affidavit of bias and prejudice of judge. Application denied.

See, also, 259 Fed. 673.

Francis G. Caffey, U. S. Atty., of New York City. Thomas J. O'Neill, of New York City, for defendant.

MAYER, District Judge. At about 11 a.m. on the 16th day of January, 1919, there was left at my chambers a letter, of which the following is a copy:

"January 15, 1919.

In re U. S. v. Fricke. Treason Indictment Filed December 6, 1918.
"Hon Julius M Mayer United States District Judge. Post Office."

"Hon. Julius M. Mayer, United States District Judge. Post Office Building, New York City, Manhattan.—Dear Sir: I am filing in the office of the clerk of the United States District Court, Southern District of New York, an affidavit and certificate under section 21 of the Judicial Code, requesting that you proceed no further in the above case.

"I therefore request you, pursuant to section 20 of the Judicial Code, to make appropriate entry on the records of the court and certify an authenticated copy thereof to the senior judge for the Southern district of New York.

"Very truly yours, Thomas J. O'Neill."

It appears, also, that there was filed in the office of the clerk to-day an affidavit by Albert Paul Fricke, the defendant, and a certificate by his attorney of record, Thomas J. O'Neill. These papers are as follows:

"United States District Court, Southern District of New York,

"United States of America, Plaintiff, against Albert Paul Fricke, Defendant.

"Indictment for Treason. Filed December 6, 1919. C-15-199.

"State, County, City, and Southern District of New York-ss.:

"Albert Paul Fricke, being duly sworn, says:

"I am the defendant above named. This indictment, filed December 6, 1918, charges me with the crime of treason under section 1 of the United States Criminal Code.

"I was present in the United States District Court. Southern District of New York, before United States District Judge Julius M. Mayer on January 10, 1919, at 10 a.m., when this case was called. I then heard Thomas J. O'Neill, who had been retained by my wife as counsel to defend me with reference to this indictment, state to the court that he had been retained to defend me in this case yesterday afternoon, and that he had not as yet met me, which was the fact, and that he had not sufficient time to familiarize himself with the case, and that the charge was that of treason, which is the highest crime known to the law, and that, under the circumstances, he desired a reasonable opportunity to familiarize himself with the case, and to make such applications with reference to the indictment as might be necessary, and after some discussion Judge Mayer stated, in substance, that he would only give Mr. O'Neill until next Thursday, 4 o'clock, within which to file demurrers or make motions with reference to the indictment, and that counsel should again appear before him on next Friday morning, at which time he would set the case down for argument. Mr. O'Neill then stated, in substance, that with all respect to the court he considered this time entirely inadequate in a case of this character, and the court stated that he had decided to give the defendant until next Thursday at 4 o'clock, and that Mr. O'Neill had the inalienable right to express his opinion outside of the courtroom.

"I am now being held in prison without the privilege of bail, and have been in prison since May 20, 1918, and while I am myself anxious to have my case tried at as early a date as is possible, I do not believe the court has allowed my counsel sufficient time, and indeed I am firmly convinced that the time thus limited is grossly inadequate and unjust to me and my counsel.

"I therefore make and file this affidavit that the said Hon. Julius M. Mayer, United States District Judge for the Southern District of New York, has a personal bias and prejudice in favor of the plaintiff, the government, and the facts and reasons for my belief that such bias and prejudice exists are hereinbefore stated, and I do hereby make this application that such judge shall proceed no further herein.

"This affidavit is made pursuant to section 21 of the United States Judicial

Code (Act of March 3, 1911).

"Sworn to before me this 15th day of January, 1919.

"Albert Paul Fricke.

"[Seal.] Meyer L. Cohn. Notary Public, Bronx County. #45 "Certificate filed in New York county #348.

"My commission expired March 31, 1920.

"I, Thomas J. O'Neill, counsel of record for the above-named defendant in the above referred to indictment for treason, filed December 6, 1918, do hereby certify that the above affidavit and application are made in good faith. I regret to be obliged to present such an application and affidavit, but I am utterly convinced that the time given to me by Judge Mayer is entirely inadequate and insufficient to properly protect the rights of this defendant, charged as he is by this indictment with the highest crime known to the criminal law, and inasmuch as the said judge, when I objected to said time as being inadequate, in substance stated to me that I had 'an inalienable right to express my opinion about this out of the courtroom,' I thought that it was my duty to express my opinion in a more effective way, and particularly as the defendant believes that Judge Mayer is prejudiced in favor of the government herein, and this application is therefore made pursuant to section 21 of the Judicial Code (Act of March 3, 1911).

"Dated New York, January 11, 1919.

"Thomas J. O'Neill, Counsel of Record for Defendant."

Section 21 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1090 [Comp. St. § 988]) is as follows:

"Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner

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prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The following is a brief outline of the procedure before me:

On December 6, 1918, the indictment found by the grand jury was filed. My recollection is that during that month Judge Knox was holding the criminal term, but regarded himself as disqualified to act in this case, by reason of official knowledge obtained during the time that he was an assistant United States attorney. At that time I was presiding in civil jury cases, which were being tried in room 227 of the Old Post Office Building. Therefore I received the grand jury. On December 11, 1918, the defendant was arraigned, and, in accordance with familiar procedure, the contents of the indictment were made known to him. He appeared on that occasion with his attorney, Mr. William H. Daly. The court, as well as the assistant United States attorney, called the attention of the defendant and his attorney to the statute (Comp. St. 1918, § 1700) which provides, among other things, as follows:

"Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours." Rev. St. § 1034 (Comp. St. § 1700).

The court then stated that it would be very glad to comply with the wishes of defendant as to the assignment of counsel, and, if defendant desired counsel, the court would do all in its power to assign appropriate counsel satisfactory to defendant. The court stated that, in view of the gravity of the charge, defendant was entitled to all of the safeguards of the statute, and that the defendant would have the court's fullest assistance in such respect. The then attorney for the defendant stated that the defendant had not yet decided what he wished done in this respect, and requested that the court postpone the determination of this question until a later date, and also requested that the defendant have time within which to demur or make any motion in respect of the indictment. The defendant having entered a plea of not guilty, the court granted a leave of 20 days to withdraw said plea, within which time the defendant had full opportunity to demur or make any motion which he might be advised to make. At the same time the court stated that if, at the end of the 20 days, the attorney found that he needed further time, then that the court would extend the time 10 days further.

On the 31st day of December, 1918, the time was extended until and including January 9, 1919, within which to withdraw the plea and

demur or move as aforesaid, and on December 31, 1918, the court ordered that the matter be placed on the regular motion calendar, at which time the court asked to be advised both as to the wishes of defendant in respect of counsel to be assigned and as to whether or not he had demurred or made any motion in respect of the indictment, and, in such event, that the court would then set a date for argument.

On January 10, 1919, the attorney, Mr. William H. Daly, announced that he had withdrawn as attorney of record and that another attorney would represent the defendant. It was stated, either by Mr. Daly or Mr. O'Neill, that the defendant did not desire any counsel to be assigned to him. Mr. O'Neill then addressed the court and stated that he appeared for the defendant; that he had just recently been retained, and had not as yet seen the defendant; and, as I recall, he also stated that he had not had an opportunity to read the indictment. The court thereupon briefly pointed out the time which had elapsed and the opportunities and extensions of time which had been theretofore had, and said that in his opinion it was desirable that a case of this character should be proceeded with without undue delays. The court thereupon stated that he would further extend the time of the defendant and his new attorney until January 16, 1919, at 4 p. m., within which to withdraw the plea and demur or make any motion in respect of the indictment. The court further stated that the case would appear on the motion calendar on January 17, 1919, so that, if a demurrer was to be heard, or any motion was to be heard, the court would fix a date for such hearing.

It will thus appear that since December 11, 1918, the defendant has been represented by counsel, and although it was made plain that the last extension would expire on and including January 9, 1919, an additional extension was given in response to the request of the second attorney. Mr. O'Neill asked for a longer adjournment, which the

court was of opinion should not be granted.

An examination of the affidavit filed by the defendant fails to show compliance with section 21 of the Judicial Code, or any facts setting forth any personal bias or prejudice either against defendant or in favor of the United States of America. In the certificate of Mr. O'Neill, the statement is made: "As the defendant believes that Judge Mayer is prejudiced in favor of the government herein." No such statement is made by the defendant; but, assuming the statement as having been made on behalf of defendant, no fact of any kind or description is set forth in support of the conclusion set forth in Mr. O'Neill's certificate.

Ordinarily it would be unnecessary to state that defendant is entitled to a fair and impartial tribunal, and that a judge naturally is reluctant to exercise jurisdiction in any action or proceeding where any defendant or other litigant has just grounds for believing that bias or prejudice exists against him. It is also a matter of embarrassment that under the Judicial Code it becomes necessary, in the first instance, for the judge to pass upon the affidavit and the certificate referred to in section 21 of the Judicial Code. Unpleasant, however, as the duty is, it must be performed. It manifestly would be a serious impairment

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of the orderly administration of justice if a judge could be disqualified without just cause. Such a procedure would leave to the defendant or other litigant, as the case might be, the right automatically to dispense with the judge, even though no reason of the character required by section 21 were assigned.

An examination of the affidavit of the defendant shows, in effect, that the defendant was dissatisfied with the ruling of the court, which it had power and discretion to make in respect of an adjourned date. The only allegation which might have a serious import, viz. that of bias in favor of the government, is not supported by any facts set forth, either in the affidavit of defendant or in the certificate of his counsel.

The Supreme Court of the United States in Ex Parte American Steel Barrel Co., 230 U. S. 35, 33 Sup. Ct. 1007, 57 L. Ed. 1379, has construed the purpose and meaning in various respects of section 21 of the Judicial Code, and at page 43 of 230 U. S., at page 1010 of 33 Sup. Ct. (57 L. Ed. 1379), Mr. Justice Lurton, writing for the court, said:

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term." (Italics mine.)

With this clear statement of the Supreme Court before me, with no knowledge of any kind whatever in respect of the merits of the case, and regarding an indictment as merely an accusation, and being fully conscious that I do not entertain any personal bias or prejudice of any kind or description in the case, either against the defendant or in favor of the United States of America, I should be faithless to my duty if I permitted the affidavit and certificate filed herein to disqualify me from hearing any further proceedings in this cause which may in due and orderly course be brought before me.

Realizing the natural desire and the right of the defendant to be safeguarded in all of his rights, I may add, what in other circumstances would be entirely unnecessary, and that is that the defendant has in no way prejudiced himself because of the filing of the affidavit and the certificate of counsel herein. Also realizing that the duty cast upon me is of a delicate character, I have conferred with my associates, Judge Learned Hand and Judge Augustus N. Hand, and they each authorize me to state that they agree with the conclusion here stated. I have not conferred with Judge Knox, because of the statement made to me in court that he regarded himself as disqualified in this case for the reasons above referred to.

I must therefore decline to comply with the request contained in the letter dated January 15, 1919, addressed to me by Thomas J. O'Neill, attorney of record for the defendant.

UNITED STATES SMELTING CO. (PICHER LEAD CO., Interveners) v. HOFKIN et al.

(District Court, E. D. Pennsylvania. November 18, 1919.) No. 1703.

Corporations &= 334—Liability of directors for paying unwarranted divi-

Under Act Pa. April 29, 1874 (P. L. 102) § 39, cl. 5, providing that directors shall be liable for the debts of the corporation, if they declare and cause to be paid a dividend when the corporation is insolvent, or the payment of which renders it insolvent, directors of a manufacturing corporation, who were also the stockholders, who after 19 months of business declared and paid a first dividend of 500 per cent., held liable for debts of the corporation, which almost immediately afterward became insolvent, with large indebtedness, although at the time it had ample assets remaining to pay its then indebtedness, where its subsequent indebtedness arose out of contracts then in existence for purchase of raw material, and was caused by a large decline in its market price.

In Equity. Suit by the United States Smelting Company against Mendel Hofkin and others, in which the Picher Lead Company and others sought to intervene as plaintiffs. Decree for complainant.

See, also, 245 Fed. 896.

R. Stuart Smith, of Philadelphia, Pa., Philip W. Russell, of New York City, and Morgan, Lewis & Bockius, of Philadelphia, Pa., for plaintiff.

A. L. Moise, of Philadelphia, Pa., for intervener Picher Lead Co.

Carr & Steinmetz, of Philadelphia, Pa., for interveners Canada Metal Co. and Adam Hope & Co.

Alfred Aarons and Francis Shunk Brown, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. This case, in almost every one of its varying aspects, suggests to the mind the inspired saying that "it is the letter which killeth," and in some of its aspects the contrasted effects of discarding the letter and being guided alone by the spirit, which gives life to the words of the law. However helpful the quoted phrase may be, because of the wisdom embalmed within it, the lawyer mind is at once admonished that in this case it is the letter to which is due in the beginning all the life which the cause has. This is so, for the reason that, if it were not for the statute, the plaintiff would have no cause of action against these defendants, and we can only know the law which the statute declares from the words employed.

The argument which leads us to disregard the letter of this statute in consequence takes on the appearance of being suicidal. Every line of thought which, by its logical strength, draws us to a conclusion must (261 F

have a beginning and a starting post to which it can be tied. In this case we have for such beginning the proposition that the defendants were not as individuals the debtors of the plaintiff, nor did they become such from the mere fact that they were the directors of the corporation. If they are now or at any time became debtors, it was not nor is because they were the directors of the debtor company, but because of the provisions of the Pennsylvania statute of April 29, 1874 (P. L. 102, § 39, cl. 5), to the effect that directors shall be liable for the debts of the corporation, if they declare and cause to be paid a dividend when the corporation is insolvent, or the payment of which renders it insolvent. No question is raised over the defendants being within the statute or its application.

The real question involved is presented in the statement of counsel for defendants as one of whether the corporation was at the time of the declaring and payment of this dividend insolvent, or became insolvent as a consequence of such payment. The same question may be differently stated as one of whether the defendants, by the declaration and payment of this dividend, did that thing for which the statute visits upon them liability for the debts of the corporation. We will, because of this concession of the defendants, confine our inquiries to this ques-

tion.

The facts, baldly stated, are as follows: The American Galvanizing Company had a capital stock of \$10,000. The company had been in existence for about 19 months, and was yet to declare its first dividend. It entered into a number of contracts, which began to mature and ripen into debt obligations presently payable about the time the dividend was paid, or very shortly thereafter. The dividend declared, expressed in percentage, was a 500 per cent. dividend. Almost immediately afterwards the company by the act of these same directors, was declared to be insolvent. The conditions then presented were that each stockholder had withdrawn from the assets of the company in this one and only dividend five times what he had invested in it, and there was nothing left for creditors, and all its debts must go unpaid. Add to this the two facts that this total dearth of assets to meet debts followed immediately upon the payment of the dividend, and that the persons who received the dividend were the same individuals who, as directors, had declared it, and at once and by a resistless impulse the face of the inquirer is turned to these directors for some explanation of their conduct, in the absence of which the inference so plainly indicated would force itself upon the mind.

Those who have learned the risk of bad judgment incurred in forming that kind of hasty judgment known as judging from appearances will have in mind the fallacy which is voiced in the phrase "post hoc propter hoc." Chronological following, no matter how close, may not be causal consequence, but may be easily mistaken for it. It is no employment of an exaggerated figure of speech, however, to say, as to this occurrence, that not merely insolvency, but the stripping of this corporation of all assets, followed the payment of this dividend, as

the thunder clap follows the electric flash.

Without something more appearing than what is above stated, the

mind is staggered into an incapacity to entertain any other inference than that which would be drawn. We cannot, in consequence, do otherwise than feel that an explanation is not only looked for; it is imperatively demanded of the directors. This necessity is, of course, felt by the defendants and their counsel, and the explanation is forthcoming. To do it no more than justice, it is not only plausible but does not have the appearance of being the least bit strained. It is, although not expressed by counsel in quite this way, that the defendants have been placed in a false light through a chain of unfortunate, yet altogether unforeseen, happenings which were in fact merely coincidences.

Before the declaration and payment of this dividend the corporation had done a prosperous business, and at that time was in a prosperous condition. It had net assets, including the contributions to its capital, valued at \$71,134.99, and a surplus applicable to the payment of dividends of \$58,940.85. There is nothing to impeach the integrity of this statement of its financial condition, although, of course, its plant (and properly so) in this balance sheet summary was put at its value as a going concern, and not at its liquidating value as a bankrupt venture. It had outstanding contracts for the purchase of spelter, the raw material which it used in its manufacturing processes. These contracts proved the undoing of the company, as the drop in the price of spelter, which followed the making of the contracts to purchase, entailed a destructive loss upon the purchaser.

It is urged with earnestness, however, that at the time the dividend was declared there was not only nothing to indicate the imminence of a loss, but, on the contrary, much to found the expectation of a profit from these contracts, because the trend of the market prices of spelter was at that time upward. The facts affecting this phase of the inquiry were not sufficiently developed to enable us to make any definite findings. This is because the plaintiff was seeking to get the facts through the cross-examining of the defendants, and proceeded with a noticeable wariness, and the defendants' trial tactics were (as they would be expected to be) dictated by the policy of imposing upon plaintiff the burden of proving its case.

It is not wholly clear whether the purchases of spelter, in the quantities in which it was bought, were speculative or for manufacturing uses, nor is it by any means clear what the promise of the market as to future ranges of prices was at the time the dividend was declared. The plaintiff was in position, however, to have made this last-mentioned feature entirely clear, and, as it had failed to do so, the defendants have a right to the finding (which is now made) that there is no evidence of the price of spelter being below the contract price at the dividend date. The market was, however, so feverish and fluctuating, and the general conditions such, that there could not be said to be any stable market, and the difficulties of securing supplies so great that there was uncertainty in respect to future market conditions affecting the supply and price of spelter, and an even greater uncertainty respecting the prospects of the manufacturing business in which the corporation was engaged. The debts of the company then presently demandable did not exceed \$2,200 in amount. The total indebtedness at the time of bankruptcy, a few months afterwards, was many thousands, but none of this (beyond the \$2,200) had on the dividend date matured into a presently payable debt, and existed only in the form of obligations resting upon executory contracts in the form of purchases of spelter for

future delivery.

The legal proposition upon which, as counsel for defendants view this case, the plaintiff must recover, if at all, is that directors of a corporation cannot, except at the risk of making themselves individually liable for its debts, declare a dividend, if at the time the corporation has outstanding executory contracts carrying a monetary obligation. If this be a correct statement of the legal proposition involved in this case, it is clear that the bill must be dismissed. No such measure of responsibility can be placed upon directors consistently with a wise policy of the law, nor (and because of the unwisdom of such a law) is this the law of Pennsylvania. The words of this act of assembly carry no such meaning, nor is such a meaning in accord with the purpose of the law. That purpose is manifest. It is that the assets of corporations which belong to its creditors shall not in fraud of creditors be diverted by directors to the pockets of the stockholders, and most emphatically not to their own pockets. To assure the accomplishment of this purpose, directors are made responsible to creditors who are thus defrauded.

If there be actual fraud, it need not be stated that the transaction is within the act of assembly. The law has a further purpose, however, to formulate and enforce a policy which may extend its provisions to cases beyond those of actual fraud. The measure of responsibility visited upon directors can be more readily sensed than expressed in a formulated rule of conduct. Inasmuch as this is true, and because it is true, no honest director need be troubled with doubts whether he should favor or protest the declaration of a dividend. If to buttress his sense of what is right and to fortify his position he seeks supporting reasons, he may resort to the following test as one which may be applied:

No board of directors by the declaration of a dividend insures the solvency of the corporation. Such directors are held in the discharge of their duty only to the standard of the bona fide exercise of their best judgments. A bona fide judgment, however, carries the thought that it is a reasonably informed and intelligent judgment, in the sense that it is such a judgment as may fairly be expected to be exercised by those who assume the responsibilities of acting as directors of such a corporation. Even the possession of such a judgment is not absolutely and conclusively presumed, but such prima facie presumption is justified until removed by some explanation which the special conditions surrounding the transaction or the particular situation affecting an individual director affords.

Again, the line which separates a bona fide from a mala fide judgment is one which from necessity must be drawn after the event. Indeed, as it is a line formed, or at least indicated, by the motives and intentions of the actor, we rarely can have other evidence of it than the effects and consequences of what was done. At least the line must be drawn

in the light of results. Every director is presumed to know, because he must know, that the right of stockholders to dividends is subordinated to the rights of creditors. The right of the one does not begin until the rights of the other are assured. This, of course, does not mean an absolute assurance; but it does mean a reasonably well founded business expectation that the obligations of the corporation will be met. The financial condition of the corporation enters into it; there also enters the distinction between obligations which are presently payable debts or which time alone will ripen into debts and contingent obligations or executory contracts out of which no debt is expected to arise otherwise than as a possibility more or less remote. The reasonable expectations of those concerned, springing from the usual and ordinary, and in this sense regular, course of doing business by corporations generally, or by corporations of such general class or the particular corporation concerned, likewise enters into the problem.

This latter consideration is pertinent, because it has a bearing, and important bearing, upon the ruling to be made in this case. Ordinarily, the interests of stockholders are regarded as investments made in expectation of income to be derived therefrom. This does not apply so much to corporations which are partnerships in everything, except that letters patent have been issued to them, yet it is generally true that such interests are regarded as permanent investments, from which the holders look only for a return in dividends, and not a repayment of the capital investment. Corporations usually adopt the policy of determining what dividends they will be able to pay with more or less regularity and declare these periodically, disposing of abnormal earnings through

the declaration of special or extra dividends.

Applying the thought, which we have in mind, to a concrete case, as the best means of giving it clear expression, there would be less to challenge attention to the propriety of the declaration of a dividend which was a rate of dividend no more than a normal investment return, and which was the dividend which the corporation had been regularly declaring, than in declaring a first dividend, or one of an abnormal rate, or one which was disproportioned to the dividend which had been before regularly declared. The one would call for so little scrutiny of the condition of the corporation that, if nothing appeared to indicate that the accumulated earnings were needed or might be required to pay debts, something more than a mistake of judgment must be shown before directors would be held responsible to creditors. In the case, however, of the payment of a first and unexpected dividend, of an abnormal rate out of all proportion to investment returns, and which stripped the corporation of all its capital resources, except such as were permanently tied up in plant and equipment, if this dividend payment were almost immediately followed by rank insolvency, and to crown all, if the dividend had gone to the directors who declared it, the creditors whose claims were left unpaid might well ask why the dividend had been paid and the debts not.

The fact conditions of this case make this query irrepressible. The only explanation forthcoming is that the balance sheet showed surplus earnings justifying the payment of a dividend. This is, as stated,

justification for the payment of a dividend; but the query recurs: Why was this particular dividend paid? This presents the two dividend situations above contrasted. Had this dividend been the customary one; had it been, although the first, representing a return on the capital invested, a normal dividend; had it been limited to a distribution of surplus earnings, which could be paid out without crippling the resources of the company; or had it been paid out to stockholders who were not themselves directors—the declaration might have been passed without comment.

Instead of any of these things being true of this dividend, the exact converse was true. It was the first and only dividend; it was at the rate of 500 per cent., and many times what could have been within the reasonable expectation of any stockholder; it left the resources of the company so crippled that it succumbed within almost a few days to the first demand made upon it, and became hopelessly insolvent and almost without assets, and the dividend was declared for the benefit of the very directors who declared it. The explanation given is not a satisfying answer to the inquiry of why such a dividend, having such immediately disastrous consequences, was declared, nor justifies the directors in bringing it about that they should, as has been said, be paid five times their contributions to the capital stock of the company, and that its creditors go unpaid.

Counsel for defendants, appreciating the insufficiency of this answer, fall back upon a denial of the legal liability of the directors. The view advanced is that liability is limited to creditors, and visited only if the company be insolvent when the dividend is declared, or be made so by its payment. It is this position which suggests the distinction between the letter and spirit of laws, and provoked the comment first made. If the strict letter of this statute controls, then these defendants are not liable. In one strictly literal sense the company was not insolvent, and in an absurdly literal sense the payment of the dividend did not render it so. It was not insolvent in the sense that there were any presently demandable debts which could not have been paid; the payment of the dividend did not render it insolvent, because it would have been insolvent anyhow. This latter statement is not made to ridicule the position of the defendants, for it is not the one taken by them. The statement is made to present the thought that the words of this statute were not employed to convey the technical meaning given by the defendants to the words "debts" and "insolvent."

Those who are now creditors of the company, and who became such soon after this dividend was declared, held at that time no claim of debt, in the sense of one which they could have enforced through an action of debt, which is without exaggeration the sense which defendants contend to be the sense in which the word "debts" is used; nor was the company then insolvent in the sense of an answer to the question of when the company became insolvent. The company had at that time, however, incurred every obligation to its present creditors which it ever assumed, and was then indebted to them in the obligation sense as fully as it now is, and if the shortage of assets did not exceed the total dividend payment (which is undoubtedly the sense in which the statute employs the phrase), the payment of the dividend would have

been the act which rendered the corporation insolvent. Neither the word "debts" nor "insolvent" is restricted in its meaning to one of the technical meanings which the word has. It includes that, but also more than that.

The purpose of the act of assembly is to induce directors not to divert into the pockets of stockholders assets which are needed to pay debts, and its words must be interpreted with that thought in mind. When this is the thing which in substance they have done, if they have done it with what, in legal intendment, is with eyes open to this consequence, they must restore to creditors what has thus been taken from them.

It is to be noted that liability is not based upon guilty knowledge, and, if the statute were taken literally, liability would abide the fact of the company becoming insolvent. Here, again, however, the expression is not to be construed with verbal literalness. There must be this finding of knowledge, and this finding we make. The defendants have denied knowledge of insolvency, and this disclaimer we accept in the sense in which we understand them to have made it. They must have justified themselves in their own consciences in doing what they did, or they would not have done it.

The finding made against them involves no finding of moral turpitude, and no finding of fraud in that sense. The finding is of the facts upon which the law visits upon them a legal liability. It may be, of course, that they are victims of a coincidence. They voted to themselves \$5 for every \$1 they put into this venture, and as a consequence they received back their investment, with this very handsome return from it. Almost immediately afterwards the company looked for assets to pay its debts, and there were none. The latter fact may merely have followed chronologically the former, and they may have had no causal relation to each other.

The defendants have in effect so declared, and we make no finding which necessarily reflects upon them. The finding merely is that the evidence is so overwhelming that no other conclusion can be reached than of one which visits upon the defendants legal liability to the extent imposed by the law. This compulsion is voiced in the figure of speech employed in an address famous in the annals of our political history that if we find timbers shaped and formed at a different time and place and by a different workman, when joined together completely make the frame of a house or a mill, all the tenons and mortices exactly fitting, and all the lengths and proportions exactly adapted to their respective places, and not a piece too many or too few, not even the scaffolding being omitted, in such a case we find it impossible to believe these workmen did not have in mind the structure in the erection of which these timbers were afterwards used.

The thought embraced in the quotation which we have thus paraphrased thrusts itself between the very clear-cut and forcible argument of counsel for defendants and the acceptance which we would otherwise give it.

We have examined all the cases to which we have been referred, and find that, so far as they are applicable, they confirm the views

above expressed. Among those cited to us are Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Wing v. Slater, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566; Whitney v. Barlow, 68 N. Y. 34; Jones v. Barlow, 62 N. Y. 202; Garrison v. Howe, 17 N. Y. 458; Morimura Arai & Co. v. Traeger, 11 Pa. Dist. 378; Pettibone v. Toledo, 148 Mass. 411, 19 N. E. 337, 1 L. R. A. 787; Gold v. Clyne, 134 N. Y. 262, 31 N. E. 980, 17 L. R. A. 767; Severs v. Dodson, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641; Saleno v. Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653; People v. Arguello, 37 Cal. 524; Bank v. Walton, 13 Colo. 265, 22 Pac. 440, 5 L. R. A. 765, 16 Am. St. Rep. 200; Cunningham v. Norton, 125 U. S. 77, 8 Sup. Ct. 804, 31 L. Ed. 624; Levan's Appeal, 112 Pa. 294, 3 Atl. 804—to which may be added the opinion filed in this case on the motion to dismiss. Smelting Co. v. Hofkin (D. C.) 245 Fed. 896.

In order to give definiteness to the date of the decree made, we make none now, but leave is given counsel to submit drafts of a decree in

accordance herewith.

THE ADRIATIC.

THE GEORGE J. KIRKHAM.

(District Court, E. D. New York. October 23, 1919.)

Collision 5-71(2)-Tug and barges moored in slip.

Injury to a barge, by being forced against a pier by a collision between other barges lying outside of her and a tug engaged, with others, in maneuvering a large steamship into her slip, held due to the fault of the steamship in being allowed to swing with the tide, so as to crowd the tug against the barges.

In Admiralty. Suit for collision by the Jordan Ship Company against the steamship Adriatic, with the tug George J. Kirkham impleaded. Dismissed as to the Kirkham, and decree for libelant against the Adriatic.

Macklin, Brown & Purdy and W. F. Purdy, all of New York City, for libelant.

Burlingham, Veeder, Masten & Fearey, Chauncey I. Clark, and Charles E. Whyte, all of New York City, for the Adriatic.

Herbert Green, of New York City, for the George J. Kirkham.

CHATFIELD, District Judge. The libelant claims damages for injuries received by the barge Marjorie on April 27, 1912. On the evening of April 26, 1912, the Marjorie had been moored on the north side of White Star Pier 59, North River, and on the morning of the 27th she was shifted to the south side of that pier, where she was tied up some 59 to 75 feet in from the outer end of the pier. Two other barges were fastened with lines outside of the Marjorie. The boats were placed in this position for convenience in loading at this exact point, and also because the steamer Adriatic was to be placed in the slip on the north side of the pier. At that time a steamer of the size

of the Adriatic usually required the help of as many as ten tugs, but the testimony names only five which took part. The tug Kirkham, with at least two others, took up a position on the starboard side, or under the starboard quarter, of the Adriatic, and inside the slip between Piers 58 and 59.

The Adriatic had proceeded up the North River under her own power. The tide was running ebb, and the Adriatic was to be warped into the slip, by resting the starboard bow of the steamer against the upper corner of the pier, and drawing on a line to the south side of Pier 60. In performing this maneuver, the Adriatic was held by the force of the tide against Pier 59, and extended down across Pier 58. The three tugs in the slip in which the Marjorie was moored must have taken their places before the Adriatic rested against the end of the pier, in order to work against the side of the Adriatic when swinging her stern out into the river and turning her around the pivot formed by the upper corner of the pier. Boats at the end of the pier would have to move to avoid injury. This method had been judicially upheld in The Etruria (D. C.) 88 Fed. 553.

On the occasion in question the stern of one of the tugs came in contact with one of the barges lying outside of the Marjorie, forcing the Marjorie against a timber or fender on the face of the pier. This in turn broke the timberhead of the Marjorie, allowing the house upon the Marjorie's deck to come in contact with the fender of the pier and to receive the damage which is the subject-matter of the

action.

It appeared from the testimony that some two years clapsed before the libelant's counsel located the captain of the Marjorie and learned the name of the tug which, in the captain's opinion, came in contact with the barge, by means of which force was transmitted to the Marjorie, although he had filed a report the day after the accident, in which he named all the tugs which were assisting the Adriatic on that side. The action was started in 1913, and the proctors received this information as to the circumstances in 1915. Thereafter the tug Kirkham was brought into the case by petition on the part of the Adriatic, and the case was finally brought on for trial in May, 1918. Testimony on behalf of the Adriatic was then adjourned, because of the absence of an alleged eyewitness, whose attendance was not obtained until January 19, 1919. Testimony was finally closed on June 3, 1919, and the case submitted to the court on September 15, 1919.

This witness on behalf of the Adriatic testifies that he was standing upon the dock and saw the whole occurrence; that the Adriatic had been pushed out from the end of Pier 59, so that her stern was pointing toward Hoboken. He states that she was moving ahead into the slip under her own power, and that one tug tried to back around the other two tugs, striking the barge on the outside of the Marjorie, and causing the damage charged. This witness corroborates the captain of the Marjorie as to the place of contact, and in testifying that he saw the captain jump ashore at the time of the smashup.

It also appears from his testimony that this witness told the Marjorie to move further inshore. This the captain of the Marjorie denies, and it is apparent that no tug was sent to move the boat, nor was the captain compelled to shift his boat, but was left to his own devices. The testimony of the witness who states that the tug caused this damage by backing into the barge was given in such a way as to indicate that the witness was attempting to tell the truth; but the lapse of time, and his statement that the Adriatic had been swung out in the stream, so that she was ready to move ahead into her slip, makes it impossible to credit his recollection that the tugs had their bows still against the side of the Adriatic, and that one of them was maneuvering to get around the other, when it struck the Marjorie.

A force which could move the other two barges and drive the Marjorie against the dock with such momentum as to break her timberhead and carry her over until her house was forced out of place would certainly have been a matter of observation, and caused some commotion on the Kirkham and the barge, which was struck. The force must have been exerted in such direction as to carry the Marjorie upstream against the ebb tide, with the weight of the other two barges added to her own and when they were all moved as a unit; no lines between them being parted.

The testimony of the libelant exonerates the tug, and attributes the force which drove the boats upstream to the weight of the Adriatic as she settled along the end of the pier before the tugs began to swing her out in the river. The captain of the Marjorie testifies that one of the tugs was wedged by the steamer and the other two tugs. This is the only reasonable explanation.

On the record, therefore, it must be held that the Adriatic is liable for the damage incurred, and the petition against the Kirkham will be dismissed.

INDIVIDUAL DRINKING CUP CO. v. PUBLIC SERVICE CUP CO.* (District Court, E. D. New York. October 20, 1919.)

APPEAL AND ERROR 5 1200 DECREE ENTERED ON MANDATE.

Motion to strike from a decree a paragraph entered in supposed compliance with the mandate of the Circuit Court of Appeals, and without objection of counsel, denied, subject to further direction of the appellate court.

In Equity. Suit by the Individual Drinking Cup Company against the Public Service Cup Company. On motion to correct decree. Denied.

Clifford E. Dunn, of New York City, for plaintiff. Briesen & Schrenk, of New York City, for defendant.

CHATFIELD, District Judge. Action was brought in this court, charging infringement of letters patent No. 1,081,508, for a dispensing apparatus, and letters patent No. 1,032,557, for a paper cup. The patent for the dispensing apparatus contained a great many claims,

which were not separately questioned by the defendant's counsel, which were en bloc held valid. The cup patent was also held valid, but not infringed, and the usual decrees were entered.

Upon reference before a master, the plaintiff attempted to introduce a different machine, known as a push-button bracket. The master refused to treat this device as within the scope of the pending action, and, on review, the court denied the plaintiff's application, remitting him to a new suit with reference to the push-button device. Appeal was had to the Circuit Court of Appeals, and the case was heard in connection with an action begun in the Southern district of New York, upon patent No. 1,081,508, known as Individual Drinking Cup Company v. Charles Errett, 250 Fed. 620, 162 C. C. A. 636. action in the Southern district included also a charge of infringement of the patent by the device known as the push-button bracket or pushrod dispenser.

The Circuit Court of Appeals affirmed the general finding of validity of the patent in suit in both districts. It held that a number of the claims which were broad in language could not be maintained, upon the disclosures of the specifications and drawings, and that they should be held invalid therefor. It also, among other things, held that the push-rod dispenser, which had been a subject of litigation in the Southern district suit, did not infringe any valid claim of the patent No. 1,081,508, thus upholding this court's action in refusing to allow the push-rod dispenser, under the name of the push-button bracket, to be included as an alternative or modified form of infringement, by the same party, of the device which had been enjoined by this court in the original interlocutory decree. A separate mandate was sent down to the Southern district and to the Eastern district, each in its own case.

The mandate in the Eastern district directed that the decree be modified in accordance with the opinion of the Circuit Court of Appeals, and, as so modified, affirmed. On the 5th day of June, 1918, on notice to plaintiff's counsel, a decree was entered modifying the original decree of this court, by excluding as invalid, or as noninfringing, those claims which the Court of Appeals had disposed of in that manner. The mandate did not in words direct the entry of a new final decree, but merely a modification and affirmance of the original decree. But this, in substance, required the entry of a new final decree by the District Court.

The opinion of the Circuit Court of Appeals apparently modified the findings of this court in its original decree by holding that the free push-rod dispenser did not infringe, as well as to hold it so different in character as to require the bringing of another action in order to determine the question of infringement. The parties were before the Circuit Court of Appeals, the push-rod dispenser was also before that court in the Southern district case, and had been brought into the action in the Eastern district by the plaintiff's application to have it treated as a mere variant form of the device already held to be an infringement of patent No. 1,081,508; and the Court of Appeals had, it seemed to the District Court, complete jurisdiction upon the papers, which were all included in the record, to hold that the push-rod dispenser was not only properly excluded from the scope of the original decree in this district, but also to be so far outside of the claims of the patent as to be evidently noninfringing. The plaintiff had not appealed from the order of this court refusing to include the push-rod dispenser within the scope of the injunction, but all of the papers upon the motion had been printed in the record which was before the

Court of Appeals.

In the case of the cup patent, No. 1,032,557, no appeal was taken by the defendant from the decree holding the Lilly cup patent valid. The plaintiff appealed from the finding that it was not infringed. Upon the hearing in the Court of Appeals, opinion was rendered and the mandate ordered that the District Court hold the Lilly cup patent invalid, as well as not infringed. Undoubtedly the Circuit Court of Appeals had jurisdiction to determine this question, as the entire record, including the defendant's proofs as to invalidity, was before it. The effect of that mandate was to make the decision of the Circuit Court of Appeals as to the validity of the cup patent supersede the decree of this court,

In a similar way the defendant and the court interpreted the intention of the Court of Appeals with respect to the free push-rod dispenser, which had been held not to be an infringement in the Southern district action before the Court of Appeals after full hearing, at which the exhibit itself and a complete discussion of the issue was before the court, when it heard the appeal from the decree in this court.

Assuming that this court has jurisdiction to correct a clerical error, such as would be the accidental inclusion of a paragraph relating to a patent entirely foreign to the subject-matter of the suit, it is impossible for this court to determine whether the paragraph in the decree, now objected to, was entered by clerical mistake. It may have been entered from an entire misapprehension or misunderstanding of what was intended by the mandate of the Court of Appeals; that is, this court may have entirely failed to understand what the Circuit Court of Appeals intended to direct by its opinion. If that is the situation, and the plaintiff, by failing to object to the form of the decree, has acquiesced in a matter over which this court had jurisdiction through an implied order of the Court of Appeals, then the motion should be denied on the merits. If, however, the court and the parties, through some inadvertence, included a paragraph which was not within the mandate to this court, because the Court of Appeals did not, in fact, make such direction in its opinion, then it would seem that no jurisdiction had been conferred upon the District Court to interpret the opinion of the Circuit Court of Appeals in that regard, and the clause should be stricken out as an utter mistake. in the sense that it would be as foreign to the decree as the mention of a patent from some other art.

But this court cannot determine finally whether the Court of Appeals did, in fact, include within its mandate any determination in the action in the Eastern district as to the push-rod dispenser. The

language relating to that device in the opinion of the Circuit Court of Appeals in no way furnishes any basis for an interpretation by this court of its scope, so far as the effect upon the mandate is concerned.

It seems to this court that the District Court should not attempt to decide what the mandate of the Court of Appeals was intended to include, where there is no phrase or statement, the interpretation of which will determine that question. Responsibility does rest upon the District Court to follow the language of the opinion of the Court of Appeals, in order to determine what was the opinion of that court, and to interpret that language wherever the thought of the Court of Appeals is concealed within the words used. But to bodily appropriate certain language of the opinion, upon the theory that by analogy, or from motives of convenience or expediency, the Court of Appeals presumably intended to order something which the Court of Appeals has not said it ordered, and which that court may decide it did not order, would frequently lead to disastrous results.

If, therefore, the Court of Appeals did not intend to make direction to this court with respect to any decree as to the push-rod dispenser, and if the inclusion of the paragraph was purely a clerical error, based upon failure of this court and of the plaintiff's attorney to carefully discriminate as to what was directed by the opinion of the Court of Appeals, this court will request the Court of Appeals to withdraw

its mandate and make a further direction upon the subject.

Unless the Court of Appeals makes such direction, the present motion will be denied, upon the ground that the decree of June 5, 1918, is in accord with the direction of the Circuit Court of Appeals, in so far as the Circuit Court of Appeals made any direction at all in this court upon the subject.

In re FRASER.

(District Court, W. D. New York. November 13, 1919.)

No. 7540.

1. CHATTEL MORTGAGES \$\infty 192-Delay in filing.

That a chattel mortgage was not filed until 14 days after its execution held not such delay as to invalidate it under the law of New York, under the circumstances shown and in the absence of any evidence to indicate fraud.

2. BANKRUPTCY \$\igcream 196\top Delay in making sale on execution.

An execution held not invalid, under Bankruptcy Act July 1, 1898, § 67f (Comp. St. § 9651), for dormancy, as against a trustee in bankruptcy of the debtor, because of delay of four months after levy before sale, where it was not by direction of plaintiff or his attorney, and no prejudice to the trustee resulted.

3. Bankruptcy €==216, 217(3)—Execution sale after bankruptcy; stay by bankruptcy court.

Unless stayed by order of the bankruptcy court, a sale on execution of bankrupt's property may lawfully be made after adjudication under a valid prior levy.

In Bankruptcy. In the matter of Samuel Fraser, bankrupt. On review of order of referee. Modified.

Decker & Menzie, of Rochester, N. Y., for judgment creditor. Scott W. Crane, of Livonia, N. Y., for trustee.

HAZEL, District Judge. The referee in bankruptcy decided that the trustee for the bankrupt was entitled to a fund in the custody of the sheriff of Livingston county—\$1,547.75, less his fees—which amount had been realized on sale of property under execution issued against the bankrupt. The decision is modified as hereinafter indicated.

The material facts of this case follow: On January 29, 1917, the bankrupt delivered a chattel mortgage to the Allaire Water Supply & Land Company upon certain personal property, which was filed on February 16, 1917. On October 8, 1917, two judgments were recovered against the bankrupt, one for \$540.31, and the other for \$1,076.20. On October 20, 1917, executions on such judgments were delivered to the sheriff of Livingston county, who levied on all personal property of the bankrupt, including his interest in the personal property mortgaged. The smaller judgment was subsequently paid. The execution upon the unpaid judgment was renewed, and no sale was had thereunder until April 17, 1918, after the adjudication in bankruptcy, at which sale the amount was realized which the trustee is endeavoring to have refunded to him. The bankrupt was adjudicated on April 6, 1918.

1. The chattel mortgage expired as a lien on February 16, 1918, on account of failure to renew the same under the statute laws of this state, and I am satisfied that the levy thereafter made under the execution upon the chattels specified in the mortgage was inoperative and of no effect, since such levy was made within four months of the adjudication in bankruptcy, when the lien of the execution and levy was void under section 67f of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. § 9651]). Collier on Bankruptcy (11th Ed.) 1080, 1081.

[1] 2. About 14 days passed after the chattel mortgage was delivered before it was filed, but such intervening time is not believed to have been an unreasonable delay. It was necessary to mail the mortgage to the mortgagee at Allaire, N. J., for examination before filing. It is not shown that at such time the mortgagee knew of the insolvency of the mortgagor, or that the chattel mortgage was collusively withheld from record with an intention to cheat and defraud creditors. Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073.

3. The trustee is therefore entitled to the proceeds of the sale of the personal effects included in the mortgage on which the mortgage had ceased to be a valid lien.

[2] 4. The execution as to the levy on property not specified in the mortgage was not invalid as against the trustee because of dormancy. The sheriff, true enough, delayed about four months in enforcing the execution which plaintiff's attorney had extended at his request, but there was no direction given the sheriff not to proceed in its collection.

The law is that an execution may become dormant after levy, if instructions were given to the sheriff not to sell the property levied upon, and when such a delay ensues a senior judgment loses its priority over a junior judgment or levy, or other liens acquired during the dormancy. In the present case it is not shown that plaintiff was favoring the bankrupt by delaying to enforce his lien, or that any junior judgment creditors or others acquiring intervening rights were hindered or interfered with during the time the execution was extended, and accordingly the invalidity of the levy and sale in my opinion is not sufficiently clear to justify requiring the sheriff to surrender to the trustee the entire amount realized on the sale. The lien acquired by Rouse on the unmortgaged property was good, I think, as against the trustee at the date of filing the petition in bankruptcy. Indeed, the trustee possessed only such rights as a junior creditor had on that day. In re Zeis, 245 Fed. 737, 156 C. C. A. 139.

[3] Whatever delay there was in enforcing the execution was not prejudicial to the trustee or any rights acquired by him. The property levied upon at such time was still charged with a lien and levy, and the trustee took the bankrupt's property subject to liens against it and to the same conditions as the bankrupt himself held it. Zartman v. First National Bank, 216 U. S. 138, 30 Sup. Ct. 368, 54 L. Ed. 418. That the sheriff sold the property after filing the petition in bankruptcy is not of material importance, since he levied during the life of the process as between the judgment creditor and the bankrupt; and unless stayed by an order of the court of bankruptcy he had a right to sell under the execution. In re Vastbinder (D. C.) 13 Am. Bankr. Rep. 148, 132 Fed. 718; In re Baughman, 15 Am. Bankr. Rep. 23, 138 Fed. 742.

For the foregoing reasons I think that the Irving Rouse judgment was a valid lien, and should be paid out of the proceeds of the sale of the property not included in the chattel mortgage which amounted to \$879.75. The proceeds, however, realized from the chattel mortgaged property should be surrendered to the trustee in bankruptcy.

So ordered.

CENTRAL R. CO. OF NEW JERSEY v. DE BUSLEY.

(Circuit Court of Appeals, Third Circuit. December 2, 1919.)

No. 2458.

MASTER AND SERVANT \$\igchip\$ 301(4)—LIABILITY FOR ACTS OF SERVANT CONTROLLED BY THIRD PERSON.

Whether employes are to be deemed pro hac vice servants of a third person, for whom they are performing services, depends upon whether they are under the exclusive control and direction of such third person, and, if not, such third person is not deemed pro hac vice the master, so as to free the employer from liability for the negligence of such employes.

2. RAILROADS &== 260—LIABILITY OF RAILROAD COMPANY PERMITTING USE OF ITS TRACKS BY ANOTHER COMPANY.

In an action for the death of a freight conductor, who was struck and killed by defendant's locomotive, operated by its servants over the tracks of another company, etc., *held* that, under the evidence, the engineer and freman operating the locomotive could not be deemed servants pro hac vice of the latter company.

 MASTER AND SERVANT @==330(1)—BURDEN OF PROVING THAT EMPLOYÉ IS SERV-ANT OF THIRD PERSON.

A general master, who seeks to avoid liability for the negligence of his servants on the ground that they were pro hac vice servants of another, has the burden of establishing the new relation.

4. Appeal and error \$\iff 1033(4)\$—Harmless error in submitting question to jury.

Where the evidence would have warranted the trial court in charging that employes of defendant in charge of an engine proceeding over the tracks of a second company had not become servants pro hac vice of the second company, defendant cannot complain that the question was submitted to the jury, which found against that contention.

5. NEGLIGENCE \$\infty\$ 136(9)-INFERENCES FROM EVIDENCE AS MATTER FOR JURY.

Where the uncertainty as to the existence or nonexistence of negligence or contributory negligence, or both, whether such uncertainty arises from a conflict in the evidence, or because fair-minded and reasonable men might honestly draw different conclusions from the evidence, if undisputed, the questions are primarily for the jury, and it is permissible for the court to give binding instructions only when the facts are such that all reasonable men must draw the same conclusions therefrom.

6. Railroads \implies 400(6)—Track accidents; negligence as to signals, etc., as jury question.

In an action for the death of a freight conductor, who was struck by defendant's locomotive, which was proceeding over tracks of a second company, the employer of the conductor, while he was standing near the tracks in connection with his duties, the question of the negligence of defendant's servants in charge of the engine, who gave no effective signals, etc., held for the jury.

One cannot be held guilty of contributory negligence solely because he did not anticipate a neglect of duty which others owed him.

8. RAILROADS & 400(12)—CONTRIRUTORY NEGLIGENCE IN FAILING TO KEEP LOOKOUT AS JURY QUESTION.

In an action for the death of a freight conductor, who was struck by defendant's locomotive which was proceeding over the tracks of a second company, the employer of the conductor, while he was standing near the

^{€==}For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 261 F.—36

tracks in the course of his duties, though it appeared that he did not keep a lookout in the direction from which defendant's locomotive came, the question of his contributory negligence held for the jury.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by Mary De Busley against the Central Railroad Company of New Jersey. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Arthur G. Dickson, of Philadelphia, Pa., for plaintiff in error. Lincoln L. Eyre, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. The defendant in error, who is the widow of one John A. De Busley, deceased, brought suit in the court below against the plaintiff in error, and recovered a judgment for the damages which she and two minor children suffered by reason of the death of her husband. He was killed, under the circumstances hereinafter detailed, by an engine belonging to and under the control of a crew in the general employ of the plaintiff in error. The action is based upon the alleged negligence of the crew in the operation of the engine. De Busley, at the time of the accident, was in the employ of the Baltimore & Ohio Railroad Company and acting as a freight train conductor. While performing his duties as such, and in the course of directing the making up of a train on one of the tracks of that company at the Cherry street crossing, in the city of Philadelphia, he was struck by the defendant's engine, which was running on an adjoining track. At the place of the accident there are four tracks running parallel with the Schuylkill river and in a general north and south direction, but called by railroad men east-bound and west-bound tracks. At that point they are on a curve, described by some witnesses as sharp and by others as gradual. The two outside tracks are sidings or auxiliaries, and the two inside tracks are the main tracks, constantly used by passing trains.

De Busley's train, consisting of about eight cars, was being made up on the east-bound main track—the third track from the river. The engine and one or two cars were east of the Cherry street crossing, and the other cars were west of it. De Busley was standing, as was also one of his brakemen, in the space between the east and west bound main tracks, and, as respects the east-bound main track, he was on the inside of the curve. At the time he was struck, he was looking towards the rear of his train in order to catch a signal from one of his brakemen, who was engaged in making a coupling of one or more cars, so that he could in turn signal the engineer to start the train as soon as the coupling had been made. While thus engaged, the defendant's engine came around the curve on the west-bound track at a speed of from 10 to 15 miles per hour, and struck De Busley, inflicting the injuries from which he died. The engine, which was on its way to the Baltimore & Ohio station at Twenty-Fourth and Chestnut streets,

Philadelphia, for the purpose of hauling a passenger train from that point to Jersey City, was running backwards and was manned by an engineer and a fireman, both of whom were, at the time of the accident. in the cab.

The accident happened at about 10:20 in the morning of a clear day. The train that the engine was to haul to Jersey City was due to leave the Chestnut street station at 10:40 a.m. over the track occupied by De Busley's train. The only signal given of the approach of the engine was the ringing of a bell; but, so far as warning De Busley and the members of his crew of the approach of the engine, the bell was of very little, if any, use, because of the fact that an automatic gong located at the Cherry street crossing was continually ringing, owing to the fact that De Busley's train was standing there. The engineer, by reason of his position in the cab and the curve of the track, was unable to see ahead of his engine that part of the track where De Busley was standing. It was possible for the jury to find that the fireman could have seen the track and De Busley, had he looked out of the cab window. He, however, did not do so. It was also quite permissible for the jury to decline to accept the reason which he gave as to why, as he said, he could not do so. The brakeman, standing quite near to De Busley, was nearly struck by the engine, and none of the members of De Busley's crew were aware of its approach until it was directly upon them.

Under this general state of facts, the learned trial judge submitted the question of the defendant's negligence and of De Busley's contributory negligence to the jury, with clear and appropriate instructions. The defendant having raised a question as to the responsibility of the defendant for the acts of the crew of the engine on the ground, as it is claimed, that at the time of the accident they were pro hac vice in the employ of the Baltimore & Ohio Railroad, and not the defendant, that question was likewise submitted to the jury.

The assignments of error which need more than passing reference present three main questions, as follows: (1) Did the evidence justify the jury in finding that the crew of the engine which caused De Busley's death were, at the time of the accident, employés of the defendant in the sense that the latter was responsible for their negligence, if any there was? (2) Was there any evidence to justify a finding that there was negligence on the part of the crew of the engine? And (3) should the court have directed a verdict for the defendant on the ground that De Busley was guilty of contributory negligence? These three points will be discussed in the order in which they are stated.

[1-4] 1. In addition to the fact that the engine was the property of the defendant, and that the crew were in its general employ and received their wages and general instructions from the defendant, the evidence was that on the morning of the accident they had hauled a train from Jersey City to the Philadelphia & Reading terminal in Philadelphia, partly over the tracks of the defendant and partly over the tracks of the Philadelphia & Reading; that after reaching the terminal of the latter, pursuant to orders apparently received before that time,

the crew had taken the engine to the roundhouse of the Philadelphia & Reading at Twentieth and Hamilton streets, where it had been turned around on a turntable; and that they had then backed it over the tracks of the Baltimore & Ohio to the Twenty-Fourth and Chestnut street station of that company, from which point they were to haul a train from Philadelphia to Jersey City over the same route that they had traversed earlier in the morning. While they were on the tracks of the Baltimore & Ohio, they were subject to its ordinary track rules, signals, and directions, and as to speed they were subject, in certain cases, to the time-tables issued by that company. The defendant was paid by the Philadelphia & Reading for the service rendered by the engine and crew in hauling the before-mentioned train from the Baltimore & Ohio station in Philadelphia.

It appears from the bill which was presented therefor that the service was rendered pursuant to an agreement dated October 1, 1910. This agreement, however, was not offered in evidence, nor any explanation made of its terms; nor was there any evidence of the exact arrangement which the defendant and the Baltimore & Ohio or the Philadelphia & Reading had in respect to the use of engines and employés of the defendant. It does appear, however, that the Baltimore & Ohio exercised no disciplinary jurisdiction over the defendant's employés when operating the latter's engines over the former's tracks, except an · advisory one. As to when one in the general employ of another is pro hac vice the servant of a third, so as to make the latter and not the general employer responsible for the employe's act, has been the subject of prolific discussion in the courts, and the decisions cannot always be reconciled. Fortunately the whole subject has been very fully considered by the Supreme Court of the United States in Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 29 Sup. Ct. 252, 254 (53 L. Ed. 480), and the rule is there very lucidly stated by Mr. Justice Moody as follows:

"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking."

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In the application of the rule to the facts of that case, after observing that the employé whose negligence caused the accident in that case was in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him, Mr. Justice Moody further said (221 U. S. 225, 29 Sup. Ct. 255, 53 L. Ed. 480):

"In order to relieve the defendant from the results of the legal relation of master and servant, it must appear that that relation, for the time, had been suspended and a new like relation between the winchman [employé] and the stevedore [the person who had the general contract for doing the work] had been created."

Applying the tests of the foregoing rules to the facts in this case, we are unable to find any evidence that the relation of master and servant which existed between the defendant and the crew of the engine had been suspended for the time being, and a new relation created between the latter and the Baltimore & Ohio Railroad Company. The utmost that can be said for the evidence on this point is that it showed that, at the time of the accident, the defendant's engine was proceeding over the Baltimore & Ohio tracks for the ultimate purpose of drawing a train from Philadelphia to Jersey City, partly over the tracks of that company, partly over the tracks of the Philadelphia & Reading, and partly over the tracks of the defendant; that this service was being undertaken by the defendant pursuant to an agreement between the Philadelphia & Reading and the defendant, which agreement was not offered in evidence nor the terms thereof divulged, although it was in the control of the defendant; and that the only directions of the Baltimore & Ohio Railroad to which the crew of the engine were subject were the usual track signals, rules, and directions,

As observed in the Anderson Case, the duty of the crew to conform to such track signals, etc., showed "co-operation rather than subordination." It was, of course, necessary for any one using the tracks of the Baltimore & Ohio to be governed by their time-tables and track regulations; otherwise, endless confusion and extremely serious accidents would in all probability occur. The obedience to such signals and rules was evidence of necessary co-operation between those using the tracks and those responsible for the direction of trains thereon. and not evidence of authoritative direction and control of the Baltimore & Ohio over the crew of the engine. The burden of establishing the alleged new relation rested upon the defendant, and the evidence to sustain that burden was peculiarly within its control. As it failed to produce any evidence to sustain such burden, it follows that the jury would not have been justified in finding as a fact that the general relation of master and servant which existed between the crew and the defendant had been suspended and superseded, and that, at the time of the accident, a new like relation existed between the crew and the Baltimore & Ohio Railroad. The trial judge would therefore have been justified in giving to the jury binding instructions on this point. Hence he committed no error in declining to charge any of the defendant's requests on this point; nor was there any error, of which

the defendant can complain, in submitting to the jury, as a question of fact, whose servants the crew were at the time of the accident.

[5, 6] 2. In approaching the decision of the question as to whether a verdict should have been directed for the defendant, on the ground that the evidence was not sufficient to justify a finding that there was negligence on the part of the crew of the engine, as well as the kindred question of whether the court should have given binding instructions to the jury that De Busley was guilty of contributory negligence, we are, of course, to be guided by the well-settled rule that, where there is uncertainty as to the existence or nonexistence of negligence or contributory negligence, or both, whether such uncertainty arises from a conflict in the evidence or because, the facts being undisputed, fairminded and reasonable men might honestly draw different conclusions therefrom, the questions are primarily for the jury, and that it is permissible for a court to give binding instructions only when the facts are such that all reasonable men must draw the same conclusions from them. Grand Trunk Railway v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Texas & Pacific Railway v. Harvey, 228 U. S. 319, 324, 33 Sup. Ct. 518, 57 L. Ed. 852; Pennsylvania Railroad Co. v. Rogers, 244 Fed. 76, 78, 156 C. C. A. 504 (C. C. A. 3d Cir.).

From the foregoing recital of facts, it will be observed that the evidence developed that the crew of the defendant's engine, at the time of the accident, were engaged in backing the engine around a curve. in a place where trainmen were continually engaged in making up and moving trains, and whose presence there was, consequently, reasonably to be anticipated, at a speed of from 10 to 15 miles per hour, and without giving any signal or warning of its approach save the ringing of a bell, the sound of which was largely, if not wholly, drowned by the ringing of the automatic gong at a public crossing, and without keeping any lookout whatsoever. Applying the above-stated rule of law to these circumstances, we are convinced that, although the facts were undisputed, the question as to whether or not there was negligence on the part of the crew of the defendant's engine was peculiarly for the jury, and that the trial court committed no error in so treating it.

[7,8] 3. The solution of the question as to whether De Busley was guilty of contributory negligence is, of course, very largely, if not wholly, dependent upon the dangers which he might reasonably anticipate at the place where he was working, the nature of the duties which he was required to perform there, and the precautions which he could reasonably have taken for his own protection. Looking at the evidence in the light most favorable to the plaintiff, as we are of course compelled to do, it appears that it was necessary for him to get his train off of the main track speedily, and, in order to catch the expected signal from his brakeman and transmit it to his engineer, to stand in the space between the east and west bound tracks: that to catch the signal he was obliged, for a part of the time, at least, to keep his eyes fixed in the direction opposite to that from which the engine which struck him was approaching; and that, taking into account the overhang of the cars on the east-bound track and of the engine on the

west-bound track, the space which he could occupy between the tracks and be free from the danger of being struck by the latter was from two to three feet. This space was so small and constricted that one intending to stand and remain within it might readily, in attending to his own duties, unconsciously step within the danger zone. Although he was in a dangerous place, his duties required him to be there, and he had every right to expect that some lookout would be maintained on an engine approaching that place, and an effective warning given to him of its approach, if he was in a place of imminent danger. He cannot be held guilty of contributory negligence solely because he did not anticipate a neglect of the duty which the defendant's employés owed him. Kelly v. Pennsylvania Railroad, 264 Pa. 426, 107 Atl. 780. Under these circumstances, although there were several conceivable precautions which De Busley could have taken for his own safety, and which he did not take, we do not feel that we would be justified in concluding that all reasonable and fair-minded men would say that De Busley had failed to exercise that degree of care for his own safety which the law requires.

4. The remaining assignments of error, which are not embraced within the questions just discussed, deal with the failure of the trial judge to charge some of the defendant's requests or points of instruction to the jury. We have carefully examined all of the assignments, and find that some of them were sufficiently covered in the main charge of the trial judge, and that the others called for instructions on segregated facts, which the trial judge in his discretion was at liberty to refuse to give. None of the requests in this latter category asked for an instruction in regard to a fact the existence or nonexistence of which would necessarily be decisive of the case.

Finding no error in the record, the judgment is affirmed.

JOSEVIG-KENNECOTT COPPER CO. v. JAMES F. HOWARTH CO.

(Circuit Court of Appeals, Ninth Circuit, December 1, 1919.)

No. 3353.

Compliance with the judgment or decree of a court by payment or performance is no bar to an appeal or writ of error for its reversal, where repayment or restitution may be enforced, or the effect of the compliance otherwise undone, in case of reversal.

- 2. COURTS \$\infty\$ 359—JURISDICTION OF FEDERAL COURTS IN LOCAL OR TRANSITORY ACTION GOVERNED BY STATE LAW.
 - In determining the jurisdiction of a federal court, whether an action is local or transitory is governed by the law of the state.
- 3. Courts €==269—Suit for specific performance A "local action."

 A suit for specific performance of a contract by a corporation to deliver shares of its stock to complainant is not local, within Rem. & Bal.

Code Wash. § 204, but transitory, under the law of the state as established by decision.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Action.]

4. USURY €=37—CONTRACTS INVOLVING CONTINGENCY.

The usury statutes *held* to have no application to a contract to furnish money for the exploitation of undeveloped mining property, to be repaid only if the venture was successful.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit in equity by the James F. Howarth Company against the Josevig-Kennecott Copper Company. Decree for complainant, and defendant appeals. Affirmed.

Merritt, Lantry & Merritt, of Spokane, Wash., and Roberts, Wilson & Skeel, of Seattle, Wash., for appellant.

J. F. Ailshie, of Cœur d'Alene, Idaho, and Lester P. Edge and Joseph McCarthy, both of Spokane, Wash., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellee, in a suit against the appellant and its trustees for the specific performance of a contract, obtained a decree requiring the appellant to transfer to the appellee 260,000 shares of the appellant's treasury stock. The appellee moves to dismiss, on the ground that since the decree the appellant has complied therewith and transferred the stock to the appellee, and the latter has sold and disposed of the same to a number of purchasers, who now own the same.

[1] The appellant by its affidavit shows that the said stock was issued and transferred to the appellee more than 90 days after the date of the decree, and when a supersedeas could not be had, and that this was done solely because of duress exercised by the appellee by means of threats to institute contempt proceedings for the appellant's failure to comply with the order of the court. There having been no judgment for costs in the court below, the appellee argues that there is no longer a pending controversy between the parties to the suit. It is true that courts do not try academic questions, where neither party will be affected by the result; but by the decided weight of authority it is established that compliance with the judgment or decree of a court by payment or performance "is no bar to an appeal or writ of error for its reversal, particularly where repayment or restitution may be enforced, or the effect of the compliance may be otherwise undone, in case of a reversal." 3 C. J. 675. In Dakota County v. Glidden, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981, the court said:

"There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money, and a defendant in an action of ejectment may bring a writ of error, and, failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover, if he reverses the judgment, by means of a writ of

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restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal."

In O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840, it was held that the making of a conveyance as ordered by the decree of the court does not deprive the defendant of the right of appeal. The court said:

"The parties must either have obeyed the order of the court, or taken an appeal, and given a supersedeas bond in a sum so large that they were probably unable to do it."

In Erwin v. Lowry, 7 How. 172, 184 (12 L. Ed. 655), the court said: "In no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights."

Those cases were followed by this court in Hoogendorn v. Daniel, 202 Fed. 431, 120 C. C. A. 537.

If the decree herein were reversed, and the cause remanded, and the court below were to find in favor of the appellant, that court would not be powerless to afford the appellant substantial relief, notwithstanding that the shares of stock have been transferred to the appellee. The motion is denied.

It is contended that the court below was without jurisdiction of the cause. The appellee brought the suit in the District Court for the Eastern District of Washington, against the appellant and another corporation, each of which had its principal place of business in the Western district of Washington, and made parties defendant certain individuals, citizens of Washington, who resided in the Eastern district. It is admitted that the court below had jurisdiction under section 52 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1034]), unless the suit was one of a local nature within the terms of section 204, Rem. & Ball. Codes of Washington, which makes local "all questions involving the rights to the possession or title to any specific article of personal property."

[2, 3] The appellee contends, and the court below held, that the suit was not local, but transitory. It is admitted that the question whether the action is local or transitory is to be determined by the law of the state. Potomac Milling & Ice Co. v. Baltimore & O. R. Co. (D. C.) 217 Fed. 665; Kentucky Coal Lands Co. v. Mineral Dev. Co., 219 Fed. 45, 133 C. C. A. 151; Huntington v. Attrill, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123. The Supreme Court of Washington has held transitory a suit for the specific performance of an agreement to convey realty, Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; an action to enforce a trust in real and personal property, State ex rel. Scougale v. Superior Court, 55 Wash. 328, 104 Pac. 607, 133 Am. St. Rep. 1030; an action to reform a deed, Rosenbaum v. Evans, 63 Wash. 506, 115 Pac. 1054; and an action to recover for the use and occupation of land in another state, Sheppard v. Cœur d'Alene Lumber Co., 62 Wash. 12, 112 Pac. 932, 44 L. R. A. (N. S.) 267, Ann. Cas. 1912C, 909. Directly in point is Lively v. Huseby, 60 Wash, 47, 110 Pac. 673, in which the suit was brought to recover certain shares of stock issued to the defendant Huseby and to compel a foreign corporation to transfer the stock upon its books; the corporation having a branch office in the county in which the action was brought, and having there its president and secretary. It was held that the state court had jurisdiction of the subject-matter, and that, if there were inability to enforce the decree, a money judgment for the value of the stock might be entered. The court cited with approval Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407, where an action was held transitory which was brought against a foreign corporation to compel the issuance of a new stock certificate.

The appellant seeks to distinguish the Huseby Case from the case at bar by pointing to the fact that the shares which the plaintiffs there sought to recover were in the possession of Huseby in the county where the action was brought. That fact, however, did not affect the question of the jurisdiction of the court to entertain the cause as against the foreign corporation. The present suit does not involve the right to the possession or the title of any specific article of personal property. It involves only the specific performance of a contract to deliver a certain number of shares of the stock of a corporation. The decree does not act in rem, but in personam. Section 206 of the Washington Code provides that an action against a corporation may be brought in any county where the corporation transacts business, or where it has an office for the transaction of business or any person resides upon whom process may be served against such corporation. Hayworth v. Mc-Donald, 67 Wash. 496, 121 Pac. 984. The president of the appellant resided in the Eastern district of Washington, and in that district the contract here involved was entered into. We think that the court below had jurisdiction of the cause, and we find nothing in Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct, 559, 44 L. Ed. 647. which leads to a different conclusion.

We find no ground to sustain the contention that the court below erred in finding on the merits in favor of the appellee. The contract was in writing, and was entered into between the appellee and George Francis Rowe, therein represented to be the sales manager and fiscal agent of the appellant, with power to sell 1,000,000 shares of the appellant's treasury stock. The appellant asserts that the appellant was not informed of this contract until several months after it was executed. But the controlling facts are that on July 17, 1916, the date on which the contract was entered into, the appellant by its president wrote to the Scandinavian-American Bank, informing it that 1,000,000 shares of the appellant's treasury stock were deposited with it, and that the bank was authorized to issue to the appellee 260,000 shares thereof, and that on July 18, 1916, the appellee, together with all the stockholders of the appellant, entered into a pooling agreement, in which the appellee was represented as holding 260,000 shares of the appellant's stock.

[4] Also without merit is the contention that the contract was usurious. The contract provided that the appellee should advance to the appellant \$10,000, "to be used in the exploitation of said copper com-

pany," that out of the proceeds of the sale of stock of the company 25 cents per share should be set apart for the repayment of the appellee, that as additional consideration for services rendered the appellee should receive 260,000 shares of the promotion stock, and that if the stock-selling campaign should prove unsuccessful the appellant should not be obligated to repay the appellee the money so advanced. The usury statutes "have no application to those uncertain transactions in which the person who furnishes the money needed incurs risk of losing in whole or in part the principal sum loaned." 39 Cyc. 943; Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833; Spain v. Hamilton's Adm'r, 1 Wall. 604, 17 L. Ed. 619; White Water Valley Canal Co. v. Vallette, 21 How. 414, 16 L. Ed. 154; Provident Life & Trust Co. v. Fletcher (D. C.) 237 Fed. 104; Truby v. Mosgrove, 118 Pa. 89, 11 Atl. 806, 4 Am. St. Rep. 575; Knight v. American Inv. & Imp. Co., 73 Wash. 380, 132 Pac. 219; Case v. Fish, 58 Wis. 56, 15 N. W. 808. Here the appellee loaned money for the exploitation of undeveloped mining property, with the understanding that he was to be repaid in the event that the mining venture was successful. To deny that the event so contemplated was an uncertain contingency is to gainsay common knowledge and experience.

The decree is affirmed.

HAYS v. SOUND TIMBER CO.*

(Circuit Court of Appeals, Ninth Circuit. December 1, 1919.)

No. 3283.

1. Execution €==276(1, 2)—Purchase at sale by plaintiff; effect of vacation or reversal of judgment.

The vacation or reversal of a judgment operates to vacate an execution sale made thereunder as between the parties, where the execution plaintiff is the purchaser.

- 2. JUDGMENT \$\iff 345\$—Power to vacate; effect of satisfaction by sale. Under the law of Washington, established by decision of its Supreme Court, the satisfaction of a judgment by execution sale does not deprive the court of jurisdiction to vacate the judgment for fraud or insufficiency of service.
- 3. Execution \$\infty\$264—Title of purchaser at sale.

An execution sale of land under a personal judgment by default against certain defendants *held* not to convey title as against an answering defendant, which acquired the title from its codefendants before suit by a conveyance the validity of which was not impeached.

4. Release @==27—Discharge of purchaser of land as relieving grantee named in deed.

A receipt executed on settlement of a pending suit for commissions on purchase of lands for defendants therein, releasing them "and any others interested with them" from any claim for such commissions, held a bar to relief in a subsequent suit against their grantee, based on such claim.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit by W. F. Hays, substituted for the Sumpter Lumber Company, against the Sound Timber Company. Decree for defendant, and complainant appeals. Affirmed.

W. F. Hays, of Seattle, Wash. (Metson, Drew & MacKenzie, of San Francisco, Cal., of counsel), for appellant.

Peters & Powell, of Seattle, Wash., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. In December, 1906, the appellant in the present suit brought an action in the superior court of King county, Wash., against the appellee in the present suit, a corporation of the state of Iowa, and the Richardson Land & Timber Company, an Iowa corporation, and M. N. Richardson, B. W. Bawden, Joe R. Lane, Fred Wyman, and Sewell Dodge, residents of Iowa, and G. B. Peavey, a resident of the state of Washington, alleging in that action that the defendants therein were indebted to him in the sum of \$87,500, for services in securing the purchase of certain timber lands in Washington, the title to which had been conveyed to the appellee herein. The plaintiff in that action caused the lands to be attached as the property of the nonresident defendants. The appellee and Peavey were served personally and answered on the merits, denying the substantial allegations of the complaint and setting up affirmative defenses. The other defendants were served by publication. While the action was pending between the appellant and the defendants who had answered. the appellant caused default to be entered against the other defendants, and on June 13, 1908, obtained a judgment against them by default, and on writs of execution issued thereon proceeded to sell at sheriff's sale the interests of the said defendants in some 50,000 acres of land. On October 23, 1908, the said defendants moved the said superior court to vacate the judgment and the sales made thereunder. on the ground that the same were fraudulently entered, without notice. and without sufficient service. On December 2, 1908, the motions were sustained, and an order was entered vacating the judgment and the sales thereunder. On appeal to the Supreme Court of the state that order was affirmed. Hays v. Peavey, 54 Wash. 78, 102 Pac. 889.

In the meantime the appellant had obtained sheriff's deeds to the property so sold on execution. On November 6, 1912, the appellant brought the present suit to quiet the title alleged to have been obtained through the sheriff's deeds; the bill alleging that the appellee, when the lands were conveyed to it in 1902, took title with full notice of the rights and equity of the appellant, and with intent to defraud him out of the money agreed to be paid to the appellant under the contract, by which he rendered services in acquiring title to said lands, and praying that said conveyance be declared fraudulent and void, and that the appellant be adjudged to have title to the lands described. The appellee answered, denying the appellant's claim of title, and alleging title in itself by conveyances of date January 21, 1902, and setting up certain affirmative defenses. Upon the issues and the evidence the court below found the equities with the appellee, and adjudged it

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to be the owner in fee simple of all the lands involved in the contro-

versy.

- [1] One of the appellee's affirmative defenses was the vacation of the judgment and sales in the state superior court under which the appellant claims title. It is the general rule, and it has been so held in the state of Washington, that, where the execution plaintiff is purchaser, the vacation or reversal of the judgment operates to vacate the sale as between the parties. 17 Cyc. 1310; Benney v. Clein, 15 Wash. 581, 46 Pac. 1037.
- [2] The appellant contends that the vacation of the judgment of the state court in the action at law was void for want of jurisdiction of the court over the subject-matter of the proceeding, inasmuch as judgment had been entered, execution had been issued, and sales thereunder had been made, whereby the judgment was satisfied before proceedings were initiated to vacate the judgment and the sales, and he denies the conclusiveness of the adjudication of the state Supreme Court in Hays v. Peavey, 54 Wash. 78, 102 Pac. 889, for the reason that in the opinion the court erroneously recited, and proceeded on the assumption, that the motion to vacate preceded the sales and the confirmation, whereas in fact the latter were both prior to the motion to vacate.

So far as the conclusiveness of the adjudication is concerned, it is sufficient to say that, if the judgment of the Supreme Court is not conclusive, the judgment of the superior court is; it not having been reversed. It has been held in a number of cases that a judgment may not be vacated for fraud or mistake or irregularity after the amount thereof has been collected by payment or by levy and sale on execution. But the reverse has been held in several states, among which is the state of Washington. Barker v. City of Seattle, 97 Wash. 511, 166 Pac. 1143. In that case the court said:

"Some contention is made that the superior court had no power to vacate the eminent domain judgment, because it was satisfied upon the superior court records. As a question of error in entering the vacation order, this suggests a problem of interest as to which there seems to be some conflict in the decisions. 23 Cyc. 893. It seems plain to us, however, that it does not have any controlling force upon the question of the jurisdiction of the superior court over the subject-matter of vacating the eminent domain judgment as exercised in the vacation proceeding here in question. We conclude that the order of vacation is not void for want of jurisdiction over the subject-matter."

Upon the construction so given to the laws of the state by the highest court of the state, we think it clear that the vacation of the appellant's judgment and the sales thereunder made is a conclusive defense to his claim of title in the present suit.

[3] But, irrespective of that defense, there is other ground on which the decree of the court below herein should be affirmed. The appellant's judgment against the defaulting defendants in the law action in the state court was a personal judgment for a personal debt. Under that judgment sale was made of the right, title, and interest of those defendants in the lands which were levied upon. Before the appellant could quiet title to those lands, he would be required to show that

while he was a creditor of the defendants to whom the lands were sold, the latter conveyed the lands to the appellee, either without consideration or with the intention to hinder, delay, and defraud the appellant, and to show in addition that these defendants had not sufficient property remaining after such conveyance wherewith to satisfy the appellant's demand. Crandall v. Lee, 89 Wash. 115, 154 Pac. 190; Henry v. Yost, 88 Wash. 93, 152 Pac. 714.

The appellant failed to prove, and produced no evidence to show, that the conveyances were fraudulent or without consideration. The appellee, on the other hand, furnished undisputed testimony that the appellee herein was organized in the state of Iowa in December, 1899, for the purpose of buying and dealing in timber lands in the state of Washington, and that it furnished the money with which said defaulting defendants purchased the lands, and that the purchasers in buying the same acted for and on behalf of the corporation, and that testimony is not discredited by the circumstance that but a nominal consideration was named in the conveyance to the appellee. The judgment by default in the law action could have no effect on the title of the appellee. The appellee made its appearance in that action, and by its answer traversed the material averments of the complaint. The issue so created has never been determined. The appellee stands in this suit claiming title to all the lands. The appellant has furnished no evidence sufficient to defeat that claim of title.

[4] Again, it appears from the record that in July, 1902, the appellant herein commenced an action in the United States Circuit Court for the Southern District, Eastern Division, of Iowa against M. N. Richardson and the Richardson Land & Timber Company as defendants, in which the plaintiff alleged that on or about December 1, 1898, the defendants engaged his services to purchase for them a body of timber land in Washington at \$12.50 per acre, the plaintiff to have of such sum for his services as broker the difference between the amounts actually paid to the vendors of the land and the sum of \$12.50 per acre; that he performed such services, and that the amount due him therefor under the agreement, and for which he demanded judgment, was \$160,000, with interest. The defendants answered, and upon the conclusion of a jury trial the court directed the jury to return a verdict for the defendants, which was accordingly done, and judgment thereon was entered. Thereafter, on September 14, 1904, the plaintiff, in consideration of \$7,000 paid to him, executed a receipt to the Richardson Land & Timber Company, the Sound Timber Company, the appellee herein, M. N. Richardson, D. P. Simmons, and G. B. Peavey—

"in full settlement of any and all claims or demands by me against either, any, or all of them, and in particular in full settlement and release of any and all claims and demands by me set up in a certain action brought by me and in my name in the Circuit Court of the United States for the Southern District of Iowa, Eastern Division, against Richardson Land & Timber Company and M. N. Richardson, in which action I claim a large amount of money as due me from them as commission or profits arising out of a purchase of certain timber lands therein described. And I release and discharge each and all of said parties first named and any others interested with them, from any claims by me on account of the purchase of said timber land, or any other timber land, wherever situate. And I hereby waive

any appeal or writ of error from the judgment heretofore rendered in the said action against me."

The lands involved in the action in the superior court of the state of Washington were the same lands that were involved in the action in Iowa, the same alleged contract for services in purchasing the land is involved, and the complaints in both actions are substantially the same, except that in the Washington case the plaintiff alleges that G. B. Peavey was interested with him in the transaction, and that the aggregate which he and Peavey were entitled to receive for their services was \$175,000, of which the plaintiff was entitled to one-half, or \$87,500, for which he demanded judgment. We think it clear that the receipt so given on September 14, 1914, was an absolute release and acquittance of the plaintiff's claim and demand against any and all of the persons who purchased the lands. It is true that the Iowa suit was brought against M. N. Richardson and the Richardson Land & Timber Company only; but the receipt ran, not only to the defendants in that action, but to Simmons and Peavey, and it contains a release and discharge of said parties—

"and any others interested with them from any claims by me on account of the purchase of said timber land or any other timber land wherever situate."

It is obviously a receipt given in consideration of the waiver of right of appeal from the judgment, and in full settlement of all claims and demands of the plaintiff in that action against any and all the parties interested in purchasing said lands in the state of Washington.

The decree is affirmed.

NORTHWESTERN MUT. LIFE INS. CO. v. SECURITY SAVINGS & TRUST CO.

(Circuit Court of Appeals, Ninth Circuit. December 1, 1919.)

No. 3329.

- 1. Landlord and tenant ← \$20½ Presumption of assignment by lessee.

 If one other than the lessee is in possession of leased premises, the law will presume that he is an assignee of the lease; but such presumption is not irrefutable.
- 2. LANDLORD AND TENANT €==79(2)—Person Liable for Bent on assignment by lessee.

Privity of estate, by which one is made liable to perform covenants of a lease that run with the land, requires a transfer of the legal title by the lessee and its acceptance by the assignee.

The trustee in a mortgage of leasehold property on which the mortgagor had erected a building, which under the terms of the mortgage and at the mortgagor's request took possession of the building, and paid the running expenses, and collected the rents for the benefit of the bondholders, held not liable on the covenants of the lease for ground rent.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by the Northwestern Mutual Life Insurance Company against the Security Savings & Trust Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The insurance company brought this action against the Security Savings & Trust Company to recover rent from the trust company. In 1910 one Peterson owned lot 2 in block 7 in the city of Portland, and one Mallory owned two lots adjoining in the same block. On February 12, 1910, Peterson leased his ground for 23 years to a corporation which may be called the building company. Thereafter, in August, 1910, the building company, to secure an issue of bonds, made a mortgage to the trust company, conveying, assigning, transferring, and setting over to the trust company, as trustee, all and singular the "leasehold property lease and premises" described in and leased by the Peterson and Mallory leases. The mortgage also included a fire-proof concrete building being erected upon all the lots hereinbefore described. Thereafter, on February 15, 1911, Peterson and his wife, to secure a loan made to Peterson by the insurance company, executed and delivered to it a mortgage on lot 2, which had been theretofore leased, and at the same time and as part of the same transaction, as additional security, executed an instrument wherein it was recited that Peterson and wife "do hereby sell, assign, transfer, set over, and deliver" unto the insurance company, its successors and assigns, "that certain lease now owned by us, dated February 12, 1910, given by said John H. Peterson and Ona R. Peterson, as lessors, to Railway Exchange Building Company, lessee, * * * together with all our right, title, and interest in and to said lease and the rental reserved within, to have and to hold the said lease, together with all our rights and privileges therein and thereto belonging, unto said the Northwestern Mutual Life Insurance Company, its successors and assigns, for-

The instrument recited that the assignment was made as "additional security" for the payment of the note, and continued: "The right is hereby reserved and granted to said John H. Peterson and Ona R. Peterson to collect the rentals arising from the premises above described as they accrue under said lease and to enforce the collection of the same, and also to enforce all other provisions of said lease, so long as there is no default whatever on the part of said Peterson in the payment of any installment of interest upon the note and mortgage above described, or in the payment of any part of the principal thereof, and so long as there is no breach of any condition contained either in said note or in said mortgage." It was stipulated that, if default should occur in payment upon the note and mortgage. the insurance company would refrain from "the exercise of its rights as assignee of said lease for the period of 60 days after such default or breach of condition, at the end of which 60 days, however, said company shall be at liberty to enforce its security under said lease if such default or breach of condition shall then continue"; also that, if it should become necessary for the insurance company, for the protection of its interests, "to assert its rights as assignee of said lease and to enforce payment of the indebtedness subsisting under said note and mortgage, or any part thereof, from the lease-hold interests hereby assigned, it will account and pay over to said John H. Peterson and Ona R. Peterson all amounts realized by it from rents collected under said lease in excess of the then existing indebtedness of said Peterson to said company," together with the amounts advanced for taxes and insurance and such costs as the insurance company might be obliged to incur "in thus enforcing its rights as assignee of said lease." It is provided that upon the performance of all conditions and obligations of the note and mortgage, and upon full discharge by Peterson of all debt to the insurance company, the "assignment" should be of no effect, and thereupon and in that event the insurance company was to "reassign" to Peterson and wife "all of its right, title, and interest in and to said lease, now acquired under and by virtue of this assignment."

It is alleged that foreclosure proceedings were had and the insurance company became purchaser and owner of the leasehold interest of the lessenger.

sors in the ground lease and of the real property. The trust company denied that prior to the purchase by the insurance company of the lessors' rights under the lease, or at any other time, it took possession as the successor of the Interest of the lessee, and denied that it was in possession at the time the plaintiff alleged it became owner of the rights of the lessors. It is alleged that when the insurance company took the assignment of lease from Peterson it had knowledge of the deed of trust executed by the building company to the trust company; that in July, 1916, the building company defaulted in payment of interest upon its bonds and became hopelessly involved and unable to care for the building; that the building company applied to the trust company, trustee under the mortgage, to take charge of the building and premises, collect the rentals, pay operating expenses, and hold the surplus for the benefit of the bondholders; that, with a view of preserving the property from injury, the trust company collected the rents and paid the necessary expenses incident to the care of the building, and notified all persons that it had taken over the custody and control of the building and would collect rental and pay expenses; that defendant also advised the insurance company that it would turn over and deliver the Peterson portion of the building to the insurance company, and that the trust company notified the insurance company that it would not assume any obligation of the lease; that when the portion of the property sold was delivered to the purchaser, the Peterson portion of the property was on June 12, 1917, returned to the building company, from which latter date the trustee had no further connection with the same.

The District Court gave judgment to the trust company and against the insurance company, and the insurance company brought the case here.

The secretary of the trust company testified that about July 13, 1916, the building company had become delinquent in the payment of interest on maturing bonds, rents, and taxes, and in the requirements with respect to the sinking fund; that the trust company as trustee requested payment; that on July 13, 1916, the president of the building company told the trust company that it was impossible to proceed, and turned over the possession, management, and control of the building to the trust company as trustee, stating that the building company was unable to continue, was insolvent, and that all rents had been attached. Witness said that the trust company then took charge, and that upon taking possession the trust company as trustee notified the tenants in future to pay rents to the trust company as trustee; that an agent was employed by the trust company to collect the rents and to look after and care for the building, and that all parties in interest were notified in writing of the action by the trust company. Under date of July 22, 1916, Peterson and wife and Ainsworth, as trustee for a bank to which Peterson owed money, and also as agent, and the insurance company, were notified of default of the building company, and that in order to protect the interests of the holders of the bonds the building company had voluntarily surrendered to the trust company as trustee, which latter company was in possession of the premises. The letter advised the addressees that the trust company desired it distinctly understood "that it assumes no responsibility in reference to the said lease and will pay no rent other than as the income from the Peterson property will provide therefor.'

It also appears that on July 10, 1916, a resolution was adopted by the building company, wherein the trust company was requested to take possession of the property covered by the deed of trust under article 4 of the deed of trust, and to proceed to carry out the provisions of article 4. Article 4 referred to provides that, if the building company shall default in payment of interest, or in the performance of the other conditions of the mortgage, and such default shall continue for one month, then the building company, upon demand of the trustee, should forthwith surrender to the trustee actual possession, and that the trustee shall be entitled forthwith, with or without process of law, to enter upon and take possession of the mortgaged property. There was also a provision in article 10 of the deed of trust that the trustee would not "in any way be responsible for the conse-

quences of any breach on the part of said building company, or any of the covenants herein contained, or any act of said company or its agents or servants."

Platt & Platt and Hugh Montgomery, both of Portland, Or., for plaintiff in error.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge, (after stating the facts as above). The question argued is whether or not the mortgagee, which took over the property described in the lease, made itself liable for the payment of the rent to the lessor, or the assignee of the lessor. The position of the plaintiff in error is that the fact of possession is a reasonable and practical test, and that a mortgagee, who chooses to take possession and enter into the leased premises, and use and enjoy the same, becomes in effect, whether or not in name, the tenant, and as such should bear the burdens of the tenant. On the other hand, defendant in error takes the ground that under the facts of the case there never has been privity of estate between the trust company and the insurance company, and that the obligations of the Peterson lease to the building company, to which the trust company was not a party, cannot be imposed upon the trust company. It is in evidence that the trust company protested against assuming the attitude of an assignee, and by word and act endeavored to relieve itself from the obligation of paying rentals under the lease for the time for which recovery is asked in this action. This, in our opinion, becomes a relevant consideration.

[1, 2] We agree that as a general proposition, if one other than the lessee is in possession of premises, paying rent, the law will presume that the lease of the property has been assigned to such person. On the other hand, such a presumption is not irrefutable; it may be overcome by proof that the relationship is a different one. Leadbetter v. Pewtherer, 61 Or. 168, 121 Pac. 799, Ann. Cas. 1914B, 464. The doctrine of estoppel may not be invoked against one who can show that the one in possession never has accepted an assignment of the lease, and that no privity of estate has been created whereby he is bound to the performance of covenants running with the land. Welsh v. Schuyler, 6 Daly (N. Y.) 412. Privity of estate, by which one is made liable to perform covenants that run with land, requires a transfer of the legal title by the lessee and the acceptance of it by the assignee. Journeay v. Brackley, 1 Hilt. (N. Y.) 451.

[3] The facts here, however, are that under article 4 of the lease in question, as heretofore quoted in substance, the trustee was in a position where its action in taking possession was had as the representative of the building company. The trustee had in mind care, preservation, and custody of the property, collection of rentals, and payment of expenses. It had a physical possession; yet such possession was really for the building company. The trustee had no part in the lease made by Peterson to the building company, and undoubtedly did not intend to make itself the tenant of Peterson, or of the successor in interest of

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Peterson. It would therefore be inequitable to hold that, because the trustee took the steps it did, acting under the provisions of the mortgage, for the protection of the bondholders, at the solicitation of the building company, it placed itself under a liability upon the covenants of the lease.

A circumstance to be noted, too, is that the mortgage or deed of trust was put on record before the insurance company made the loan to Peterson and took the mortgage as security, and the insurance company had notice of the mortgage of the trust company. When Peterson assigned the lease to the building company, he executed a mortgage securing the same mortgage debt that was secured by the real estate. The provisions in the instrument, that upon full performance of all the conditions and obligations of the note and mortgage the assignment should be void and of no effect, afford additional ground for regarding the assignment as in reality a mortgage securing the same mortgage debt that the real estate secured. Again, in the foreclosure proceedings which were instituted by the insurance company against Peterson, the lease assigned is described as a mortgage, and upon sale the real estate and the leasehold interest were sold as a whole.

From many cases which have considered the question, we refer to those which appear to be based upon the better reasoning. In Johnson v. Sherman, 15 Cal. 287, 76 Am. Dec. 481, the court, through Chief Justice Field, said:

"The question, then, is this: Is Sherman liable for the rents from the date of his possession in March, 1855, to the date of his assignment to Jeffries in August following? The evidence discloses that this assignment was taken as security for the loan of \$5,000. All the parties admit that this was its object. Sherman so alleges under oath in his answer. Brown testifies to the same thing. The lessors were aware of the character of the transaction, and were not, therefore, in a position to assert rights founded upon the absolute form of the instrument. The admissibility of parol evidence to show that a conveyance or assignment absolute upon its face was intended as a mortgage is no longer an open question in this state. * * * The assignment is then to be treated, though absolute on its face, as in fact a mortgage, and the question of law thus presented is whether, as mortgagee of the term in possession, Sherman was liable upon the covenants of the lease. In England there is no doubt that he would be held liable. There a mortgage is in fact, and not merely in form, a conveyance of the estate, vesting in the mortgagee a title to the premises, defeasible until condition broken, but absolute afterward. The covenants of the lease running with the land, their performance of course devolves upon the assignee, whether the assignment be taken as security or by way of purchase. Williams v. Bosanquet, 1 Brod. & Bing. 72. In New York, where a mortgage is treated as a mere security, the legal title remaining in the mortgagor, the mortgagee out of possession is not bound as assignee, but in possession he is liable as such. The possession is there considered as in some respect affecting the title. * * * In this state a mortgage is regarded as a mere security, and not as a conveyance vesting in the mortgagee any estate in the land either before or after condition broken. As a security for a debt, default in the payment does not change its character. Payment after default operates to discharge the lien, equally with payment at the maturity of the debt. * Nor can possession under the mortgage affect the nature of the mortgagee's interest; it does not abridge or enlarge his interest, or convert what was previously a security into a seizing of the freehold; it does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously. Possession taken by consent of the owner, or by contract with him, may confer rights as against third parties; but they are independent and distinct from any rights springing from the mortgage, from which they derive no support. In thus holding we only carry the doctrine that a mortgage is a mere security for a debt to its legitimate and logical result."

The court treated the title to the property as remaining with the mortgagor, whether possession was taken or otherwise, and concluded that it advanced only one step beyond the New York cases by holding that a mortgagee of a term in possession is not liable as assignee upon the covenants of a lease. In Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765, the court, again speaking through Chief Justice Field, affirmed the principle announced in Johnson v. Sherman, supra.

In Cargill et al. v. Thompson et al., 57 Minn. 534, 59 N. W. 638, the court assumed that one Sprague, mortgagee, was in possession under an assignment by way of mortgage of rentals to Sprague, and that Sprague collected the rents and entered the premises and made repairs, yet held that the mortgage created no privity between Sprague and plaintiff in the case; that the mortgage passed no estate in the land, but gave only a lien. To the argument that the situation was different with the mortgagee in possession, that he has such an estate as makes him liable upon the covenants running with the land, the court, through Gilfillan, C. J., cited the New York cases (Astor v. Hoyt, 5 Wend. 603; Moffatt v. Smith, 4 N. Y. 126) as not altogether satisfactory, and adopted the rule in California, as announced in Johnson v. Sherman, supra. The court said:

"We do not see how the mere act of the parties, of going into possession and consenting to or acquiescing in it, can have the effect to pass the mortgager's estate to the mortgage. The latter, being let into possession under and because of the mortgage, is in only for the purpose of it, to wit, for security. * * * The fact that the possession is added, as a further security, to the security which the mortgage of the title gives him, cannot change the lien of the mortgage into an estate. The right of the mortgagee remains a mere lien, though the power to enforce it against the profits issuing from the lands is placed in his hands by letting him into possession. If an estate arises in the mortgagee, it is real estate, though the debt of which it is only an incident is personalty. Can the debt and the right of possession be severed? May the mortgagee assign the debt as personalty, and retain the right of possession as realty?"

The court assumed that an absolute assignment of the rents for the entire term of the lease is in effect an assignment by the lessor of the lease itself, bringing the assignee into privity with the lessee, putting him for the purposes and term of the lease in the place of the lessor, subjecting him to the burdens of the covenants on the part of the lessor, and entitling him to the benefits of the covenants on the part of the lessee enforceable during the term, and held that the assignee became the owner of rents, to apply them for the benefit of the lessor toward satisfaction of his debt. "His relation to them," said the court, "is the same as that of the mortgagee of the land towards the legal title—that of one holding a lien; and, if he can maintain in his own name a suit to collect them, it must be as a trustee. He is not therefore, an assignee so as to be liable on the covenants in the lease."

In Calvert et al. v. Bradley et al., 16 How. 580, 14 L. Ed. 1066, the

Supreme Court, through Justice Daniel, discussed "the much-controverted and variously decided doctrine as to the responsibility of the mortgagee of leasehold property, pledged as security for a debt, but of which the mortgagee has never had possession, for the performance of all the covenants to the fulfillment whereof a regular assignee of the lease would be bound," and cited the leading English cases, to which Justice Field afterwards adverted in Johnson v. Sherman, supra. The court, however, did not decide the question immediately before us, having gone no farther than to rule that a mortgagee who has not taken possession of the demised premises is not liable for rent, and that the law in this respect was different in New York from what it was in England.

Washburn on Real Property, § 747, refers to the rule that in England a mortgagee of the lessee's interest is regarded as an assignee and liable accordingly, though he may not have entered, as concurred in by the courts of New Hampshire and perhaps some other states. But he points out that in California, because of the peculiar character of mortgages in that state, it has been held that the mortgagee of a term would not be liable upon the covenants in the lease. He regards the weight of authority as seeming to be that such mortgagee becomes responsible as assignee when he takes possession under his deed, but not

before.

In McKee v. Angelrodt, 16 Mo. 283 (1852), the Supreme Court of Missouri considered the liability of a person to whom a lease has been assigned by way of mortgage for the payment of rent to the lessor, without such assignee ever having possession of the premises leased. The court reviewed the leading English cases, and recognized the general rule that a mere legal ownership does not make the assignee liable in such cases, without some evidence of his possession or actual agency, and regarded the better rule as holding that the mortgagee of the term of years, who has not taken possession, has not all the legal right, title, and interest of the mortgagor, and therefore is not treated as a complete assignee, chargeable upon the real covenants of the assignor. The court did not attempt to state what rule should be applied where the circumstances show that the mortgagee had taken possession, but their general view seems to have been that, to create any liability to payment, possession in the assignee is essential, and yet that, where there has been assignment of a lease by way of mortgage, such assignment becomes a mere security for the payment of the money, and cited Eaton v. Jagues, Doug. 455, to support the argument that where there has not been possession the assignee of a lease by way of mortgage is not liable to the lessor for rent, and quoted Lord Mansfield in this way:

"The mortgagee never asks whether the rent be paid; he only looks to his security, and when the principal and interest be paid he reassigns. But, if the plaintiff is right, a mortgagee might be called upon, years after such reassignment, for arrears or breaches of covenant during reassignment. The consequences would be terrible."

In Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415, the Supreme Court held that under the laws of Oregon a mortgage is a mere security for a debt, and that the mortgagee is not entitled to the

rents and profits until he gets possession under a decree of foreclosure, and that if a mortgage is not a conveyance, and the mortgagee is not entitled to possession, his claim to the rents is without support.

We regard the assignment of the lease of the Peterson estate to the building company as really but a mortgage, and, as already indicated, as securing the same mortgage debt that had been secured by the real estate. The instrument recites that upon—

"full performance of all the conditions and obligations of said note and mortgage, and upon the full discharge by said Peterson of all indebtedness to said insurance company accruing under said note and mortgage, this assignment shall be void and of no effect, and thereupon and in that event said company is to reassign to said John H. Peterson and Ona R. Peterson all of its right, title, and interest in and to said lease now acquired under and by virtue of this assignment."

While taking possession becomes an important matter in determining the rights of the parties, nevertheless it is not conclusive evidence of a complete assignment, so as to make the assignee chargeable on the covenants of the assignor. When it is remembered that there was no assignment of the lease to the trust company, and that the relationship between the trust company and the building company was in its representative capacity, and was taken with the intention of protecting the bondholders, for whom it acted, and at the special instance of the building company, we conclude that there never was a privity of estate between the trust company and the insurance company, and that it would be unjust to impose the burdens of the lease made by Peterson to the building company upon the trust company.

The judgment is therefore affirmed.

GUINEY v. BONHAM, U. S. Inspector of Immigration.

(Circuit Court of Appeals, Ninth Circuit. December 1, 1919.)

No. 3384.

- 1. Aliens 54—Limitation of proceeding for deportation.

 The five-year limitation clause of Immigration Act, § 19 (Comp. St. 1918,
 - The inve-year limitation clause of immigration Act, § 19 (Comp. St. 1918, § 4289¼jj), does not apply to the provision for deportation of any alien "who at any time after entry shall be found advocating or teaching the unlawful destruction of property."
- 2. ALIENS \$\infty\$=54\to STATUTE APPLICABLE IN DEPORTATION PROCEEDING.

 Although a warrant of arrest for deportation is in terms based on a particular statute, the alien may be deported under a later statute, which under the facts charged is applicable.
- 3. ALIENS \$\infty\$=\infty\$4—Warrant for arrest of an alien for deportation need not have the formality and particularity of an indictment, but is sufficient if it give him adequate information of the acts relied on.
- 4. Habeas corpus ⇐⇒30(3), 97—Scope of inquire.

 The question in habeas corpus is whether the petitioner is lawfully detained at the time of the hearing, and, if so, he is not to be discharged for defects in the original warrant or commitment.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. Aliens 54-Proceeding for deportation.

A proceeding for deportation of an alien is not unfair because he was not informed of his right to counsel until some evidence had been taken on his preliminary examination before an inspector.

6. Aliens 54-Legality of deportation proceeding.

That the record returned by the Department of Labor to a writ of habeas corpus obtained by an alien detained for deportation contained irrelevant matter not introduced in the deportation proceeding does not affect the legality of the order of deportation.

Appeal from the District Court of the United States for the Dis-

trict of Oregon; Charles E. Wolverton, Judge.

Habeas corpus by Neil Guiney against R. P. Bonham, United States Inspector in charge of Immigration for the District of Oregon. From an order discharging the writ, petitioner appeals. Affirmed.

George F. Vanderveer and Ralph S. Pierce, both of Seattle, Wash., for appellant.

Bert E. Haney, U. S. Atty., and Barnett H. Goldstein, Asst. U. S.

Atty., both of Portland, Or., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant, a native of British Columbia, entered the United States in February or March, 1913. In 1916 he became a member of the Industrial Workers of the World, in which he has held the offices of standing delegate, branch secretary, and traveling delegate. In September, 1918, he became secretary of Lumber Workers' Industrial Union, a branch of the I. W. W., having 35,-000 members. In February, 1919, he opened an office for said union in the city of Portland. On February 18, 1919, the Department of Labor issued its warrant of arrest, charging that the appellant had been found advocating or teaching the unlawful destruction of property, in violation of the Immigration Act of February 5, 1917. On this warrant he was granted three hearings, which resulted in an order for his deportation. On appeal to the Department of Labor, the order of deportation was affirmed. The appellant presented to the court below his petition for a writ of habeas corpus. On the hearing the writ was discharged and the appellant was remanded to custody. The appellant appeals.

[1] The appellant contends that deportation under section 19 of the act of February 5, 1917 (39 Stat. 889, c. 29 [Comp. St. 1918, § 4289¼jj]), was barred after five years from the date of his entry into the United States. We do not so read the statute. It provides:

"Sec. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not af-

firmatively shown to have arisen subsequent to landing, * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

It is plainly the intention of the statute to provide for the deportation of any alien who at "any time after entry" shall be found advocating or teaching the unlawful destruction of property. The five-year limitation expressed in the first clause of the statute is not to be read into the clause under which the appellant is ordered deported.

[2] Again, the order of deportation does not depend upon the law of 1917. Act Oct. 16, 1918, c. 186, 40 Stat. 1012, authorizes the deportation of aliens who advocate or teach the unlawful destruction of property and declares:

"The provisions of this section shall be applicable to the classes of aliens mentioned in this act irrespective of the time of their entry into the United States."

The law of 1918 was in force prior to the institution of proceedings against the appellant. The fact that the warrants of arrest and of deportation are in terms based upon section 19 of the act of February 5, 1917, does not render the act of 1918 inapplicable to the case. The principle involved is similar to that which obtains in criminal cases in which it is held that the statute on which an indictment is founded must be determined as a matter of law from the facts charged, which facts may bring the offense within an existing statute, although the indictment in terms bases the charge upon another statute. Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509; United States v. Nixon, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207; Vedin v. United States, 257 Fed. 550, — C. C. A. —.

- [3] It has been repeatedly held that the warrant of arrest for deportation of an alien is sufficient if it give him adequate information of the acts relied upon to bring him within the excluded classes, and to enable him to offer testimony to refute the same at the hearing, and that it need not have the formality and particularity of an indictment. United States v. Uhl, 211 Fed. 628, 128 C. C. A. 560; United States v. Williams, 200 Fed. 538, 118 C. C. A. 632; Healy v. Backus, 221 Fed. 358, 137 C. C. A. 166; Ex parte Hamaguchi (C. C.) 161 Fed. 185; Siniscalchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501; Toy Tong v. United States, 146 Fed. 343, 76 C. C. A. 621.
- [4] It is to be observed, also, that this being a habeas corpus proceeding, section 761 of the Revised Statutes (Comp. St. § 1289) requires the court, justice, or judge granting the writ "to dispose of the party as law and justice require," which means as law and justice require at the time of the hearing. Iasigi v. Van de Carr, 166 U. S. 391, 17 Sup. Ct. 595, 41 L. Ed. 1045; Motherwell v. United States, 107 Fed. 437, 48 C. C. A. 97. In Nishimura Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, the court said:

"A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

[5] The appellant contends that the hearing before the immigration inspector was unfair, in that he was not represented by an attorney nor informed of his right to counsel until three-fifths of the testimony had been taken. This does not render the hearing unfair. In Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, it was held that the preliminary examination of an alien without counsel is permitted, and that it is sufficient if at subsequent stages the alien has counsel. That case was followed by this court in Mok Nuey Tau v. White, 244 Fed. 742, 137 C. C. A. 190. The appellant, on being told that he was entitled to counsel to represent him, stated that he did

not desire to avail himself of the privilege.

[6] It is said that the hearing was unfair, in that the record which was sent from the Department of Labor in answer to the writ contains ten letters and one newspaper clipping which were on file in the department, and which had been introduced ex parte and without the appellant's knowledge, and the appellant cites the decision of this court in Chew Hoy Quong v. White, 249 Fed. 869, 162 C. C. A. 103, in which the hearing on an application of an alien for admission into the United States was held unfair for the reason that the decision was based in whole or in part on confidential communications received by the immigration officers, the source, motive, or contents of which were not disclosed to the applicant or his counsel, and no opportunity was offered to cross-examine or to present testimony in rebuttal thereof. The appellant's case does not come within that ruling. It is clear that the order for his deportation was not based upon anything contained in the letters, and there is nothing in them tending to sustain the charge on which the appellant was arrested or ordered to be deported, and in fact those papers are not properly a part of the record.

Nine of the letters consisted of correspondence which the appellant had with fellow workers of the I. W. W. after his arrest and while he was in jail. One of the letters was a communication from the Department of Justice to the Commissioner General of Immigration, and is no part of the evidence upon which the report of the inspector at Portland was based, and it has no proper place in the record. It contains the erroneous statement that in 1917 the appellant had been arrested in Idaho on a charge of criminal syndicalism, and had been convicted, and imprisoned in the Idaho state penitentiary; whereas, in fact, the appellant had been acquitted of that charge. But the memorandum of the Commissioner General of Immigration contains the statement that the department knew that the appellant had been acquitted of the charge of criminal syndicalism in Idaho, and the decision of the Commissioner General shows by its terms that the judgment of deportation was based wholly upon the activities of the appellant in the various offices which he held in the I. W. W., and his distribution of literature which advocated the doctrine of sabotage, or the unlawful destruction of property.

The newspaper clipping, originally found in the appellant's possession, contains a list of men in Benewah county, Idaho, "known as aliens, or alien enemies, who have either revoked their first papers or who have claimed exemption from military service on the ground that

they were aliens," and in the list is the name of the appellant. The appellant could not have been injured by anything contained in the clipping. He admitted that he was an alien, and that as such he had claimed exemption from military service. In Tang Tun v. Edsell, 223 U. S. 673, 681, 32 Sup. Ct. 359, 363 (56 L. Ed. 606) the court, answering the contention that certain papers in addition to the record on the nearing had been forwarded to the Secretary on the appeal, said:

"The contents of these papers are not printed in the transcript of record, but we must assume from the description that they were from the official files. Of these the Secretary might at all times take cognizance, and it would be extraordinary, indeed, to impute bad faith or improper conduct to the executive officers because they examined the records, or acquainted themselves with former official action."

In re Jem Yuen (D. C.) 188 Fed. 350, it was contended that the hearing on the appeal was unfair because of alleged improper additions made to the record submitted to the Secretary. The court said:

"As to the hearing at Boston there is no complaint that the applicant was in any way hindered in submitting such evidence as he desired, or of any refusal to hear what was submitted. * * * It is well settled that officers of the government, to whom the determination of questions of this kind is intrusted under statutes like those governing these proceedings, are not bound by the rules of criminal procedure, nor by rules of evidence applied in courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony, or no record of the testimony or of the decision. * * * I am unable to believe that the duty of the officers to give a fair hearing required them to shut their eyes to the contents of this former record, or to do so without formal or independent proof of its contents."

It is contended that the order of deportation is void, for the reason that there is no evidence in the record to sustain it. It is true that the appellant testified that he did not advocate, nor to the best of his knowledge did the organization to which he belonged advocate, the unlawful destruction of property in any way whatsoever, and said:

"I do not believe in sabotage, whether as a weapon used by the working class or used against them."

But it appears without dispute that in his connection with the organization to which he belonged he had been actively engaged in distributing to others the literature published and issued under the sanction of that organization. In that literature are to be found expressions directly and unmistakably inculcating the unlawful destruction of property. It was on the nature of that literature and the appellant's activities in disseminating the same that the order of deportation was based. It is not our province to weigh the testimony. We can go no further than to determine whether or not the officers to whom is intrusted the enforcement of the law have in this instance abused the discretion which was placed in them. We find no abuse of discretion, nor absence of evidence to sustain the order which is appealed from.

The order is affirmed.

GARRETT v. ATKINS.*

(Circuit Court of Appeals, Fifth Circuit. October 6, 1919. Rehearing Denied December 6, 1919.)

No. 3333.

1. Sales \$\iiint \text{110(2)}\$—Petition in action for rescission insufficient.

Since under the common law, failure to pay the price for personal property when agreed is not ground for rescission of the sale, a petition therefor does not state a cause of action, where it fails to show that the con-

for does not state a cause of action, where it fails to show that the contract was made in a jurisdiction where the law gives such right.

2. SALES @==194—Effect of default or delay on right of purchaser to make payment.

Civ. Code La. art. 2546, providing that, in a suit for dissolution of a contract for sale of movables for nonperformance, it shall not be within the power of the judge to enlarge the time for performance, construed in connection with other provisions, applies only to contracts in which the resolutory condition is expressly stipulated, and, where the contract contains no provision for its dissolution for nonpayment of the price when agreed, the defaulting purchaser may make payment at any time before final judgment.

In Error to the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Action by J. W. Atkins against L. C. Garrett. Judgment for plaintiff, and defendant brings error. Reversed.

Edward Barnett and G. W. Hardy, both of Shreveport, La. (E. H. Randolph, Allen Rendall, and A. B. Freyer, all of Shreveport, La., on the brief), for plaintiff in error.

J. D. Wilkinson, of Shreveport, La. (Wilkinson & Lewis, of Shreveport, La., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. The judgment presented for review is one canceling or rescinding, at the instance of the seller, a sale made by J. W. Atkins to L. C. Garrett of 50 shares of the capital stock of the Lenzburg-Crichton Oil & Gas Company. For the purchase price Garrett gave his note to Atkins, secured by a pledge of the certificate for the stock sold. Atkins discontinued the suit he brought on the note after it matured, and afterwards brought this suit in a Louisiana state court for the rescission of the contract. The petition averred the non-residence of the defendant. The latter appeared in the suit by attorneys, and on his application the suit was removed to the court below. Before judgment in this suit he tendered the amount of the note given for the price of the stock, with interest and costs.

[1] The suit is the assertion of the right given by the law of Louisiana to have such a contract rescinded because of the purchaser's non-compliance with his engagement. The averments of the petition do not show that the contract in question was made in Louisiana, or the existence of any ground for rescinding it, if it was made in a jurisdic-

tion in which the common law is in force. The contract did not expressly provide for the seller having the right to rescind in the event of the purchaser's failure to pay the price when due. If it is not consistent with the obligation created by a contract for it to be subject to rescission on a ground not recognized by the law of the place where the contract was made, it seems that a right to have a contract of sale of personal property rescinded for the nonpayment of the price within the time stipulated for the payment is not shown by a petition which fails to show that the sale was made in a jurisdiction the law of which gives the right of rescission on that ground. In behalf of the plaintiff in error, the defendant below, it is contended that the evidence showed that the sale in question was made in Alabama. Whether that contention is well founded or not, the right asserted being one peculiar to the law of Louisiana, it seems that a petition which fails to show that the sale sought to be rescinded was made in that state must be regarded as failing to show a material element of the cause of action relied on.

[2] But it may be assumed that the judgment cannot properly be reversed because of the failure of the petition to show that the contract sought to be rescinded is one governed by the Louisiana law. The court decided that the purchaser could not be allowed to prevent the rescission prayed for by paying the purchase price, interest, and costs, after the suit for rescission was brought. A review of that ruling calls for a consideration of the following articles of the Civil Code of Louisiana:

"2046. A resolutory condition is implied in all commutative contracts, to take effect, in case either of the parties do [does] not comply with his engagements; in this case the contract is not dissolved of right; the party complaining may either sue for its dissolution, with damages, or, if the circumstances of the case permit, demand a specific performance.

"2047. In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutory condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition"

"2563. If, at the time of the sale of immovables, it has been stipulated that, for want of payment of the price within the term agreed on, the sale should be of right dissolved, the buyer may nevertheless make payment after the expiration of the term, as long as he has not been placed in a state of default, by a judicial demand, but after that demand, the judge can grant him no delay.

"2564. In matters of sale of movable effects, the dissolution of the sale shall take place of right, if demanded, without its being in the power of the judge to grant any delay, except that fixed by law."

The ruling gave to article 2564 the effect of depriving the court of the power to allow the defendant to prevent a rescission of the sale by tendering payment of the price, interest, and costs, after the suit for rescission was filed. That provision is to be interpreted in the light of the connection in which it is found, and of the other provisions of the Code dealing with the right of a party to a contract to have it rescinded or dissolved. Article 2046 evidences the existence of the rule that resolutory conditions which are implied, not expressed, do

not take effect upon a party's noncompliance with his engagement. Article 2047 provides in effect that when a resolutory condition is an event depending on the will of a party it must be sued for, and that the bringing of such suit does not prevent the party in default being allowed to perform. Article 2564 would conflict with articles 2046 and 2047, if the former means that a contract of sale of movable effects which does not stipulate for its dissolution on the nonpayment of the price within the time agreed on is dissolved of right, if demanded, without it being in the power of the judge to grant any delay, except that fixed by law. Under article 2047 the defaulting party to such a contract may be allowed to perform after the other party has brought suit for a rescission.

If only the language of article 2564 is looked to, dissociated from its context, and without regard to other provisions of the Code dealing with the right of a party to a contract to have it rescinded or dissolved, it conveys a meaning which it cannot be supposed was intended. Though it does not mention a noncompliance with a condition of a sale of movables, it is not to be supposed that it was intended to provide that a dissolution of such a sale should take place of right, if demanded, without the party proceeded against being in default. If the language used is considered, not by itself, but in the light of the connection in which it is found, it has a meaning which it is reasonable to suppose was intended, and does not conflict with other provisions of the Code. Reading it in connection with the next preceding article, which deals with a sale of immovables accompanied by a stipulation that, for want of payment of the price within the time agreed on, the sale should be dissolved of right, it is plain enough that article 2564 was intended to deal with a sale of movable effects accompanied by such a stipulation as that mentioned in article 2563 dealing with a sale of immovables, and that there was an absence of any intention to make the provision of article 2564 applicable to sales of movables unaccompanied by an express resolutory condition. There is no conflict between articles 2046 and 2564 if the operation of the latter is confined to sales of movables accompanied by an express resolutory condition.

By quoting with approval a statement of a French commentator with reference to the corresponding articles of the Code Napoléon, the Supreme Court of Louisiana, in the opinion rendered in the recent case of Watson v. Feibel, 139 La. 393, 71 South. 585, recognized that article 2564, like article 2563, deals only with a sale in which a rescission for nonpayment of the price within the time agreed on is stipulated for. The conclusion there expressed is not deprived of weight by the circumstance that it was a sale of real estate which was sought to be rescinded in that case. The following was said in the opinion in that case:

"Plainly, the distinction is this: That where the resolutory condition has been expressly stipulated and takes place of right, the purchaser has until judicial demand in which to pay; but where it is only implied and takes place only as the result of a final judgment, he has until final judgment in which to pay."

That statement referred to sales of real estate. The above-quoted Louisiana statutes also make a distinction between sales of personal property where it is stipulated that the seller has the right to rescind if the purchaser fails to pay the price when due and such sales where a right to rescind is not expressed. There is no provision giving to the bringing of a suit for rescission by a seller of movables in whose favor a right to rescind has not been stipulated for the effect of depriving the court of the power of permitting the defaulting purchaser to perform.

We think the foregoing considerations warrant the conclusion that the provision of article 2564 is inapplicable to the contract of sale which is in question in this case, as that contract contained no stipulation conferring on a party to it the right of having it rescinded or dissolved. The right of the plaintiff to have the contract dissolved being the implied one given by article 2046, the defendant's tender of perform-

ance did not come too late.

Because of the court's error in ruling otherwise, the judgment is reversed.

STEPHENS V. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 1, 1919.)

No. 3349.

1. CRIMINAL LAW \$\iiinstructure{304(9)}\$—Indictment and information \$\iiinstructure{61}\$—Indictment for violation of Espionage Act.

An indictment need not allege that the United States was at war at the time of commission of the act charged, since, if material, the court will take judicial notice.

2. ABMY AND NAVY \$\ightharpoonup 40\top-Indictment for violation of Espionage Act, \\$ 3 (Comp. St. 1918, \\$ 10212c), by offering and selling a book opposing the war and deriding patriotism, with intent to create insubordination and disloyalty in the military and naval forces, held sufficient.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Criminal prosecution by the United States against E. A. Stephens. Judgment of conviction, and defendant brings error. Affirmed.

Stephens asks reversal of a conviction for violation of section 3, title 1, of the Act of June 15, 1917 (40 Stat. 219, c. 30 [Comp. St. 1918, § 10212c]) known as the Espionage Act. The charge was that in March, 1918, at Redlands, Cal., Stephens did knowingly and feloniously attempt to cause insubordination, disloyalty, mutlny, and refusal of duty in the military and naval forces of the United States, by then and there "peddling, issuing, selling, and offering for sale" to various persons, among others A. H. Murray, a certain book entitled "The Finished Mystery," containing seditions and inflammatory statements and language, a portion of which language was as follows:

"Nowhere in the New Testament is patriotism (a narrow-minded hatred of other peoples) encouraged. Everywhere and always murder in its every form is forbidden; and yet, under the guise of patriotism, the civil governments of earth demand of peace-loving men the sacrifice of themselves and their loved

ones and the butchery of their fellows, and hail it as a duty demanded by the laws of heaven.

"If you tell me that this war is fought for the integrity of international law, I must ask you why it is directed only against Germany, and not also against England, which is an equal, although far less terrible, violator of covenants between nations? If you say it is fought on behalf of the rights of neutrals, I must ask you where, when, and by what belligerent the rights of neutrals have been conserved in this war, and what guaranty you can offer that, after all our expenditure of blood and money for their defense, these rights will not be similarly violated all over again in the next war by any nation which is battling for its life? If you say that it is fought for the security of American property and lives, I must ask you how and to what extent it will be safer for our citizens to cross the seas after the declaration of war than it was before? If you say that it is fought in vindication of our national honor, I must ask you why no harm has come to the honor of other nations, such as Holland and Scandinavia, for example, which have suffered even more than we, but which, for prudential reasons, refuse to take up arms? If you say it is a war of defense against wanton and intolerable aggression, I must reply that every blow which we have endured has been primarily a blow directed, not against ourselves, but against England, and that it has yet to be proved that Germany has any intention or desire of attacking us. If you say that this war is a life and death struggle for the preservation of civilization against barbarism, I must ask you why we remained neutral when Belgium was raped, and were at last aroused to action, not by the cries of the stricken abroad, but by our own losses in men and money? If you say that this war is a last resort in a situation which every other method, patiently tried, has failed to meet, I must answer that this is not true—that other ways and means of action, tried by experience and justified by success, have been laid before the administration and wilfully rejected. The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one bluejacket on the sea or one khaki-coat in the trenches."

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and W. Fleet Palmer, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The contention is that the indictment does not state facts sufficient to constitute a public offense, in that it failed to set forth that the United States was at war when the acts charged were done, and failed to allege that any attempt was made to cause insubordination, disloyalty, and refusal of duty by sale or offer of sale to any person who was registered or eligible for service in the military and naval forces of the United States. So far as material, section 3, tit. 1, of the act referred to, provides that whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, shall be punished as provided by law. Inasmuch as the courts should take judicial notice of the joint resolution of Congress passed April 6, 1917, declaring that a state of war existed, between the United States and Germany (40 Stat. p. 1), we hold that neither an averment nor proof of the fact was essential.

[2] The allegation that the defendant knowingly and feloniously

attempted to create insubordination and disloyalty and refusal of duty, by selling and offering for sale the book described, was sufficient to admit evidence in support of the charge. It is difficult to gather any purpose other than a disloyal and wicked one on the part of one who, knowing the contents of the book described, deliberately offered the same for sale. The book rails at love of country, calls the prosecution of the war a crime, denies the truth of the fact that the war was a last resort, where other methods failed, and generally in other ways endeavors, not only to foment suspicion and hatred of the cause of the United States, but also to engender respect for the position of Germany as against the United States.

We are also of the opinion that the charge that defendant knowingly offered the book as described for sale, and sold it, with intent to do the things charged, was sufficient. Shilter v. United States, 257 Fed. 724, — C. C. A. —, does not conflict with this view, for in that case the charge was merely that the defendant uttered the seditious language which was set forth in the indictment with intent to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States. There was nothing in that indictment which connected the act of Shilter with the military or naval forces of the United States, and we held the indictment failed to set forth enough to advise the court that an offense had been committed. But here the charge is that in the attempt to cause disloyalty the defendant offered the book for sale, and sold it with the intent alleged, and the character of the book is shown by the excerpt from it. The rule announced in Goldstein v. United States, 258 Fed. 908, — C. C. A. —, is applicable. Kirchner v. United States, 255 Fed. 301, 166 C. C. A. 471; United States v. Eastman (D. C.) 252 Fed. 232.

We think that the evidence was sufficient to sustain the conviction. There is testimony to the effect that the defendant sold the book; that he told a young man 26 years old, who was registered under the Selective Service Draft Act that he ought to read the book; that if people would refuse to fight the country would be in a state of anarchy, and that some of the people would stay with the government, and some would fight against it; and that he did not approve of the war. The book has such assertions as that militarism is contagious; that "the parade of battleships can kindle fires in the blood of even peaceful peoples, and create naval appropriations in a dozen lands." In reference to military equipment it is said:

"This delusion threatens to become as mischievous as it is expensive. Every increase in the American navy strengthens the militarists in London, Berlin, and Tokio. The difficulty of finding a reason for an American navy increases the navy. No one outside the militarists can answer. Because there is no ascertainable reason for this un-American policy, the other American countries are becoming frightened. * * * A fleet of battleships gives a wrong impression of what America is, and conceals the secret which has made America great. Children do not know that we became a great world power without the assistance of either army or navy, building ourselves upon everlasting principles by means of our schools and churches. The down-pulling force of our naval pageant was not needed in a world already dragged down to low levels by the example of ancient nations, entangled by degrading traditions from which they are struggling to escape. The notion that this ex-

hibition of battleships has added to our prestige among men whose opinion is worthy of consideration, or has made the world love us more, is only another feature of the militarist delusion."

It is unnecessary to quote more at length. Whether the defendant intended that the book should cause disloyalty or refusal of duty among the military or naval forces of the country was a question for the jury. We find no error, and affirm the judgment.

Affirmed.

SCHELL V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 24, 1919.)

No. 5395.

Embezzlement @-9-Evidence showing accused in possession or custody

OF PROPERTY OF UNITED STATES.

A laborer employed in a mint, whose duty it was, with another, to remove coins from a scale where they had been weighed, into receptacles on trucks, and wheel the trucks into a vault, *held* intrusted with the possession and control of coins while being so moved, which rendered his appropriation of some of them to his own use while so handling them "embezzlement," within Penal Code, § 47 (Comp. St. § 10214).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzlement.]

In Error to the District Court of the United States for the District

of Colorado; Robert E. Lewis, Judge.

Criminal prosecution by the United States against Enos Peter Schell. Judgment of conviction, and defendant brings error. Affirmed.

Thomas Ward, Jr., and G. W. Musser, both of Denver, Colo., for plaintiff in error.

Harry B. Tedrow, U. S. Atty., of Denver, Colo.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. The defendant was indicted, convicted, and sentenced upon the charge of having embezzled certain coins of the United States alleged to have been in his possession and control while employed as a laborer in the United States mint at Denver, Colorado. The defendant, Schell, now seeks reversal upon "the sole ground that the undisputed evidence shows that defendant committed the offense of larceny, if he committed any offense, and not the offense of embezzlement, with which he was charged."

The defendant was a laborer in the melting and refining department of the mint at Denver. The coins alleged to have been embezzled were brought into a large transfer room, where the scales were situated, from what was called the coiner's department, by two employés of the department, and placed in the pan on the scales,

and thereupon control over these coins ceased so far as these two employés were concerned. The coins were then weighed by the general management of the mint, and the weights checked by a representative of the coiner's department and by a representative of the melting department. It appears that the immediate duty the defendant and his coworker had to perform with reference to the specific coins alleged to have been embezzled was to take them into their possession and custody while they were on the scales in the pan, scoop them out of the pan into receptacles upon trucks which Schell and his coworker, Bush, pushed into the vault which leads off the make-up room, where the trucks were left with their loads upon them and the vault locked.

There was testimony covering the weighing in both departments, the reweighing, and the discovery of the shortage, with the tracing of the coins, alleged to have been embezzled, into the possession of the defendant, the details of which it is unnecessary to set forth. Suffice it to say there is testimony on the part of Schell's coworker that he saw the defendant scooping the coins with his right hand, shoving the silver into the scoop with his left, then going with his left into his pocket as he dumped with his right hand, and the details of the finding of the silver upon the defendant. There is substantial testimony that Schell, as an employé of the United States engaged in the mint, had the actual physical possession of this silver, and that it came lawfully into his possession and custody.

The contention of the defendant is simply that upon these facts, with reference to the defendant's connection with the coins, the defendant never had possession, control, or even custody of the coins, nor was he intrusted with them, so that it was possible for him to embezzle any of them; that, if he took any of them, the original taking was wrongful, and constituted larceny. On the other hand, the plaintiff insists that, upon the state of facts shown, the actual physical possession of the coins was in the defendant from the moment he began to scoop from the pan on the scales until he followed his coworker out of the vault, which was after he had pulled and his coworker had pushed the last of the two trucks into the vault: that the defendant was lawfully entitled to put his hand into the pan and to scoop up the silver; that it was part of his regular duties, as an employe of the mint, to receive these coins and put them into the vault; that his handling of the silver and transfer of the same was lawful-within his duties-and that he then separated a small number of the coins from the large mass in his possession and converted them to his own use.

The respective contentions, therefore, resolve themselves into a discussion of the differences between larceny and embezzlement. No good purpose can be served by an extended consideration of such differences. The term "embezzlement" has been used in many different statutes, and, as it is a statutory offense, but little aid can be derived from the construction put upon local statutes by the courts of the various states. McKnight v. U. S., 97 Fed. 208, 215, 38 C. C. A. 115.

This conviction is under section 47 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1097 [Comp. St. § 10214]):

"Whoever shall embezzle * * * moneys * * * of the United States shall be fined. *

It will be noted that the statute itself does not define the crime of embezzlement.

"Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking." Moore v. U. S., 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422.

Having in mind the employment of this defendant in the mint and the character of his duties, with the facts and circumstances appearing in the record, the jury was justified in finding that the defendant came into the possession and custody of these coins lawfully, and that he took coins from the larger quantity thus coming under his control, and that, therefore, there was:

(1) A breach of trust or duty in respect to the coins in question,

which belonged to the government of the United States;

(2) That he wrongfully appropriated the same to his own use.

Counsel for defendant finally contends that, upon the facts as they appear of record here, the defendant had nothing more than the bare custody, as distinguished from the possession, of the coins in question, and therefore could not and did not embezzle them, but stole them. The Supreme Court of the United States has disposed of this contention in Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130, in which the court says:

"We do not care to inquire into the soundness of the distinction made in some of the older cases between the custody and possession of property, because under the section above quoted nothing more is necessary to constitute embezzlement than that the party charged should have the control or care of the money."

There is substantial testimony to sustain the verdict of the jury that the defendant was an employé of the United States to whom these coins, alleged to have been embezzled, were intrusted, that they lawfully came into his hands by virtue of his employment, and that they were thereafter converted to his own use, in violation of this statute of the United States.

The judgment of conviction is therefore affirmed.

CITY LIGHT & WATER CO. v. JAMES.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1919.)
No. 3349.

ELECTRICITY \$\infty\$ 19(13)—Instruction in action for death from electric shock.

In an action against an electric company for the death of a person, killed by receiving a heavy current of electricity when he touched a light switch, refusal of an instruction that defendant was not an insurer of the safety of persons using its current, but was liable only for negligence in failing to use due care, held error, in view of the evidence.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by Lena De Boe James against the City Light & Water Company. Judgment for plaintiff, and defendant brings error. Reversed.

Thos. F. Turner, of Amarillo, Tex. (Turner & Dooley, of Amarillo, Tex., on the brief), for plaintiff in error.

Alexander M. Mood and John W. Veale, both of Amarillo, Tex. (Alexander M. Mood, Alexander A. Lumpkin, and John W. Veale, all of Amarillo, Tex., on the brief), for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. The defendant in error, the widow of John Lewis James, suing for the use and benefit of herself and minor children of herself and her deceased husband, brought this action to recover damages alleged to have been caused by the death of the latter. The parties will be referred to as they were designated in the trial court.

The deceased was an employé of J. H. Harris & Son, who were merchants doing business in the city of Amarillo, to whom the defendant, which operated an electric lighting plant, for compensation supplied electricity for lighting their premises and to operate a motor thereon; it being stipulated that the current so to be furnished was to be a safe voltage, and not involving danger to Harris & Son or others. In the course of the performance of his duties as employé the deceased, needing a light for work he had to do, attempted to turn on an electric light under a shed on the premises of his employers, and was instantly killed when his hand came in contact with the switch. His death was attributed to the negligence of the defendant in permitting a very dangerous, unreasonable, and unnecessarily high voltage of electricity to be on the wires serving the premises of the deceased's employers.

The petition in the case contained a number of specifications of respects wherein the defendant was charged to have been negligent in allowing an excessive and dangerous current of electricity to be transmitted to the wires on those premises. The allegations of negligence were duly put in issue. Under the evidence adduced it was a question for the jury whether the defendant had been negligent as charged.

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There was evidence having some tendency to prove that a defective condition of the defendant's equipment, to which the presence of the dangerous current on the wires on the premises of the deceased's employers might have been attributed, was the result of a storm which occurred so short a time before the deceased was killed that the defendant could not properly be charged with a lack of due diligence in failing to discover and remedy the defect before the casualty occurred.

An exception was reserved to the court's refusal to give the following

written instruction requested by the defendant:

"Gentlemen of the Jury: You are instructed that the defendant in this cause was not an insurer of the safety of the persons using its electric current, including the deceased, but that, if it used the proper degree of care, as given you elsewhere in the charge of the court, then the fact that the deceased came to his death by reason of the passage through his body of a heavy current of electricity, but that the cause thereof was not attributable to negligence of the defendant, but by reason of causes over which it had no control, or which it had not had sufficient time to discover in the exercise of reasonable diligence, then you will return a verdict in favor of the defendant."

The refused instruction states a proposition which was correct and applicable to the case on trial. Under the issues raised by the pleadings and evidence, the plaintiff was not entitled to a verdict in her favor, in the absence of a finding that the presence of the unusual and dangerous current on the wire on the premises of the deceased's employers was due to negligence chargeable against the defendant. The proposition stated in the refused instruction was not covered by anything said in the court's charge to the jury. The following is all that was said in the charge given touching the question of the duty owing by the defendant:

"As to the duty of the defendant, you are charged that a company supplying electricity for lighting purposes, and engaging with individuals to deliver a suitable current at their residences and places of business, over its own system of wires and appliances, is bound to exercise such control over the subtle and perilous agency with which it is dealing, and take such precautions in the maintenance and inspection of its wires and appliances as are reasonably essential to prevent an excessive and dangerous current from passing from

its supply wires to the service wires of its patrons.

"Now, if you believe, from a preponderance of the evidence and facts and circumstances in evidence, that the defendant failed to exercise such control over the voltage of electricity with which it charged its wires, and failed to take such precautions in the maintenance and inspection of its wires and appliances as were reasonably essential to prevent an excessive and dangerous current from passing from its supply wires to the service wires on the premises of J. H. Harris & Son, by allowing a cross-connection or contact between its high-voltage circuit serving said premises within or without said transformer, or between said high-voltage circuit and the ground, or in failing to install a proper and reasonable number of lightning arresters at proper distances from each other on its high-voltage circuits, sufficient to deflect into the ground high circuits of electricity of great and dangerous magnitude, and particularly near the transformer serving the premises where deceased was employed, and if you find that by reason of such failure, if any, the insulation or substance separating the high voltage from the low voltage in the transformer serving the premises where deceased was employed was broken down and rendered useless, and that by reason of its failure to exercise such control over the voltage of electricity in its wires, or by reason of its failure to take such precautions in the maintenance and inspection of its wires and appliances as were reasonably essential to prevent an excessive and dangerous current from passing from its supply wires to the service wires of said

court.

Harris & Son, in either one or more, or all, of said respects herein set forth, plaintiff's husband, John Lewis James, in undertaking to turn a switch for the purpose of making a light by which he might perform his duties, came to his death by electrocution, then and in that event, the plaintiff herein would be entitled to recover the actual damages sustained by her. If you do not so believe, you should find your verdict for the defendant company."

In the above-quoted part of the charge given, the court, in stating the duty owing by the defendant, expressed itself in language almost identical with that used in a part of the opinion delivered in the case of San Juan Light Co. v. Requena, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680. Other parts of that opinion make it plain that the defendant in that case was held to be liable for a death due to a current of dangerous voltage on a wire in a residence, because of its negligence in failing to exercise appropriate care in the maintenance and inspection of its equipment. The charge given by the court not having been such as to inform the jury that the defendant was not an insurer of the safety of persons using its electric current, or that a finding that it was negligent was required to justify a verdict in favor of the plaintiff, the defendant was entitled to have the above-quoted requested instruction given. The court erred in refusing to give that instruction.

Because of that error the judgment is reversed.

EISENBERG V. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1919.)
No. 5362.

1. Indictment and information \Longrightarrow 125(4)—Joining in one count illegal sales from Quartermaster's Department.

Where indictment charged illegal purchases from Quartermaster's Department during certain months, contention that such purchases on different dates would constitute separate offenses, and that indictment included more than one offense in the same count, *held* without merit.

2. Army and navy \$\iff 40\to Indictment and information \$\iff 87(2)\to Sufficiently specific as to date of offense and description of property sold.

An indictment for violation of Criminal Code (Act March 4, 1909, c. 321) § 35, 35 Stat. 1095 (Comp. St. § 10199), by knowingly purchasing "during the months of April and May, 1918," from soldiers in the Quartermaster's Department, having no lawful right to sell the same, "approximately 21 sacks of oats," the exact quantity being unknown, the property of the United States, furnished for use of the army, held sufficiently specific as to date and description of the property.

- 3. CRIMINAL LAW \$\infty\$780(3)—Instructions as to testimony of accomplices.

 Instruction in a criminal case respecting testimony of accomplices held without error.
- 4. CRIMINAL LAW \$\infty\$=1055, 1119(4)—Review; remarks of counsel.

 A judgment of conviction will not be reversed because of remarks of the prosecuting attorney in argument, which were not excepted to, and where the record contains neither the evidence nor the charge of the

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Criminal prosecution by the United States against L. Eisenberg. Judgment of conviction, and defendant brings error. Affirmed.

C. M. Chambers and Dave Watson, both of San Antonio, Tex. (Chambers, Watson & Wilson, of San Antonio, Tex., on the brief), for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex. (Claud J. Carter, Asst. U. S. Atty., of San Antonio, Tex., on the brief), for the United States.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge. The plaintiff in error (hereafter called the defendant) and his wife were charged in two counts, first, with having unlawfully "purchased," and, second, with having "unlawfully applied to his own use," certain property of the United States. Defendant was convicted on both counts. The record fails to disclose what became of the charges against the wife. Eleven errors are assigned, of which the second, third, fourth, fifth, sixth, and eighth are not relied on, and are therefore dismissed from further consideration.

[1,2] The first error alleged is the overruling of a demurrer and motion to quash the indictment, on the grounds that the indictment includes more than one offense in the same count and fails to name a specific day upon which the offense occurred and to specifically describe the property. Both counts of the indictment are in substantially the same language, with the necessary change to charge the purchasing in the first count, and the application of the property to the defendant's own use in the second count. The material part of the indictment is as follows:

"That heretofore, to wit, during the months of April and May, A. D. 1918, the exact dates being to your grand jurors unknown, one L. Eisenberg and one Ida Eisenberg, acting together, each with the other, jointly and severally, did unlawfully, knowingly, and willfully purchase from one Sergeant S. W. Crawford and one Private Robert C. Jenkins, both of whom were then and there soldiers in the Quartermaster's Department of the United States Army, certain property of the United States, to wit, a certain quantity of oats, the exact quantity being to your grand jurors unknown, but being approximately twenty-one (21) sacks of oats, which said oats were then and there property which had been theretofore furnished to the army of the United States for use in the military service; the said soldiers then and there not having the lawful right to sell the same."

It is conceded by the defendant that the offenses of purchasing and applying to his own use might be properly incorporated in one indictment in separate counts under the provisions of R. S. § 1024 (Comp. St. § 1690); but the point is made that the purchasing, etc., of each sack of oats, if done on different days, would constitute a separate offense. It is further contended that neither the dates nor the description of the property is specific enough to put the defendant on notice and to serve as a basis for a defense of former jeopardy in possible future indictments.

We do not agree with any of these contentions. It is difficult to

conceive how property of the character involved here could be better described than was done, and clearly each count of the indictment presents but one offense. It is necessary for the government to lay some date in the indictment, but it is elemental that, having alleged a specific date, the prosecution is not bound by it, and may prove any date prior to the return of the indictment within the statute of limitations, three years. We think the indictment was sufficiently specific, and the overruling of the demurrer and motion to quash was not error.

[3] The seventh error assigned is to the charge given by the court regarding the testimony of two witnesses who were accomplices of the defendant and named in the indictment. The court charged the jury fairly and fully, with more elaboration than we here repeat, that the witnesses were accomplices, that the jury might convict upon their uncorroborated testimony, but that they should weigh the evidence with great care and accept it with caution. The charge given was not error.

[4] The ninth, tenth, and eleventh assignments of error relate to certain remarks of the Assistant District Attorney. In his closing argument the Assistant District Attorney stated in effect that defendant was represented by a criminal lawyer employed by the year, who had succeeded in acquitting him in many other cases. These remarks were unnecessary and in bad taste, and might have constituted reversible error, if unsupported by the evidence in the case, and the court had declined to reprimand counsel for the government, and had failed to charge the jury to disregard them. They were not excepted to, however, before the jury retired, because of the absence of counsel for the defendant from the courtroom. The negligence of counsel for the defense cannot be taken advantage of to incorporate in a bill of exceptions remarks of the district attorney in this way.

The purpose of excepting to remarks of counsel, or to the charge of the court, before the jury retires, is to allow to either a full and fair opportunity to correct or explain same. It appears from the bills of exception that, when objection was made to other remarks of the assistant district attorney, the court admonished him to keep within the record. Neither the charge of the court nor the complete evidence appears in the transcript. It is reasonable to assume that in his charge the court told the jury to disregard the unauthorized remarks of the district attorney, which would have cured the error, if any there was. Wright v. United States, 108 Fed. 805, 48 C. C. A. 37. The presumption is that all things are rightfully and regularly done in the lower court, and the burden is on the plaintiff in error to show the contrary. Reagan v. Aiken, 138 U. S. 109, 11 Sup. Ct. 283, 34 L. Ed. 892.

The record discloses no prejudicial error. Affirmed.

BLACKSHEAR et al. v. FIRST NAT. BANK OF DOTHAN. (Circuit Court of Appeals, Fifth Circuit. November 17, 1919.) No. 3445.

1. Mortgages \$\infty 329, 378-On sale under power title passes by deed.

Powers of sale in a mortgage are intended to avoid the delay and expense incident to foreclosure, and are in general favor; hence, if a sale is conducted in accordance with the terms of a valid power, the title to the premises granted by way of security passes to the purchaser on its consummation by conveyance.

 Courts 365—Decisions of state courts as precedents in federal court.

A power of sale should be construed as a part of the contract of mortgage, and not as a hostile process. The Supreme Court of the state where this instrument was executed, agreeably to this principle, held a similar power to be good, and that ruling is followed.

3. MORTGAGES \$\infty 333-Validity of power of sale.

A power of sale in a mortgage, providing for sale at public auction after notice, is not open to attack as inequitable, and a sale in accordance with such power will bar the equity of redemption.

4. Mortgages \$\ightharpoonup 333-Validity of one of several modes of sale provided disjunctively.

Where a mortgage provided several modes of sale in the disjunctive, a sale made under a power which was in no wise inequitable cannot be attacked, because some of the modes prescribed were inequitable.

 USURY € 109 — RIGHT TO QUESTION INTEREST CHARGES AFTER MORTGAGE FORECLOSURE.

Where power of sale in a mortgage was valid, and the equity of redemption passed, the mortgagor cannot, more than two years thereafter, question interest charges collected by the mortgagee out of the proceeds of the sale, on the ground of usury.

In Error to the District Court of the United States for the Southern Division of the Middle District of Alabama; Henry D. Clayton, Iudge.

Action by R. D. Blackshear, for use, etc., and another, against the First National Bank of Dothan. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. A. Gunter, of Montgomery, Ala., and O. C. Doster, of Dothan, Ala., for plaintiffs in error.

T. M. Espy and Farmer, Merrill & Farmer, all of Dothan, Ala., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and BEVERLY D. EVANS, District Judges.

BEVERLY D. EVANS, District Judge. This is an action to recover usury from a national bank, alleged to have been reserved in a loan secured by mortgage, instituted more than two years after the mortgage had been satisfied by a foreclosure under a power of sale. The bank pleaded the general issue and the statute of limitations of two years.

Counsel for plaintiff and defendant stated in open court on the argument that the sole question was the validity of the power of sale in the mortgage under which the property was sold. The power of sale in two of the mortgages was as follows:

"Now, if said debts are paid at maturity, then this mortgage ceases to be of force; but, if default be made in the payment thereof, or the grantor shall in any way dispose of or part with possession of any of said property, or, if for any cause said [mortgagee], its successors or assigns, shall see fit to do so, they are authorized, before or after the maturity of said debts, at any time to take possession of said personal property, to sue for or otherwise collect in their own names for said rents and advances due to us, to sell said personal property and real estate at public outcry or private sale, with or without notice of the time, place, and terms of sale, at their election, and in case they give notice to determine what kind they will give, to make said sale when, as, and where it shall seem best to them, for cash or on credit, to become purchaser at any such sale of either the real or personal property sold, to make deeds of conveyance to the purchaser at the sale," etc.

The power of sale in the other mortgage was:

"If default is made in the payment of any of such obligation or debt, at its maturity, or if we shall in any way abandon, sell, or dispose of any of said property, or part with the possession of any of it, or if we shall remove, mistreat, or injure any of said property, or if the First National Bank of Dothan, or its successors or assigns, shall see fit to do so at any time before or after the maturity of this debt, if, its successors, assignes, or agent, is hereby authorized to take possession of said property, or any part of it, and to sell said property and real estate, one or both, at private sale, without advertising same and without delay, or at public outcry for cash to the highest bidder at Dothan, Ala., after advertising the same for five days by posting one notice of the time and place of sale at the front of the Houston county courthouse, in Dothan, Alabama, and either such private or public sale may be made of said property before or after taking possession of same."

- [1] Powers of sale in a mortgage are intended to avoid the delay and expense incident to a foreclosure and a sale in equity, and are in general favor, both in England and in this country. There is nothing in the law of mortgages which prevents the conferring by the mortgagor in such instrument of the power to sell the premises described therein, upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance. Bell Silver & C. Mining Co. v. Butte Bank, 156 U. S. 470, 477, 15 Sup. Ct. 440, 39 L. Ed. 497.
- [2-5] A power of sale must be construed as a part of the contract of mortgage, and not as a hostile process. On this theory the Supreme Court of Alabama has construed a power of sale similar, if not identical with, those sub judice, as only authorizing a sale after default, or before maturity of the debt, where the mortgagor was attempting to dispose of the property. Henderson-Law Co. v. Wilson, 161 Ala. 504, 49 South. 845. This is an Alabama contract, and we might well rest the construction of the powers of sale under review on the reasoning of the Alabama court.

Another equally compelling view that the powers of sale authorized a sale at public auction after posting the prescribed notice results from the verbiage of the powers. It will be seen that the mortgagee is given

(261 F.)

several modes of executing the power. Even if we grant that one or more of them be inequitable, or even void, that one which provides for public sale, after published notice, is not open to legitimate attack. As the various modes are expressed in the disjunctive, any inequitable or void mode is separable from the good, and if the latter mode be pursued the sale would not be inherently bad.

The record discloses that the property embraced in each of the mortgages was sold at public outcry to the highest bidder for cash, during the legal hours of sale, in front of the courthouse door of Houston county, Ala., in Dothan, after maturity of the debt, and that it brought a fair and reasonable value, which was sufficient to discharge the debt and pay the charges incidental to the sale, and the money was thus applied more than two years prior to the commencement of this action. Under these circumstances the sale was legal, and its consummation barred the equity of redemption. See Olcott v. Bynum, 17 Wall. 44, 21 L. Ed. 570. Such being the case, the mortgagor was foreclosed in opening the matter to recover any alleged usury in an action brought more than two years after the same.

Judgment affirmed.

FOSTER et al. v. CONRAD.*

(Circuit Court of Appeals, Eighth Circuit. November 15, 1919.) No. 5163.

MASTER AND SERVANT € 124(4)—MASTER NOT BEQUIRED TO INSPECT PLACE OF WORK OWNED BY THIRD PERSON.

Employers, who have neither possession nor control of gas well premises owned by another, and who are not using them otherwise than to connect up their pipe line for a supply of gas, are not subject to a duty of inspection, and are not liable for injuries to an employé by the explosion of a defective tee in the pipes of the well; there being nothing in his work dangerous in itself or contributing to the explosion.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Action by Grover Conrad against H. V. Foster and another. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

T. J. Leahy and C. S. Macdonald, all of Pawhuska, Okl., for plaintiffs in error.

Phillip Kates, W. A. Sipe, Jr., and J. P. O'Meara, all of Tulsa, Okl., for defendant in error.

Before HOOK, Circuit Judge, and AMIDON and BOOTH, District Judges.

HOOK, Circuit Judge. Conrad sued Foster and Davis, and recovered judgment, for personal injuries caused while in their service by the explosive bursting of a weak and defective tee in the pipes of a gas

well from which they had been getting gas for fuel in their oil pumping operations. The defendants prosecuted this writ of error.

The gas well where the accident occurred and defendants' oil well were 1,000 or 1,200 feet apart and were separate and distinct enterprises. There was substantial evidence that the defendants did not own the gas well or its equipment or appliances, and were not operating it or in control of the operation. They simply had a 2-inch pipe line from their own plant to the gas well for the conduct of the fuel. The accident occurred while plaintiff was at the gas well to restore a connection of the pipe line which had been temporarily severed while the operators of the gas well were making certain changes in their pipes. The work plaintiff was to do was a simple mechanical task. It was not dangerous in itself, nor did the doing of it contribute to the injury, except as it brought the plaintiff in proximity to the tee that burst. No complaint was made in the testimony of the character or condition of defendant's pipe line; nor was it shown that they had notice of any defect in the pipes of the gas well, or in fact knew anything more about it than the plaintiff himself, if, indeed, as much. The verdict and judgment proceeded upon the theory, expressed in the charge of the trial court to the jury, that if defendants sent plaintiff to the gas well to restore the connection, as the jury found they did, they were subject to the familiar duty of an employer in respect of a safe working place for the employé, and this regardless of ownership, possession, or control of the premises which proved unsafe. In other words, the duty of inspection of the gas well premises was laid upon the defendants, though they had no power of ownership or control, and were not using them in their own business otherwise than to connect up their pipe line for a supply of gas. An exception to the instruction was sufficiently preserved.

The rule founded in principle and supported by the weight of authority is that the responsibility of an employer in respect of a safe working place for his employé does not extend to the premises of a third person of which the employer has neither possession nor control, to which the employé is sent for the performance of some act or duty.

"Otherwise he might be made responsible for the negligence of third persons with reference to premises he had never seen, and about the condition of which he knew, and perhaps could know, nothing. The merchant would, in effect, be liable to his clerk for the negligence of the customer with respect to the safety of the premises upon which the clerk goes to deliver his master's goods, and the master, plumber, or carpenter to his workman for the negligence of the householder upon whose premises he sends the workman simply to make some slight repairs." 18 R. C. L. p. 585, and cases cited in the note.

Where the employer, for the purposes of his work, has made the premises his own in whole or in part, he would be responsible to the extent of his possession and control. The defendants had no possession or control of that which caused the accident, yet plaintiff seeks to charge them with a liability which broadly implies a duty to have previously inspected the gas well plant of the other concern, the pressure of the gas, and the resistance of the pipes and fixtures installed, as pre-liminary to the making of their connection. The imposition of such

a duty does not appear reasonable or in accord with ordinary, yet prudent, business customs.

In view of the above, it is not necessary to consider whether defendants asked for a directed verdict at the conclusion of the evidence. They come practically to the same end.

The judgment is reversed, and the cause is remanded for a new trial.

SMITH V. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 1, 1919.) No. 3358.

EMBEZZLEMENT @==30-AVERMENT OF INCORPORATION OF FRATERNAL ORGANIZA-

TION UNNECESSARY IN INDICTMENT OF OFFICER FOR EMBEZZLEMENT.
Under Comp. Laws Alaska 1913, § 1926, making any officer, agent, or employe "of any private person or persons, copartnership or incorporation," who shall convert to his own use money or property coming into his possession by virtue of such employment, guilty of embezzlement, an indictment charging that defendant so converted money coming into his possession as secretary of a fraternal organization, and which was the property of such organization, held to charge an offense, although it was not averred that the organization was incorporated.

In Error to the District Court of the United States for the Fourth Judicial Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Criminal prosecution by the United States against William H. Smith.

Judgment of conviction, and defendant brings error. Affirmed.

Henry M. Owens, of San Francisco, Cal., for plaintiff in error,

R. F. Roth, U. S. Atty., and Harry E. Pratt, Asst. U. S. Atty., both of Fairbanks, Alaska, and Annette Abbott Adams, U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Defendant asks review of a judgment of conviction in Alaska under an indictment which charged that he had embezzled \$253.25—

"the said money and the whole thereof being then and there the property of other persons, to wit, the Nenana Lodge, No. 1193, Loyal Order of Moose, the said Nenana Lodge, No. 1193, Loyal Order of Moose, being then and there a fraternal organization, and the said William H. Smith being then and there an agent, servant, and employe of the said Nenana Lodge, No. 1193, Loyal Order of Moose, to wit, its secretary, and the said sum of \$253.25 and the whole thereof having come into his possession as such officer, employé, and servant of said lodge," etc.

The statute (section 1926, Criminal Code, Compiled Laws of Alaska 1913) provides:

That if any officer, agent, clerk, employé, or servant "of any private person or persons, copartnership, or incorporation" shall embezzle or fraudulently convert to his own use, or shall take or secrete with intent to embezzle or fraudulently convert to his own use, "any money, property or thing of another which may be the subject of larceny, and which shall have come into his possession or be under his care by virtue of such employment, such officer, agent, clerk, employé, or servant shall be deemed guilty of embez-zlement."

The contention of the plaintiff in error is that "fraternal organization" is not included in the language of section 1926, and that a fraternal organization is not a private person or persons, within the meaning of the statute, and that therefore the indictment was wholly insufficient. But in our opinion the allegation that the money was then and there the property of "other persons," to wit, the Nenana Lodge, "being then and there a fraternal organization," was a sufficient averment that the money belonged to the lodge, an association of private per-

sons, clearly included within the statute.

The argument that the indictment failed to aver that the Nenana Lodge was an incorporation or a copartnership is not relevant, because it does not follow at all that a fraternal organization must be either a corporation or a copartnership. Of common knowledge is it that persons often associate themselves together in fraternal organizations without resorting to forms of statutory organization. Such associations are, however, none the less fraternal organizations, composed of private persons, and employ servants and agents to whom moneys are intrusted. We believe the indictment stated an offense. Spurlock v. State, 45 Tex. Cr. R. 282, 77 S. W. 447; Hughes v. State, 109 Ark. 403, 160 S. W. 209; Griggs v. U. S., 158 Fed. 572, 85 C. C. A. 596.

There being no bill of exceptions in the record, the errors assigned on the giving of two instructions are not presented for consideration. Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451; Buessel v. U. S., 258 Fed. 811, — C. C. A. —. We find no error, and affirm the judgment.

Affirmed.

GENERAL ELECTRIC CO. v. NITRO-TUNGSTEN LAMP CO.

(District Court, S. D. New York. October 27, 1919.)

PATENTS \$\iff 328\$—FOR INCANDESCENT LAMP VALID AND INFRINGED.

The Langmuir patent, No. 1,180,159, claims 4, 5, 12, and 13, for an incandescent lamp, with a nitrogen-filled bulb and tungsten filament, held not anticipated and to disclose invention of highly meritorious character; also held infringed.

In Equity. Suit by the General Electric Company against the Nitro-Tungsten Lamp Company for infringement of all 13 claims of letters patent No. 1,180,159, issued April 18, 1916, to plaintiff, on application filed on April 19, 1913, by Irving Langmuir. Decree for complainant.

Frederick P. Fish, of Boston, Mass., Hubert Howson, of New York City, and Albert G. Davis and Alexander D. Lunt, both of Schenectady, N. Y., for plaintiff.

Williams & Holland, of New York City (William B. Greeley and Charles J. Holland, both of New York City, of counsel), for defendant.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

MAYER, District Judge. Invention is the substantial question involved, for, if established, infringement of certain claims is unquestioned. The search for improvement in lighting means began at least as far back as about 1840, but the real art in incandescent lamps started with Edison in 1879, when he created the commercial incandescent lamp by producing the one-piece bulb, the carbon filament and the vacuum.

To those skilled in the art the details of Edison's contribution need not be recited. It so happens that much of the outline of the progress of this art is to be found in reports of court opinions beginning with the so-called Edison Lamp Case. Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83. After Edison's pioneer step, the thought of inventors was mainly directed to improvements in the filament, and the story of the achievement of Just and Hanaman, whose work culminated in the tungsten filament, is told in the so-called Tungsten Lamp Case. General Elec. Co. v. Laco-Phillips, 233 Fed. 96, 147 C. C. A. 166. The tungsten filament of Just and Hanaman, however, was fragile, and this difficulty led to further endeavor, eventuating with the ductile drawn tungsten filament of Dr. Coolidge. The tungsten lamp with the Coolidge filament marked the furthest and last advance in the art until the Langmuir invention.

The Langmuir lamp has proved extraordinarily successful. In street and display illumination it dominates the commercial field, and from the standpoint of aggregate product for use in many ways, and return in dollars and cents, the record demonstrates unquestioned commercial utility. With this indisputable success, the question is whether Langmuir has merely taken advantage of well-known facts and data to an extent within the knowledge of only a man having the qualifications of one skilled in this art, or whether the accomplishment was so advanced as to rise to invention.

Langmuir is a scientist of extensive education and extraordinary ability, possessed of persistency and patience, and gifted with the kind of imagination which is valuable, when curbed by analysis. With this equipment he undertook the task which resulted in his "present invention," which "relates to improvements in incandescent electric lamps whereby it is possible to produce a lamp capable of operating at extraordinarily high efficiency and giving a light of marked increase in intrinsic brightness and whiteness." Claims 1 and 12 are illustrative of the invention claimed.

- "1. In an incandescent lamp, the combination of the closed lamp bulb, a gaseous filling therein of substantial pressure at the operating temperature of the lamp, and of substantially poorer heat conductivity than hydrogen, and a filament of such high melting point and low vapor pressure that it may be operated during a long, useful life at a temperature higher than that of a tungsten filament operating in a vacuum at an efficiency of one watt per candle."
- "12. In an incandescent lamp, the combination of the lamp bulb, a tungsten filament therein, and a gaseous filling; the effective diameter of the filament being sufficiently large, and the heat conductivity of the filling being sufficiently poor, to permit the lamp to be operated with a filament temperature in excess of that of a vacuum tungsten lamp operating at an efficiency of one water per candie and with a length of life not less than that of such a lamp."

Defendant states its defense frankly and clearly as follows:

"There is not found in the prior art any instance of an incandescent electric lamp having a filament of tungsten, whether drawn or squirted, in an atmosphere of nitrogen, and anticipation, therefore, is not alleged. It is contended, however, on behalf of the defendant, that, the characteristics and usefulness of the tungsten filament, drawn and squirted, straight and coiled, as a filament for an incandescent lamp, having been well understood in the art before Langmuir's application for the patent in suit, and the characteristics and effect of nitrogen as a filling for incandescent lamps with filaments metallic and otherwise, also having been well understood in the art before Langmuir's application, Dr. Langmuir, in putting the tungsten filament into an atmosphere of nitrogen, in which neither element had any new function by reason of the combination, exercised only the skill of one familiar with the art, and made no patentable invention."

It will conduce to simplicity to describe in near-lay language, what Langmuir's invention is. This is admirably done at page 849 of the "Handbook for Electrical Engineers," New York, 1914, edited by Dr. Harold Pender, defendant's expert, as follows:

"Nitrogen-Filled Lamps.—This type of lamp has a closely coiled helical filament of drawn tungsten wire mounted in a glass chamber filled with nitrogen or other inert gas. The pressure of the gas retards the decay of the filament, so that it may be operated with a satisfactory life at a higher temperature than is practicable in a vacuum. The gain in radiant efficiency so obtained is offset in part by the convection of heat from the filament by the gas. When the diameter of the filament is minute, there is little or no net gain in effi-When the filament is relatively heavy, the net efficiency may be doubled. The helical coiling of the filament increases its effective diameter as a radiant, and simplifies the problem of its support, for the filament is distinctly soft when incandescent. The gas-filled lamp has an elongated bulb, the upper portion of which serves as a cooling chamber. The walls of this chamber receive the black deposit from the filament, but are so placed that they absorb but little of the useful light. The gas-filled lamp is designed for operation in a pendent position. Such lamps are much more brilliant than vacuum lamps, and should be fully shaded. The light of the gas-filled lamp is decidedly whiter than that of the vacuum tungsten lamp."

The invention described supra, according to plaintiff, is a co-ordination, a new relation of parts, a new combination. It was arrived at after a long and tedious effort, described with great particularity by Dr. Langmuir, whose recital is accepted by the court as by him set forth. It was undertaken, or in course of progress, when men like Edison and Wickenden saw no hope in the nitrogen or other gas filled lamp, and authorities like Von Siemens and Monasch doubted whether it would be possible "to construct a much more economical glow lamp"; yet, while vacuum lamps for 110–115 volt circuits are not now made in sizes above 100 watts, the Langmuir lamps range from 50 watts to 1,000 watts or over.

The heat delivered to the filament of an incandescent lamp and dissipated therefrom is carried off in various ways: (1) By useful radiation, i. e., in the form known as light; (2) by dark heat radiation, not perceived as light; and (3) by convection.

In a vacuum lamp, the only loss of importance is (2) supra and, of course, the aim is to lessen this loss. It is now elementary that, the hotter the filament, the higher the efficiency of the lamp; but, as the temperature is increased, the life of the lamp is shortened, because of

the ultimate destruction of the filament, preceded by a process of what might be called disintegration, resulting in a blackening of the bulb. Just when these results occur depends upon the filament and the temperature. It was common knowledge that a tungsten lamp could be operated at three-fourths of a watt per candle, or, perhaps, even one-half a watt, but that, at such efficiency, the lamp would be readily destroyed, and hence of no practical value.

This relation of high temperature with lessened life of filament had to be reckoned with. So, also, with (3), the loss by convection currents, which, according to Howell's testimony of Edison's experiment, is claimed by plaintiff to be the reason for Edison's failure in respect

of the carbon nitrogen lamp.

Langmuir, however, introduced nitrogen or other gases into his lamp at considerable pressure, and thus deliberately accepted an obstacle which his theory of co-ordination and corelation was to overcome. It is because the scientist might have been expected to pursue other directions that the invention in controversy is claimed to reside in—"so co-ordinating the pressure and character of the gas with the nature and size of the filament, and with the temperature at which the filament is run, as to create, notwithstanding this additional loss, a lamp which at a given average useful life produces more light or better light for the same amount of electric energy than is produced by the corresponding vacuum lamp."

With this contribution of a concededly new result, highly successful from an operative and commercial standpoint, we turn to the prior art to ascertain its teachings. Much of this prior art was before the Patent Office, and but four references are new in this suit—Waring, Fox, Thomson, and Abel. Much of the prior art consists of isolated statements of now accepted principles or of fruitless endeavors to produce a practical result. It is very much the same kind of situation as is presented when some or all of the separate elements of a puzzle are laid before one, and the problem is to put the elements together, so as to build the toy house, or railroad, or what not, which constitutes the achievement of the puzzle.

The Grove publication of 1845, the Fox British patent, No. 3,988 of 1878, the Gordon British patent, No. 218 of 1881, all preceding Edison's patent of 1883, taught nothing. Edison, in his patent No. 274,-295 of March 20, 1883, made a serious attempt to produce a gas-filled nitrogen, inter alia, lamp. He failed, and Howell graphically describes how completely he failed. He supposed he should reduce the size of the filament, in order to reduce the cooling effect of nitrogen; and the fact that the thought of the workers in the art was thereafter largely directed to finding the right material for the filament is some indication, at least, that Langmuir's conception was bold in returning to gases.

At this point it is desirable to refer to the "getter," which is clearly described in the following extract from Howell's testimony:

"In all these lamps, from the Edison lamp of from 5 to 6 watts per candle to the tungsten lamp of 1.0 watt per candle, no addition or subtraction was made to or from Mr. Edison's original lamp, or any of the elements of it. The original lamp had three elements. They were a filament, a vacuum, and an all-glass globe, and every lamp made from that time on until Dr. Langmuir's

invention had those three elements, and no more—every one of them. Every commercially successful lamp had the same three elements that Mr. Edison's

lamp had—a filament, a vacuum, and a glass inclosing globe.

"During the time that these filament improvements were carried on, great advances were made in the preparation of the vacuum. In 1881, when I went to work in the lamp works, it took five hours to exhaust a lamp, and only one lamp was put on one pump. I have records now showing the time that it took to exhaust one lamp. That showed the time it took to exhaust the lamp on a mercury Sprengel pump; a very good vacuum being produced therebyvery good, indeed; just as good as we get to-day. By improving that pump we reduced that time gradually to half an hour-from five hours to one-half

"In 1895 the Malignani method of exhaustion was invented. A mercury pump will take out the air and other gases quickly, but the great trouble is that it will not take out the water vapor. A mercury pump will not take out water vapor sufficiently, because the vapor pressure of water is probably less than the vapor pressure of mercury, so that on those mercury pumps we had to have, and to-day have, chemical means of removing water vapor. That was done by placing a connection with the pump, and as close to the lamp as possible, a small vessel containing phosphoric anhydride, which absorbs the water vapor very greedily.

"Malignani's invention consisted in placing in the small tube in which the exhaustion is produced, as in that lamp, a little piece of red phosphorus—I think there is some in that tube now, a little reddish color-and when the lamp was on the pump, and all the air had been taken out, they heated that phosphorus until it vaporized, and that sent into the lamp a little cloud of phosphorus vapor, which produced a chemical reaction, which made a per-

fect vacuum.

"By that invention we could exhaust a lamp in less than one minute. It reduced the time from 30 minutes to one minute. In that way we could produce a more uniform exhaustion than was ever produced before.

"Phosphorus or other substances, used in a lamp in that way, used by introducing them into the vacuum after the air had all been taken out, are called vacuum 'getters.' They 'get' the vacuum. It is a homely term, but it

is well established in the industry.

"That carries the lamp up to 1913, when Dr. Langmuir's announcement of the nitrogen-tungsten lamp was made. Before this every lamp contained as good and as high a vacuum as possible, and every one realized that a vacuum of the highest type was a necessary part of every incandescent lamp, and it was; every incandescent lamp ever sold commercially, or ever used, had a high vacuum in it."

The United States patent to Waring, No. 297,038, is referred to for its acknowledgment of the effect of an atmosphere of hydrogen or nitrogen in reducing the heat of the filament, and for the paper read in reference thereto by Prof. Anthony in 1894. This Waring lamp is dealt with by Judge Shipman in Edison Electric Light Co. v. Waring Electric Co. (C. C.) 59 Fed. 358, 363. Its pertinency, according to defendant, lies in the fact that in 1894 lamp manufacturers and engineers were discussing the effect of pressure, and were discussing and understood the effect of an inert gas under pressure in the bulb of an incandescent electric lamp. While the lamp burned out quickly, it apparently remained relatively clean up to the point at which it burned out, and Prof. Anthony held the opinion that it was shown that evaporation was prevented by bromine gas. The evidence is satisfying that this result was due to a "getter" action, whereby the evaporated carbon combined with the bromine, forming a light-colored compound less harmful on the globe than the uncombined carbon would have been.

But Langmuir's invention is not a "getter" invention, although it

is conceded that there is a helpful "getter" action when nitrogen is used, but such "getter" action in the Langmuir lamp is incidental to the real invention. This question of "getters" is aptly summarized in the brief of plaintiff thus:

"'Getters' have been used with vacuum lamps with good results. It was the chemical 'getter' action which helped to reduce the consumption of the vacuum tungsten lamp from 1.25 to 1.1 watts per candle when the long life of 1,000 hours was standardized. It was the Langmuir invention (involving a physical rather than a chemical action) which reduced the consumption from 1.1 to .8 or even .5 watts per candle, with the same life.

"The two expedients work in different ways and produce different results. The 'getter' does not reduce the evaporation; it merely lightens the color of the deposit. It allows the filament to disintegrate, but minimizes one—and

only one—of the harmful effects of disintegration."

In addition to the forgoing is the persuasive fact that nearly 20 years (1894–1913) elapsed between Waring and Langmuir, without any practical contribution in the way of a gas-filled lamp in an art which has attracted to it men of the highest attainments and which offers the most alluring financial rewards. The Blau patent, No. 674,754 of 1901, Thomson British patent, No. 18,968 of 1899, Anker British patent, No. 19,847 of 1908, Siemens & Halske British patent, No. 12,156 of 1902, Sander British patent, No. 14,411 of 1901, and Abel, No. 12,156 of 1902, at best, merely contain isolated elusive suggestions, valuable, if at all, only for a starting point of infinite experiment.

The argument of defendant is respect of the coiled filament has not been overlooked; but, if it be assumed that this knowledge was old, the problem still remained as to how to utilize it successfully in combination with other elements. Considering, then, these and the other references to patents and publications, which need not be discussed, the prior art had pointed out no hope, and so it happened that the tungsten lamp with the Coolidge advance was the last word of practical consequence until Langmuir's ability and toil evolved the invention in controversy. Indeed, unless Langmuir had worked out the coordination, there would have been no invention. As is briefly stated in the testimony:

"Q. 262. Then the mere substitution of nitrogen in the most favorable lamp of the prior art, as it would have been substituted by a skilled lamp maker, would not have produced favorable results? A. Would have resulted in failure. I think that those lamps on the shelves made in that way, if they were run in vacuum and given to a person five years ago, five or ten years ago, to be filled with nitrogen and run, that he would not have suspected that any advantage was to be gained by the use of nitrogen.

"Q. 263. But you had sufficient confidence in the theories which you had worked out and the experiments which you had conducted to resort to extraordinary and unusual purification, and then for the first time you pro-

duced favorable results? A. Yes."

From the foregoing it is plain that there can be no doubt that Langmuir contributed a highly meritorious invention to this art.

Looking, now, to the claims, the first attack is against their indefiniteness; but the case in this regard is well within the principles laid down in Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 632, 148

C. C. A. 390. In the second place, there is nothing in the file wrapper which need give pause or embarrassment, for the most that can be said is that the claims were narrowed—a result which does not in any way help defendant.

So far as concerns these litigants, it is necessary to a decision of the case only to pass upon such claims as are clearly not open to argument. To go beyond that may be of no concern to defendant, but may inadvertently arrest the art. Plaintiff has fully appreciated the point of view indicated by the court in this connection on the trial in the observation:

"The question of invention is clear. The only other question raised is a technical one, whether those of the claims which do not specify tungsten are too broad to be sustained. We remark, first, in regard to this question, that it is hardly necessary to be decided in this case. If it were necessary, to save the patent, to read the limitation to tungsten into every claim in the case, it would not help this defendant, which uses tungsten. When, if ever, some other defendant comes along using Langmuir's co-ordination with some other filament, this question may, it would seem, be profitably discussed for the first time."

Even though not now probable, it is not impossible that some new filament, different from tungsten or other now known filaments, may be found. While it would seem that the claims would cover such a situation, it is undesirable to foreclose argument, especially as the claims are expressed in very comprehensive terms, which, though intended to mean much the same, might be capable of expansion.

It is enough, therefore, to hold claims 4, 5, 12, and 13 valid and infringed, without now passing on the remaining claims. Eibel Process Co. v. Remington-Martin Co., 234 Fed. at page 633, 148 C. C. A. 390.

IMPERIAL MACH. CO. v. REES et al. SAME v. METROPOLITAN LIFE INS. CO.

(District Court, S. D. New York. November 6, 1919.)

PATENTS \$\iff 328\$—For vegetable peeling machine valid and infringed.

The Robinson patent, No. 809,582, for a vegetable peeling machine, held valid and to cover a highly meritorious invention; also held infringed by a machine in which the abrading disk, while not "striated" within the terms of the claims, is made equivalent in function and operation by substituting an abrading surface of carborundum.

In Equity. Suits by the Imperial Machine Company against Frederick Rees and Frederick Stindt, copartners, and others, and against the Metropolitan Life Insurance Company, for infringement of the Robinson patent, No. 809,582, for a vegetable peeling machine, granted January 9, 1906. On final hearing. Decree for complainant.

A. Alexander Thomas, of New York City, for plaintiff. James H. Griffin, of New York City, for defendants.

MAYER, District Judge. These cases have been tried together, and defendants do not contest the validity of the patent, but con-

tend that, if the claims are construed in accordance with their language and in view of the prior art, they are not infringed.

The invention is highly meritorious in a modest art, and the patentee has struggled with many litigations over a long period of years to retain the fruits of his efforts. The following is a list of the cases in which decisions have been had: Judge Hough held claim 1 valid and infringed in Imperial Machine Co. v. Smith & McNell, after trial and argument in February, 1914. Judge Hough's opinion is not reported. Judge Lacombe granted a preliminary injunction on claim 1 in Imperial Machine Co. v. Jacobus (D. C.) 212 Fed. 958. Judge Hazel granted a preliminary injunction on claim 1 in Imperial Machine Co. v. Streeter & Co. (D. C.) 214 Fed. 985. Judge Learned Hand granted a preliminary injunction on claims 1, 2, 3, and 4 in each of the two cases here in controversy and in a third case (Whyte's Case) argued at the same time. The opinion of Judge Hand is not reported. Judge Mack, in Imperial Machine & Foundry Corporation v. Blakeslee, pending in this district, on a motion for a preliminary injunction, held claims 1, 2, 3, and 4 valid and infringed (September, 1919). Judge Learned Hand granted a preliminary injunction in July, 1917, in Imperial Machine Co. v. Reilly. Judge Tuttle, in the Eastern district of Michigan, in Imperial Machine Co. v. Reinhold Mfg. Co., granted an order for a temporary injunction in July, 1919. Judge McPherson, in Robinson Machine Co. v. American Fruit Machinery Co., held claims 1, 2, and 3 valid and infringed. 212 Fed. 959, 960. This decision, however, was reversed on the interpretation of the word "flat" in the claims, 191 Fed. 723, 112 C. C. A. 313. In these various cases nearly all of the prior art was either discussed or considered.

The point made by the defendants revolves around the word "striated"; it being urged that, because portions of defendants' disks are not "striated," therefore defendants do not infringe. The issue is thus clearly and simply presented, and it would be enough to rest upon the opinion of Judge Learned Hand, were it not for the fact that the plaintiff, after his years of struggle in litigation, is entitled to have another affirmative decision, which, if upheld, may permit him to enjoy the benefits of his invention for the remaining years of the patent.

In his specification the patentee states:

"This machine has relation to improvements in that type of machines for peeling vegetables wherein an abrading disk rotates at the bottom of a containing vessel provided with an abrading lining. Machines of this type have been hitherto designed according to two principal plans. In following one plan of construction inelastic sharp cutting edges are provided for acting upon the material to be treated, and the turning of individual vegetables is accomplished by special devices introduced in the path of movement of the mass. The second plan of construction involves the use of brushes as abrading agents, and the turning of the vegetables to bring all parts successively against the active surfaces is supposed to be accomplished by the elasticity of the wires or bristles in such brushes. In this form a free path of movement is left for the mass to be treated.

"While the present invention involves certain improvements capable of advantageous use with any class of active surfaces or abraders, the invention

furthermore comprises improvements in the abraders themselves, whereby the advantages of both of the above classes of construction are united, while avoid-

ing the disadvantages inseparable from each of the older plans.

"Among the advantages incident to this invention aside from the nature of the specific abraders used may be mentioned the following: The entire device can be easily opened for inspection and cleaning. The abraders are divided into sectional elements which are so arranged as to be easily removed and replaced when worn out, and this whether brushes or other abraders are used. The two normally separable parts of the machines are so joined that no water can escape, and this without the use of gaskets or other perishable devices. The top of the containing vessel is left entirely open and unobstructed, so that the machine may be charged without any impediment whatever. The impelling rotary disk at the bottom of the containing vessel is removable in sections without the use of tools, so as to expose the parts wherein the waste may accumulate, thus facilitating sanitary and convenient operation at all times."

The four claims in suit are as follows:

"1. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a horizontal flat striated portion and a raised portion, extending from near the circumference inward and having two sides sloping down to the flat striated portion of said disk, substantially as described.

"2. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a number of horizontal flat striated portions separated by raised portions at intervals extending from near the cir-

cumference inward, substantially as described.

"3. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a horizontal flat striated portion and a rounded raised portion rising gradually from near the center toward the circumference, substantially as described.

"4. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a horizontal flat striated portion, and a rounded raised portion bounded by two approximately radial edges extending from near the circumference inward and having a striated surface, substantially as described."

The history of the art shows that Robinson's is a pioneer patent, which first disclosed a practical successful machine for peeling a deep mass of vegetables at the same time. This machine has been extensively used by hotels and restaurants and by the United States Navy, with the result that the peeling, especially of potatoes in large quantities, has been quickly, cleanly, and efficiently done.

Robinson described in his testimony the problem which he sought to solve, and told briefly and convincingly how he finally hit upon the basic idea of the invention. The fundamental feature of the invention resides in an abrading disk having rounded lumps or raised portions to produce the necessary agitation and circulation of the vegetables, without which a machine of this character is not practical. Robinson's original disk had a roughened or striated surface. Later, in practice, he adopted carborundum, which, of course, has a granular or granulated surface. Defendants' devices copy the basic feature of the invention, and if the word "striated" in the claims is to be literally followed, then the departure is only in substituting an abrading surface such as carborundum or concrete for a striated or channeled surface. But such a substitution amounts only to the use of an equivalent in a case where such an equivalent is fully permissible. This is

so well and carefully stated by Judge Learned Hand that I shall adopt his language and quote it:

"Taken verbally the language of the first four claims of patent No. 809.582 are certainly not infrifiged, if for no other reason, at least because there are no striæ upon the surface of the abrading member. That word keeps substantially the same meaning as it had in Latin; it is a furrow or groove, and none of the supposed infringing devices have grooves, for the surface is covered with carborundum dust, which apparently Benziger was the first to invent. Nor, indeed, can we suppose that by striæ the patentee supposed he was dealing with anything else, because not only on page 3, lines 73-76, does he give the ultimate scope of his claims, which include 'any fine ridges presenting rubbing edges,' but in patent 942,932 he contrasts these striæ or 'abrading ribs' with a 'broken unstriated abrading surface' (page 2, line 51). It should therefore be conceded that the patent did not use words which can be held

literally to cover the carborundum surface later discovered.

"Yet this does not necessarily conclude the patentee under the doctrine of equivalents, if the same means accomplished the same result. Now, it is clear that the same result is accomplished by a carborundum plate as by a striated; the potatoes are peeled by the abrasion of a moving roughened disk. Furthermore, the same means are used-not literally the same I own, but substantially. If, for example, there had been two sets of striæ at right angles, or if the striæ had been serrated, it could scarcely be urged that the patent was successfully avoided, yet the resultant surface would be only a series of points set in uniform geometric relation. Does it make a difference that the points are irregularly set by the chance deposit of particles of carborundum? It seems to me not. The actual operation is this: The curved surface of the potato touches the abrading rib over only a minute line, whose length depends upon the amount that the rib penetrates the skin of the potato. That is, if course, literally different from the penetration of a point; but the doctrine of equivalents presupposes some differences and looks at the infringement only for functional variations. The variations arising from an improvement in the art do not materially change the operation of the means, and the infringement seems to me, though an improvement, to fall within the fundamental patent.

"I conclude, therefore, that as to Campion's peeler and the Metropolitan Life Insurance Company's infringement is established, and I am not embarrassed in that conclusion by the decision of the Circuit Court of Appeals for the Third Circuit. American Fruit Machinery Co. v. Robinson Machine Co., 191 Fed.

R. 723 [112 C. C. A. 313]."

Judge Learned Hand, in the same opinion, in considering Whyte's device in reference to another feature, shows the esteem in which he held the patent by stating:

"I cannot bring myself to destroy the whole value of what appears to have been a most valuable device by sanctioning so trivial an evasion of the obvious meaning of the claims."

Buist and the other slight additions to the prior art introduced in this case are of such little consequence that they do not call for discussion. It was shown on the trial that these devices would prove of no practical value, and they do not disclose anything which would have helped Robinson in his experiments looking toward a solution of the problem.

The patent is held valid, and the four claims are held infringed.

THE SHAWMUT. THE T. MORRIS PEROT. SOUTHERN S. S. CO. v. RANDOLPH et al.

(District Court, E. D. Pennsylvania. November 11, 1919.)

Nos. 70-72, and 97.

1. COLLISION \$\infty 43, 44-Duty of steam vessel to avoid sailing vessel.

When a steamer and sailing vessel are on courses which cross, the duty is imposed on the steamer to alter her course, if this will avoid the danger of collision, and the sailing vessel is bound to hold her course, and the only justification for nonobservance of this rule is some danger of navigation, or some emergency which forbids observance,

2. Collision €-49—Burden of Proof on Steam Vessel colliding with sailing Vessel.

Where a steamer admitted seeing some two miles away a schooner, which was approaching on a course that would cross, and the vessels collided, the steamer, in view of the navigation rules requiring it to avoid the collision, practically has the burden of proving that the collision occurred despite its observance of the rules.

3. Collision =18-Negligence contributing to injury.

Negligence with which the law maritime concerns itself, as in the case of the law of negligence everywhere, is not negligence, but negligence which contributes to the injury done; and hence a vessel is not liable for negligence which did not contribute to the collision.

4. Collision \$\infty 45\$—Fault as between steam and sailing vessels.

Where a steam and a sailing vessel, proceeding on courses which would meet, collide, held that, under the circumstances, the steam vessel, which was bound to avoid the sailing vessel, was solely liable, being negligent in failing to give the sailing vessel space in which to safely pass, and the sailing vessel not being negligent in an attempt to change its course when it appeared that a collision was imminent.

In Admiralty. Libel by William F. Randolph, master and part owner of the schooner T. Morris Perot, on behalf of himself and the other owners of said schooner, and on behalf of himself and other members of the crew, against the American steamer Shawmut, together with a libel by William F. Randolph, late master of the schooner T. Morris Perot, against the American steamer Shawmut and against the owners of the schooner T. Morris Perot, together with libel by Stephen Olsen, late mate on board of the schooner T. Morris Perot, against the American steamer Shawmut and against the owners of the schooner T. Morris Perot, together with a libel by the Southern Steamship Company, owner of the steamship Shawmut, against William F. Randolph and others, owners of the schooner T. Morris Perot. Sur trial hearing on bill, answers, and proofs. Libels against the steamer Shawmut sustained.

Howard M. Long, of Philadelphia, Pa., for Randolph and Olsen. H. Alan Dawson, Biddle, Paul & Jayne, and M. Hampton Todd, all of Philadelphia, Pa., Proctors for owners of the Shawmut and the T.

Morris Perot.

DICKINSON, District Judge. These cases all grow out of the same occurrence. This occurrence was the collision of the steamer

Shawmut with the three-masted coasting schooner T. Morris Perot on the night of September 28, 1913. The collision occurred just south of Fenwick Island Lightship, in the Atlantic Ocean, off the Delaware coast. A libel was filed by the schooner, and a cross-bill by the steamer. There are libels also by the master and crew of the schooner for personal injuries.

The facts of this collision called forth comments at the argument from the proctors of the respective parties, which each in its way fitly presents the general aspect of this case. One was to the effect that the question presented was whether the broad Atlantic was wide enough to enable two vessels to pass each other in safety when each had a clear view of the approach of the other for a distance of nearly, if not quite, three miles. The other was the statement that this collision could not have occurred without the grossest negligence on the part of one of these vessels or both.

In view of the latter statement, as each is seeking to put the blame upon the other, the easy solution of the problem is suggestive of a finding that they were both to blame. However easy this may be, it is not a satisfactory solution, without more light being thrown upon what

led up to the collision.

In getting at the truth of the responsible causes of happenings on the water, the inquirer is hampered by certain inbred and ineradicable predilections and prejudices and traditional feelings, with which those who follow the water are imbued. One which has often been observed is that every one on a boat identifies himself with his boat, and is quite as slow to admit the blame to be there as the ordinary man is to admit the fault to be his. Another is the class feeling which is aroused and always manifested. The navigator of every steamer looks upon the navigators of sailing vessels as the personification of careless and reckless management. He is not only prepared to believe, he assumes it to be the fact, in every case of collision of steamer and sailing vessel, that the latter was being navigated in disregard of every rule of navigation, and of everything except what pertained directly to the handling of the Sailing masters retort in kind, and are in their turn ever ready to believe that steamers have no regard for the safety of sailing vessels, and refuse to recognize the right of the latter to navigate the same waters with themselves. These opposing attitudes and points of view are sure to produce conflicts of testimony in every litigation. The impartial inquirer must perforce find a viewpoint of his own, and hold every one to the observance of the rules and regulations which are laid down for the common good and for the guidance of all.

[1] To find a beginning for the inquiry to be made, we start with the proposition that, when steamer and sailing vessel are on courses which cross; the duty is imposed upon the steamer to alter her course, if this will avoid danger of collision, and, in order that this rule may accomplish its purpose, the correlative duty is imposed upon the sailing vessel to hold her course. The only justification for nonobservance of this rule is some danger of navigation, or some emergency, which forbids observance. When, therefore, as here, there was no justification for a departure from this rule of action, other than some sudden emergency,

and no explanation which accounts for what occurred, except neglect of the rule, the inquiry is narrowed to the point or points indicated.

[2] The finding is made of the fact, before intimated, that under the conditions existing the lights of the schooner could be made out at a distance of nearly, if not quite, three miles, and those of the steamer at a greater distance. This fact compels the inference that the rule adverted to was disobeyed or there would have been no collision, and as the primary duty of the steamer was to be outside of what may be called the zone of collision, it practically imposes upon the steamer the burden of causing it to appear why the collision occurred, if the steamer observed the rule.

This burden the very fair and capable proctor appearing for the steamer recognizes and assumes, and is ready with an explanation, which is clear and intelligible in its statement, and the theory of it is consistent with all the facts which are not in dispute. The theory is met, if at all, by the version of the disputed facts which is given by the

master and crew of the schooner.

[3, 4] There is a minor fact which has some bearing upon the main fact to be found. This relates to the relative speeds of the two vessels. The schooner was running free before a fairly fresh breeze, and was running almost dead before the wind. She was making about nine knots an hour. The steamer was making about the same speed. Some question has been made of when the steamer made out the schooner's lights. All question as to this is resolved by the admission, frankly made on behalf of the steamer, that she made out the lights in ample time to enable her to so maneuver as to avoid the collision.

The theory of the steamer begins with the averment of the fact that she had notice of the presence of the schooner when the vessels were a mile apart in distance and between three and four minutes in time. The next fact averment is that the schooner showed a red light only. The schooner, in its general direction, was bound south; the steamer, north.

The conditions named indicated that the vessels were passing on converging lines, and that if both vessels held to their courses they would collide, or that the steamer would cross the bows or cross astern of the schooner. These conditions further dictated that the steamer should pass under the stern of the schooner, and to assure this should port her helm.

The next averment of fact is that the steamer did port her helm, and further that she slowed her engines, and followed this (as will later appear) by reversing them. The assertion is confidently made that the effect of what was done was to turn the course of the steamer to the eastward and away from the course of the schooner, and that if the schooner had held her course, as she was expected to do, and as it is further asserted was called upon to do, the vessels would have passed in safety. On this theory, what occurred is accounted for by averments of what was done by the schooner.

Up to the time the steamer's helm was ported, the schooner, as before stated, was showing a red light. Almost at that moment the red light disappeared and a green light was shown. This meant collision, or grave danger of it, because it meant that the schooner was being

thrown athwart the course of the steamer and right under her bcws. It was then the engines were reversed. The conditions immediately after the collision which then occurred are said to bear out the theory thus outlined. Before a change of course on the part of either vessel, the steamer bore off the schooner's port bow. If there had been a collision under these conditions, the steamer would have struck the schooner on the latter's port side. When the collision did occur, the schooner was struck on her starboard side, and finally was directly across the bows of the steamer. This position of schooner and steamer could not possibly have been brought about, except by a changing of the course of the schooner to the eastward.

All this is entirely clear, and is further confirmed by the statements made by the master of the schooner after the collision. The judgment would rest satisfied with the finding indicated, except that the query might enter and linger in the mind why the schooner was guilty of such gross negligence as is implied in this version of the facts.

The theory of the steamer has ready the required explanation. lies in the following facts: The schooner was short-handed. As a consequence, she had no lookout during the mate's watch. The watch was about being changed when the collision occurred. The schooner had been, as before stated, running before the wind and was winged out. The wind was hauling around to eastward, and coming more and more from that quarter. It came in puffs, and each puff was little more from the east than the one before it. When the master came on deck to relieve the mate, he came a while before the mate's watch was up. He saw that it would be necessary to change the sails. This involved jibing the spanker from port to starboard. He decided to do this then, and not wait. He was getting ready for this as the steamer approached, and did it at about the time the steamer shifted her helm. The helm of the schooner was put to starboard to assist in this maneuver, thus bringing her head to port, or this was brought about by the heavy sail swinging over to starboard and filling. In doing this the master did not know of the proximity of the steamer. This was due to the absence of a lookout forward, and that the schooner's sails prevented the man at the wheel and any one who was aft seeing anything dead ahead. If the steamer had been made out before this, its presence was forgotten for the few minutes the jibing was being done.

It must be admitted that what happened might have happened as described, and that this theory plausibly accounts for conduct on the part of the schooner which otherwise might be thought unaccountable. and that the theory is consistent with all the facts so far disclosed. The theory, because of this, can be combated only by the disclosure of other facts, or by the successful denial of the truth of the fact statements on which it is based. The schooner thus meets the steamer's theory. This new fact situation and changed fact situation are disclosed by the schooner's version of what occurred. That version is as follows:

The steamer's theory has been first stated, because it was in the development of the trial the first to be given, and for this reason the schooner's case was in large part in the form of an answer to the theory thus set up. In giving the story of the collision put forth by the schoon-

er, we will indicate the points of conflict between the two accounts. In order to do this, it will be recalled that the picture drawn by the steamer of the lines of approach of the two vessels showed converging lines with such a sharpness of angle that the red light of the schooner was opposed to the green light of the steamer, the schooner showing off the steamer's starboard bow, and the steamer off the schooner's port bow, and that the speed of each was nine knots. This was accompanied with the statement, as indeed the theory itself implied, that these were the only lights shown because of the angle of approach. There is agreement only upon the speed, and the fact that the green light alone was seen by the schooner. According to the version of the latter, the vessels were approaching almost exactly head on. All the witnesses for the schooner place the steamer slightly on their starboard bow, except the master, who placed her a little off the schooner's port bow, but practically dead ahead. The masthead lights of the steamer were made out when she was perhaps seven and at least five miles away, and these indicated that she was headed almost directly for the schooner. Each vessel changed her course slightly, but these changes had no bearing upon the collision and did not change the line of approach.

Just here appears the first difference between the accounts. As both the schooner's lights were unquestionably burning, if her account is correct, both lights should have been made out by the steamer, and the only explanation of the fact that the steamer showed no red light is

that this light was not burning.

We will not take the space to attempt to reconcile these differences, because, as we view it, neither the absence of the red light, if it was absent, nor whether the vessels were holding the same course in reverse or converging courses, affects the question of who was at fault. The absence of the red light (we say again if it was absent) did not mislead the schooner, and this difference as to the courses of the approach made no difference in the result that the vessels met, and did not alter the duty of the steamer to keep out of the way of the schooner, nor in any way interfere with the steamer passing the schooner port to port. The only possible bearing it has upon what happened, and upon the steamer's theory of why it happened, is that the final swing of the schooner to port was less of a swing, if the schooner's statement of the approach courses is accepted, than if that of the steamer is correct. The difference is only an illustration of the hopelessness of the expectation that those on board of vessels complaining of each other will ever see anything alike.

There is another difference of a like small value. The steamer did not make out the schooner until she was within a mile or three-quarters of a mile. The schooner avers the steamer should have seen the schooner's lights for three miles, or at least two. It is asserted that these facts convict the steamer of negligence, because they argue the absence of

a proper lookout.

The Carroll, 75 U. S. (8 Wall.) 302, 19 L. Ed. 392, and other cases, are cited in support of this proposition, and it is very confidently urged that the failure to keep a proper lookout was the proximate cause of the collision. It is to be observed, however, that the negligence with which

the law maritime concerns itself, as does the law of negligence everywhere, is not negligence, but negligence which contributes to the injury done.

The finding made is that the steamer made out the schooner in ample time to get out of her way. This the steamer admits. It follows that the proximate cause of the collision, if the steamer was responsible, was in the failure to avoid the schooner, and not in the failure to discover where she was.

There is, however, another difference in the accounts given which is important, if not controlling. It will be further remembered that the theory of the steamer was based upon the fact that the schooner changed her course in the act of jibing her spanker in ignorance or momentary forgetfulness of the proximity of the steamer. It is this which gives plausibility to the theory. The schooner meets the theory with a denial of this vital fact upon which it is based. The schooner had been running free, with her mainsail and spanker booms over the port rail. The wind, as before stated, had been hauling more and more around, and was coming in puffs; each succeeding puff coming more from the east. The master had in mind to set these sails wing and wing. He deferred this first until the change of watch at 4 o'clock, and he says he further deferred it because of the nearness of the steamer and his fear that the maneuvering of the schooner might confuse the steamer. The crew jibed the mainsail over without waiting for him. It was a small sail compared to the spanker, carried no topsail, and being blanketed by the spanker, could be easily handled. This put the mainsail boom over the starboard rail and left the spanker to port; the schooner after that sailing wing and wing. The wind continuing to haul around to the eastward, the master had in mind to jibe the spanker over also, but did not do so for the reason stated. The steamer all this time was, as he saw her, dead ahead. He held the schooner steady on her course in obedience to the well-known rule, and kept her so until the steamer was so close that a collision was inevitable, and then, in order to ease the shock, by receiving a glancing instead of a head-on blow, he ordered the helm put to starboard. The collision came so soon that the witnesses for the schooner all testify that the schooner did not have time to feel her helm.

Right here is a very significant fact to be found, all the circumstances affecting which should have been developed more fully than they have been. Was the spanker left over the port side, as it had been, or was it being jibed at the time of the collision? It was a large and heavy sail, and had above it and as part of it a big topsail. With such a wind as was blowing, no one would have thought of jibing over such a heavy sail all standing. Something would have carried away. Before the jibing was done, the peak would have been lowered, and this would have required the taking in and resetting of the topsail, and the sheets would have been hauled home and eased off as the boom went over.

We have no evidence of anything having been done in preparation. On the other hand, at least, just after the collision and as the immediate result of it, the bows of the schooner were turned so far to port that

the spanker must have jibed then, if it had not before. What happened when that heavy sail and boom, with loose sheets, went sweeping over the deck in a full half circle from port to starboard? We are not told anything, except the casual remark that "the spanker went over," and "the force of the blow broke the hook and the spanker went over"; "the spanker jibed over after" the collision, etc. It may be, of course, that the attention of every one was so taken up by the collision that the particulars of nothing else were specially noted. These particulars were not more fully developed at the trial, because the issues did not at the time clearly appear. The testimony of the witnesses on behalf of the steamer had been taken by depositions, as was that of all the witnesses for the schooner, except that of the master, so that the trial was nothing more than the taking of his deposition. In consequence, the significance of this branch of the case did not then present itself. All the testimony, however, so far as it goes, goes to the establishment of facts which destroy the steamer's theory, because they go to the other fact that the turning of the schooner to port, so far as she did turn, was not the result of the jibing of the spanker, and that the changing of course, so far as there was any, was prompted by the necessities of an emergency which forbids any finding of negligence on the part of the schooner or the imputing to her of any blame for the collision.

There is no doubt that the steamer ported her helm, and it may be (although this finding we cannot make) that she would have cleared the schooner if the latter had held her course, and it may further be that the schooner used bad judgment in putting her helm to starboard. The judgment exercised, however, was under the evidence a hasty judgment, forced upon the schooner by the steamer, and although bad judgment, or even a mistake in judgment, may be evidence justifying a finding of negligence, it will not justify such finding when it is excused by an emergency created by the negligence of the one who makes the complaint of bad judgment.

We are influenced in reaching the conclusion we have reached by the fact that the steamer should have made out the schooner in ample time to have moved outside of what we have called the zone of collision, and did see the schooner, as is admitted, in time to keep out of her way. The collision nevertheless occurred, and the steamer can escape a finding of culpability only by the facts, making it clear that the collision occurred through some cause other than failure in her duty to

give the schooner sea room.

In every one of the long line of cases to which we have been referred by the proctor for the steamer in his clear and very helpful discussion of this case, it will be found that the sailing vessel, held responsible for collision with a steamer, had changed her course, not because of necessity, born of some danger of navigation, or of some emergency decision forced upon her by the negligence of the steamer, but because she unexpectedly changed her course wholly for her own convenience, or to get some benefit or advantage which might have been deferred until the danger of collision was past.

The findings of fact made and conclusions reached are:

1. The steamer Shawmut was wholly to blame for the collision, in

that it was brought about by the negligence of the steamer in not giving the schooner sufficient space in which to safely pass.

2. The schooner was without blame for the collision, in that she was guilty of no negligence; the error of judgment in putting her helm to port, instead of holding her course, being the result of a sudden impulse itself resulting from the negligence of the steamer.

3. The several libels against the steamer should each be sustained,

and the libelants recover their respective damages, with costs.

The conclusion reached is supported by all the cases, among which the following, taken more or less at random from the briefs submitted, are cited as sufficient authority for the ruling made: The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; The Oregon, 59 U. S. (18 How.) 570, 15 L. Ed. 515; The Carroll, 75 U. S. (8 Wall.) 302, 19 L. Ed. 392; The Ardanrose (D. C.) 115 Fed. 1010; The Truro (D. C.) 35 Fed. 317; The Potomac, 75 U. S. (8 Wall.) 590, 19 L. Ed. 511; The Illinois, 103 U. S. 298, 26 L. Ed. 562; The Europa (D. C.) 116 Fed. 696.

We have discussed the case without reference to the conversations aboard the Shawmut. There is little real dispute as to what they were. The master of the schooner, it is true, makes a denial; but this is more to the stated effect of what was said than of what was said. When rightly interpreted, what was then said was what was testified at the trial in every substantial respect. The schooner did put her helm to starboard. The captain had for his schooner the love of a parent for his child. In his grief over her loss he regretted everything that had happened. This included what he had done. He was, of course, in doubt about doing it; but after he had done it the reason he gave for not undoing it was a good one, and the reason he gave for doing it was the same he gave at the trial. We see no real conflict between his statements and his testimony, which reflects upon the latter.

The finding against the steamer is forced by what it did and omitted to do by its own admissions. It made out the schooner, but did not

soon enough move to get out of the danger zone.

We have ruled all questions upon which we have been asked to rule at this time.

The libels against the steamer are sustained.

THE ESROM.

(District Court, E. D. New York. November 13, 1919.)

SHIPPING \$\igchim\$ 133—Lien on vessel for care and transportation; signing
of bill of lading.

Notwithstanding charter of vessel provided that captain should sign bills of lading, and they were signed only by the charterer, by receipt of the goods by the vessel she was bound, and lien on her for care and transportation then attached.

2. Shipping \$\infty\$=133—Attaching of lien on vessel for care and transportation; breaking ground for voyage.

Attachment of lien on vessel for care and transportation is not deferred till she break ground for the voyage, but accrues with obligation to carry when goods are laden on board.

3. Shipping \$\infty\$ 125—Injury to cargo during delay in sailing; vessel's liability.

The master of the ship, knowing of the perishable character of dried fruits received on board for transportation, and the consequences thereto of failure to sail in a reasonable time, there was a breach of duty for which the boat should respond, no attempt having been made by the owner to notify shipper or to reship the goods, though sailing of ship was delayed two months through dispute between owner and charterer.

 Shipping ← 132(3)—Injury to cargo during delay in sailing; proof as to voyage.

To establish liability of vessel for deterioration of cargo of perishable goods during unreasonable delay in sailing, it is not necessary for libelant to show that, had she sailed seasonably, the voyage would have been completed in such time and under such conditions as would cause no deterioration.

In Admiralty. Libel by the J. K. Armsby Company against the steamship Esrom, her engines, etc.; the Aktieselskabet Dampskibet Island, claimant. Interlocutory decree for libelant.

Harrington, Bigham & Englar and Curtis, Mallet-Prevost & Colt, all of New York City, for libelant.

Burlingham, Montgomery & Beecher, of New York City, for claimant.

GARVIN, District Judge. A libel was filed against the Danish steamship Esrom by the J. K. Armsby Company, claiming damages by reason of a failure to convey to Copenhagen 5,100 boxes of prunes, which were placed on board on or about August 11, 1915, and which deteriorated in value thereafter. The Esrom did not sail until October 9, 1915, the prunes having been previously removed in a damaged condition, due to decay from heat, while the boat was lying at the pier.

An answer was interposed by the owner and claimant of the vessel, Aktieselskabet Dampskibet Island, setting forth that, at the time the goods were loaded, the Esrom was under charter to the Interocean Transportation Company of America, Incorporated, which issued the bill of lading, and that the contract of affreightment which had been made with the Interocean Company gave that company no authority

to enter into any contracts of affreightment or to issue bills of lading in behalf of the claimant or the Esrom.

The charter to the Interocean Company provided by article 1 that the Esrom load at New York-

"a full and complete cargo of wheat and/or maize and/or other lawful merchandise, and being so loaded shall therewith proceed, as ordered when signing bills of lading to Gothenburg and Copenhagen,

"Charterers shall pay the vessel freight as follows: 57/ (fifty-seven shillings B. S.) per ton on her actual dead weight carrying capacity of cargo. Freight prepaid in New York before steamer leaves New York, less 21/2 per cent. discount."

Article 13 provided:

"The captain shall sign bills of lading or master's receipts as and when presented, without prejudice or reference to this charter party, and any difference between the amount of freight by the bills of lading and this charter party to be settled at port of loading before sailing, as customary."

The libelant paid the freight, \$1,685.04, in advance, direct to the Interocean Company, which issued its own bill of lading, signed "Interocean Transportation Co. of America, Inc., by Sam'l G. Jackson." The owner had a dispute with the charterer over the payment of freight under the charter party, as a result of which the ship did not sail until October 9th.

[1] Without disputing that the general rule that the owner of the cargo has a valid lien upon the vessel for the care, transportation, and delivery thereof is well settled (The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772), the claimant insists that this rule does not apply for two reasons:

First, that there is no obligation on the part of the vessel to transport the cargo, if the bill of lading is signed by the charterer and not by the master, until the charterer has performed his obligations, which by the charter are conditions precedent to the sailing; and

Second, that there is no liability on the part of the vessel to the cargo to proceed with it under the bill of lading here involved, until

she breaks ground for her voyage.

Voluminous and able briefs have been submitted, and the industry of counsel has brought to the attention of the court many authorities, the effect of most of which it is unnecessary to discuss, because they are clearly distinguishable from the case at bar.

The real objection advanced by the claimant is that there can be no lien because the master did not sign the bill of lading. However, the goods were received by the vessel, and I am of the opinion that by their receipt the boat was bound. The fact that her owners had chartered her should be no objection to this, for the only object of the charter was to put the charterer in a position to give shippers the right to place freight aboard for shipment, and the charter itself provided that the captain should sign bills of lading.

[2] It does not seem that, under the authorities, it can be successfully claimed that the lien does not attach until the vessel breaks ground for the voyage. I think a correct statement of the law is to be found in the opinion in the case of Blowers v. One Wire Rope Cable (D. C.) 19 Fed. 444 at page 446, by Judge Brown:

"I understand the law, as generally administered, to be that the lien of the vessel upon the goods, and of the goods upon the vessel, attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. The Bird of Paradise, 5 Wall. 545, 562, 563 [18 L. Ed. 662]; Bulkley v. Naumkeag, etc., Co., 24 How. 386, 393 [16 L. Ed. 599]; The Yankee Blade, 19 How. 82 [15 L. Ed. 554]; 1 Pars. Shipp. & Adm. 174, and notes; The Hermitage, 4 Blatchf. 474 [Fed. Cas. No. 6,410]; The Eddy, 5 Wall. 481, 494 [18 L. Ed. 486]."

See, also, The Hiram (D. C.) 101 Fed, 138, 140.

The Circuit Court of Appeals for this circuit has stated in the comparatively recent case of National Steam Navigation Co., Ltd., of Greece v. International Paper Co., 241 Fed. 861, 154 C. C. A. 563:

"The obligation of the ship to carry, and of the shipper to pay for the carriage, accrues when the goods are delivered to the ship."

- [3] The claimant suggests that the master of the Esrom was not chargeable with notice of the perishable nature of libelant's shipment. The testimony of the witness Coxon, which was not contradicted, is in part as follows:
- "Q. Will you state what, if any, precautions there are which are customarily taken on steam vessels with respect to dried fruit cargoes? A. Well, it is customary to stow them in the coolest place in the ship, where they get the most ventilation, thorough ventilation."

It is clear from this and other testimony that the master or his representative, who received the goods on board, must have known of their nature, and of the consequences in the event of the failure of the vessel to sail within a reasonable time. Under such circumstances, when no attempt was made by the owner to notify the shipper or to reship the goods, it seems to me that there was a clear failure of duty, and that for the damage the boat should respond. The Gordon Campbell (D. C.) 141 Fed. 435.

Even if the master was not charged with notice of the contents, I am satisfied from the testimony of Capt. Coxon that, if the vessel had sailed with reasonable promptness, no damage would have resulted. The cause of action was therefore complete before there could have been any delay to the ship in reaching her destination after her voyage was begun.

[4] The claimant contends that the libelant must show that the voyage would have been completed within such a time and under such conditions as would cause no deterioration to the cargo, but with this I do not agree. It seems to me that that would be, at best, a matter of conjecture.

It follows, therefore, that the libelant will have an interlocutory decree.

In re CONTINENTAL PRODUCING CO.

(District Court, S. D. California, S. D. October 30, 1919.)

No. 3284.

- 1. BANKRUPTCY \$\ightharpoonup 224\to Referee has no jurisdiction as to adverse claims.

 A referee has no jurisdiction, except that conferred by Bankruptcy Act July 1, 1898 (Comp. St. §§ 9585-9656), which, in the absence of consent, does not extend to the determination of a controversy between a bankrupt or his trustee and a third party, in which a bona fide adverse claim is made by such party.
- 2. BANKRUPTCY 224—JURISDICTION OF REFEREE AS TO COUNTERCLAIMS.

 While Bankruptcy Act July 1, 1898, § 68a (Comp. St. § 9652), confers on a referee jurisdiction to consider the merits of a counterclaim asserted by the trustee against a creditor, it is only for the purpose and to the extent of ascertaining the net amount, if any, due to the creditor.
- 3. Bankruptcy \$\iff 224\$—Jurisdiction of referee as to counterclaim.

 Where a counterclaim, which a trustee seeks to set off against the claim of a creditor, clearly exceeds such claim, unless the trustee waives the right to any excess, the referee should refuse to consider and determine it, but should make an order, on allowance of the creditor's claim, withholding any payment thereon until the counterclaim can be adjudicated in a court of competent jurisdiction.
- 4. Bankruptcy \$\infty\$ 224—Jurisdiction of referee as to counterclaim.

 A referee held without jurisdiction, over the objection of a creditor, to make a finding of the amount due from him to the bankrupt estate on a counterclaim, in excess of his claim against the estate.

In Bankruptcy. In the matter of the Continental Producing Company, bankrupt. On petition of Simon Goldstein to review order of referee. Reversed.

Hunsaker & Britt, Le Roy M. Edwards, Samuel Poorman, Jr., and G. H. Janeway, all of Los Angeles, Cal., for petitioner.

Adams, Adams & Binford, of Los Angeles, Cal., for trustee.

I. Henry Harris, of Los Angeles, Cal., for bankrupt.

BLEDSOE, District Judge. In this matter Simon Goldstein filed his claims as a creditor for sums in excess of \$6,600 against the bankrupt estate. They were duly allowed, but thereafter the trustee petitioned for their reconsideration, and by way of defense set up a counterclaim in the sum of \$43,700 as for moneys owing to the bankrupt from the creditor upon an entirely disconnected transaction. Over the timely and insistent objection of the creditor, and without his consent (Bankruptcy Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 [Comp. St. § 9607]), the referee proceeded to a hearing upon the merits of the set-off or counterclaim, and determined that the same was well taken. After allowing the claims of the creditor, he made and entered the following order:

"The trustee is entitled to a set-off against the claims filed by Simon Goldstein in the within matter, and allowed at \$1,916 and \$4,703.25.

"And it is ordered and adjudged that Simon Goldstein is indebted to the Continental Producing Company in the amount of \$37,080.75, with lawful interest thereon from August 30, 1916, being the difference between the sum of \$43,700 and the proven claims of Simon Goldstein as allowed."

Upon petition for review, it is urged that the consideration of the counterclaim of the trustee was without and beyond the jurisdiction of the referee in any capacity or for any cause, and that the order made by him, in so far as it purports to make a finding of indebtedness due from Simon Goldstein to the Continental Producing Company in the

sum of \$37,080.75, is void.

[1] After a careful consideration of the matter, I can see no escape from the conclusion thus sought to be established by the petition-The referee's court and his jurisdiction are creatures merely of the Bankruptcy Law, and he possesses no jurisdiction or authority save that conferred upon him by that statute. The purpose of the Bankruptcy Law, as well, indeed, as the function of the bankruptcy court, is to collect, administer, and distribute, to those ratably entitled thereto, estates of bankrupts. It has been specifically pointed out, however (Bardes v. Hawarden Bank, 178 U. S. 524, 537, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Wood v. Wilbert, 226 U. S. 384, 387, 33 Sup. Ct. 125, 57 L. Ed. 264; In re Hutchinson & Wilmoth, 158 Fed. 74, 85 C. C. A. 404; Collier on Bankruptcy [11th Ed.] pp. 516, 519, 523, 531, 539-541), that no general jurisdiction, especially in the absence of consent, was accorded to the bankruptcy court to determine controversies between the bankrupt or his trustee and a third party, with respect to which a bona fide adverse claim was made by such party.

Section 68 of the Bankruptcy Act (Comp. St. § 9652), does provide that, in all cases of mutual debts or mutual claims between the estate of the bankrupt and a creditor, the "account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid." Respondent's contention is that, the trustee's counterclaim having been urged under the terms of this section, it became the duty of the referee to give it consideration for the purpose of enabling the account to be stated and one debt to be set off against the other. He insists that this would have been clearly so, had the counterclaim been for a less amount than the total claim presented by the creditor against the bankrupt estate, and that in such event, under established precedents, it would have been the duty of the referee to strike a balance and allow the claim of the creditor only for such overplus as was shown to exist. It is then said that if the referee could thus enter upon a consideration of the entire matter, with respect to any amount up to the very sum demanded by the creditor, out of considerations of expediency, if not of necessity, it was proper that the referee should proceed in like manner with respect to a case in which the amount claimed by the trustee against the creditor was in excess of the claim presented by the creditor himself. Then it is asserted that, if it were found in the course of such hearing that the amount thus claimed by the trustee was a valid charge against the creditor, a finding to that effect should be made, as was done in the case at bar.

In this connection, although it is admitted that such a finding would not of itself constitute an enforceable judgment against the creditor, yet it is urged that such finding would be conclusive against him, and that, in a suit thereafter to be brought upon the alleged overplus thus found to be due, he would be estopped from urging any defense other than that of payment. Breit v. Moore, 220 Fed. 97, 99, 135 C. C. A. 573. That is, in any subsequent suit, the merits of the claim would not be inquired into, on the ground that there had been an adjudication had in the matter, and that the same question could not again be litigated. The net result is that, though the finding of the referee with respect to the counterclaim of the trustee does not, in form, constitute a judgment against the creditor, yet it does in substance, in that the creditor is estopped to go behind the finding thus made, and the only defense he would have to a subsequent suit brought to secure an enforceable judgment would be the defense of payment made. In this wise, and in its substantial aspects, the finding is tantamount to a judgment, and the creditor stands in the position of having had a money judgment pronounced against him by a court which, under the law limiting its power, was without jurisdiction so to do.

[2] Though section 68, supra, does confer upon the referee jurisdiction to entertain consideration of the merits of an asserted counterclaim, this is done only for the purpose and to the extent of ascertaining the net amount, if any, due to the creditor from the bankrupt estate. The spirit and purpose of the Bankruptcy Act, and of the decisions construing it, do not look to the rendition of any general judgment in favor of the bankrupt estate as against third persons, even though they may be proven creditors. The jurisdiction, I am confident, in the absence of consent, goes no further than to permit of an inquiry into and determination of, the net amount due the creditor. Outside and beyond that, the general laws of the land, and the courts authorized to administer them, must be looked to for affirmative relief.

[3] Upon the reconsideration of the creditor's claims in connection with the asserted counterclaim of the trustee, it would be the duty of the referee, and clearly within his jurisdiction, under the terms of section 68, supra, to enter upon a determination of the validity and extent of those claims. Having determined that the creditor had valid claims against the estate, in such amount as he might find, it would then be his duty to consider whether or not such claims were to be subject to offset in virtue of the counterclaim asserted. If the amount of the counterclaim as asserted was clearly in excess of the amount of the creditor's claims as allowed, and if the trustee did not then and there waive a recovery, and the right to proceed further against the creditor for all amounts in excess of the claims actually allowed, then it would seem as if, under the authorities, it was the instant duty of the referee to refuse to enter upon a determination of the merits of the asserted counterclaim, because of the fact that he lacked jurisdiction. 34 Cyc. 646. He should have contented himself with merely staying the payment of the creditor's claims until there had been a final judgment upon the counterclaim, remitting the trustee in his prosecution of the same to a court possessing the requisite jurisdiction.

If the trustee had entered his waiver with respect to the excess and the right to proceed further against the creditor, I am constrained to believe the referee would have had jurisdiction to enter upon the consideration of the entire counterclaim, merely for the purpose of determining whether or not the amount actually due thereon was sufficient to offset, in whole or in part, the claims actually allowed in favor of the creditor. 34 Cyc. 647.

[4] It would seem as if, in the absence of the necessary waiver by the trustee, the referee would not be entitled to consider the merits of the entire counterclaim, and then, if in his judgment it was sustained in an amount in excess of the creditor's claims, to allow it for the amount of those claims, thus offsetting completely such claims, and then remitting the trustee to another suit for the balance. The creditor may not thus be harassed by having two suits for the same demand. Furthermore, it would be incongruous to permit a hearing by the referee with respect to a part of the demand, and an allowance perhaps of that part, and then a hearing in another tribunal with respect to another part of the demand, and a possible disallowance by that tribunal of the part brought within its jurisdiction.

So I am constrained to hold that, except in the event of a specific waiver by the trustee of all of his demand in excess of the allowed claim of the creditor, it is the duty of the referee to refuse to entertain consideration of the merits of the counterclaim at all, and, upon the allowance of the claim of the creditor, to hold all payments in satisfaction of the same in abeyance, until there shall have been a final determination of the question of the amount due the bankrupt estate in a forum having jurisdiction of such controversy. Collier on Bank-

ruptcy, supra, p. 1099.

Obviously the trustee herein has not heretofore entered his waiver with respect to the excess referred to. If, hereafter, he shall do this, it will then be the duty of the referee, as I conceive it, to enter upon a consideration of the merits of the counterclaim, allowing the respective parties to introduce such proper evidence as they may desire, and make such finding and judgment with respect to the offsets to the creditor's claims, up to their total amount, as may be required. If the trustee declines so to do, then it will be the duty of the referee to allow the claims of the creditor in the amounts heretofore ascertained by him, and to make an order directing a withholding of all payments or dividends thereon, until there shall have been a final determination with respect to the counterclaim.

Upon the consideration thereafter of the judgment in such suit, respecting the matter involved in the counterclaim, he will make such order as will be appropriate under the terms of section 68, supra. There is no suggestion in the case, of course, that anything in the nature of a preference (Bankruptcy Act, § 60b [Comp. St. § 9644]) is involved. Decisions recognizing the right of the referee to consider the merits of, and make a binding adjudication with reference to, an

alleged preference, have no applicability.

The order heretofore made by the referee is therefore annulled, and the matter is re-referred to him, with instructions to take such action as will be in conformity with the views expressed herein.

EVERETT SCHOOL DIST. NO. 24, SNOHOMISH COUNTY, WASH., v. PEARSON, County Treasurer, et al.

(District Court, W. D. Washington, N. D. March 27, 1918.)

No. 142.

Woods and forests S—S—Donation from forest reserve income creates
trust for public schools and roads.

Act May 23, 1908 (Comp. St. § 5149), providing that "twenty-five per centum of all money received from each forest reserve during any fiscal year * * * shall be paid at the end thereof by the Secretary of the Treasury to the state or territory in which said reserve is situated, to be expended as the * * * Legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest receive is situated," creates an express trust, of which the several school districts and road districts of such counties are the beneficiaries, and any such district may sue in equity to enforce the trust.

2. Constitutional law \$\equiv 63(3)\$—Delegation of power; appointment of fund created by statute,

Under Act May 23, 1908 (Comp. St. § 5149), donating a fund to a state, "to be expended as the * * * Legislature may prescribe for the benefit of the public schools and public roads" of certain counties, the Legislature cannot delegate power to the county commissioners to apportion the fund between the school and road districts.

3. Woods and forests & Apportionment of fund between beneficiaries.

Under Act May 23, 1908 (Comp. St. § 5149), creating a trust fund from the income derived from forest reserves, to be expended under direction of the state Legislature for the benefit of the public schools and public roads of the county in which the reserve is situated, and Laws Wash. 1907, p. 406, directing payment of the fund to the county treasurer, and directing the county commissioners to expend the same "for the benefit of the public schools and public roads," the schools and roads of the county are entitled to share equally in the fund.

4. Officers &=111-Execution by public officers; Liability for diversion of fund.

Public officers, who are custodians of trust funds under an express trust, are liable for any misappropriation, and must account to the fund for sums diverted.

In Equity. Suit by the Everett School District No. 24, Snohomish County, Wash., for itself and on behalf of all other school districts in Snohomish county, against D. Carl Pearson, County Treasurer, and Snohomish county. On motion to dismiss bill. Denied.

Henry W. Pennock, of Seattle, Wash., for plaintiff.

Lloyd L. Black and Jesse H. Davis, both of Everett, Wash., for defendants.

NETERER, District Judge. The complainant alleges, in substance, that it is a municipal corporation, having its principal office in the city of Everett; that the defendant Pearson is the treasurer of Snohomish county; that the issue tendered is one of common interest to more than 1,000 districts in the state, and of particular interest to 78 school districts, in addition to plaintiff, within the county of Snohomish; that by act of Congress approved March 4, 1907 (U. S. Comp. Stat. 1916, §

5146), the Secretary of the Treasury was directed to pay to the treasurer of the state 10 per cent. of all moneys received by the United States from forest reserves situate within such state during any fiscal year, including the year ending June 30, 1906; that said money be expended as the Legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which a forest reserve is situated; that by the act of Congress approved May 23, 1908 (U. S. Comp. Stat. 1916, § 5149), the amount to be so paid was increased from 10 per cent. to 25 per cent.; that afterwards there was remitted, pursuant to the provisions thereof, annually such amount of the proceeds from the sale of timber from the forest reserves within Snohomish county; that on March 15, 1907, by legislative enactment (Laws 1907, c. 185), with approval of the Governor of the state, the state treasurer was directed to pay to the treasurers of the respective counties the proportionate amount belonging to said counties by reason of such act; that by the same act the county commissioners of the respective counties were authorized and directed to expend the same for the benefit of the public schools and public roads thereof, and not otherwise; that the state treasurer remitted to the treasurer of Snohomish county \$32,433.41 for the years 1907 to 1917, inclusive, and from said sum there was placed in the road and bridge fund the sum of \$30,910.85, and in the various county school district funds the sum of \$1,522.56; that the county commissioners assumed to direct the county treasurer in the apportionment made; that the exercise of such power was without authority; that the trust created by the act of Congress requires an equal division between the public schools and roads, to be expended for their benefit as the Legislature might direct; that the county treasurer of the respective counties to whom such trust fund was remitted became trustee thereof, and was only empowered to make such apportionment equal to the two funds; that by such conduct the defendants have misappropriated and diverted from the public schools of Snohomish county \$14,694.14; that there is now on deposit with the county treasurer of Snohomish county \$2,500, which the defendants are threatening to disburse in violation of acts of Congress and the act of the Legislature of the state.

The defendants have moved to dismiss, first, on the ground that the court has not jurisdiction of the subject-matter; second, that the bill of complaint does not state facts to constitute a valid cause of action

in equity.

[1] No argument was presented upon the first ground of the motion to dismiss. It is contended that the execution of the trust must be left entirely to the good faith of the state and that, since it appears from the complaint that the funds received by Snohomish county have been devoted to a public purpose, Congress alone can inquire into the manner in which the trust has been executed; that no cause of action is stated. Emigrant Co. v. County of Adams, 100 U. S. 61, 25 L. Ed. 563, and Alabama v. Schmidt, 232 U. S. 168, 34 Sup. Ct. 301, 58 L. Ed. 555, are cited in support of this contention.

The reception of the money by the defendant treasurer, under the provisions of the congressional and state acts, carried with it notice of

the object and purpose of the money and its trust character, and any disposition of the funds contrary to the trust was at the defendants' peril (Smith v. Ayer, 101 U. S. 320, 25 L. Ed. 955), and the cestui que trust is not remediless when the fund is dissipated, but may sue in equity to protect such right (39 Cyc. 448; Grant v. Phœnix Life Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; President & Trustees of Bowdoin College v. Merritt [C. C.] 54 Fed. 55). Emigrant Co. v. County of Adams, supra, does not sustain the contention of the defendants. In this case the court merely held that the objections to the validity of the contract for the sale of swamp lands could not prevail, because—

"the state was to have full power of disposition of the lands, and only gives direction as to the application of the proceeds, and of this application only 'as far as necessary' to secure the object specified."

And in Alabama v. Schmidt, supra, Act March 2, 1819, c. 47, § 6, 3 Stat. 489, was held to operate as a present grant, and vested in the state fee-simple title to section 16, and the state had the right to subject the land to ordinary incidents of other titles in the state. The plaintiffs in those cases did not bear the relation to the issue as is sustained by the plaintiff in this case. The question for decision upon this issue is whether the language employed by the act of Congress and the act of the state Legislature, in requiring to be paid "for the benefit of the public schools and public roads of the county," directs the payment to each an undivided half interest in the fund.

[2] I think it must be conceded that the acts of Congress (Act March 4, 1907, and Act May 23, 1908, supra) created an express trust, of which the several school districts and road districts are the cestuis que trustents. The act of the Legislature of Washington of March 15, 1907, supra, does not deviate from the terms of the trust imposed by the act of Congress. The act contains, however, this provision:

"County commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the public schools and public roads thereof, and not otherwise."

The act of Congress creating the trust for the schools and roads provided that the fund is "to be expended as the state or territorial Legislature may prescribe." The Legislature could not delegate any discretionary power reposed in it with relation to such fund. This is a discretion which must be exercised by the trustee provided by the act of Congress (Singleton v. Scott, 11 Iowa, 589), and in so far as this act, if it may be so held, seeks to delegate discretion, must be inoperative; but such issue is not in this case, as this matter must be determined upon the rights of the parties in the particular fund.

Schools have ever received the special consideration of Congress, and many grants to states in trusts for various objects are on the statute books,¹ and no diversion from the purpose is countenanced without the

² Act March 6, 1820, 3 Stat. 545, § 6, third (Missouri); Act March 3, 1845, 5 Stat. 788, § 1 (Florida); Act March 3, 1845, 5 Stat. 790, § 6, fifth (Iowa); Act Feb. 26, 1857, 11 Stat. 167, § 5, fifth (Minnesota); Act Feb. 14, 1859, 11 Stat. 383, § 4, fifth (Oregon); Act Sept. 4, 1841, 5 Stat. 453, §§ 1 and 2 (many states);

approval of Congress. Act March 4, 1907, c. 2934, 34 Stat. 1414. A distinction between grants for a specific purpose and grants to a state generally is recognized by Congress. Act Sept. 4, 1841, c. 16, 5 Stat. 453. Particular localities have been made the beneficiaries from the sale of lands located in such communities. Act March 6, 1820, c. 22, § 6, 3 Stat. 547 (U. S. Comp. Stat. § 6799 [42]); Act March 3, 1845, c. 75, 5 Stat. 788. The same policy evidently actuated the congressional mind by the act in issue, when it granted to the schools and roads in such counties 25 per cent. of the net proceeds received for the sale of timber from the forest reserve located in such county.

[3] It is contended by the plaintiff that the history of congressional grants is conclusive that each fund should receive an equal share. In the consideration of the act in issue, aside from the congressional policy gleaned from the legislative history which should be considered (United States v. Sweet, Adm'r [decided Jan. 28, 1918] 245 U. S. 563, 38 Sup. Ct. 193, 62 L. Ed. 473), it would seem that the general rule applicable to the construction of gifts, wills, and deeds should apply, where it is established that when bequests, gifts, or grants are made to two or more persons, each is presumed to take an equal share, in the absence of limitations to the contrary.²

[4] The power which was given by the state Legislature, supra, to the board of county commissioners to expend the moneys for the benefit of the public schools and the public roads, was only a power to expend the funds in the manner authorized by the laws of the state relating to roads and schools. There are many ways in which money available may be expended for roads or for schools. The money having been paid to the county treasurer for roads and schools, he had no authority to disperse the fund in any other proportion than directed by the act of Congress, which language was repeated by the state Legislature; and the defendants, being the custodians of the trust funds, are liable for any misappropriation, and must account to the fund for the sums di-

Act Feb. 22, 1889, 25 Stat. 680, § 13; Rev. Stat. 1873-74, § 3689, p. 728 (permanent appropriation of proceeds of federal lands to several states for various purposes); Comp. Stat. 1916, § 6799(42).

² Markoe v. Wakeman, 107 Ill. 251, 261; Keuper v. Mette, 239 Ill. 586, 88 N. E. 218; Gerting v. Wells, 103 Md. 624, 64 Atl. 298, 433; Campau v. Campau, 44 Mich. 31, 5 N. W. 1062; Nippel v. Hammond, 4 Colo. 211–219; Hill v. Reiner, 167 Mich. 400, 132 N. W. 1031; Bennett v. Quinlan, 47 Mont. 247, 131 Pac. 1067; Lee v. Wysong, 128 Fed. 833–838, 63 C. C. A. 483; Ridley v. McPherson, 100 Tenn. 402, 43 S. W. 772; Jackson v. Moore, 94 App. Div. 504, 87 N. Y. Supp. 1101–1103; Baumann v. Guion, 21 Misc. Rep. 120, 46 N. Y. Supp. 715; Cage v. Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180; Bittle v. Clement (N. J. Ch.) 54 Atl. 138; In re Conner's Will, 6 App. Div. 594, 39 N. Y. Sup. 900; Guerin v. Guerin, 270 Ill. 239, 110 N. E. 402; Harris v. Keasbey (N. J. Ch.) 53 Atl. 555; Eherts v. Fisher, 44 Mich. 551; Justice v. Stringer, 160 Ky. 354, 169 S. W. 836; In re Helling, 84 Misc. Rep. 684, 147 N. Y. Supp. 799.

8 Mechanics' Bank v. Seton, 1 Pet. 299, 309, 7 L. Ed. 152; Wilson v. Mason, 1 Cranch, 45–100, 2 L. Ed. 29; McCall v. Harrison, 1 Brock. 126, Fed. Cas. No. 8,671; Allen v. McCalla, 25 Iowa, 480, 96 Am. Dec. 56; Miller v. Aldrich, 31 Mich. 420; Jones v. Abraham, 75 Va. 466; United States v. Carter, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594.

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verted. The evident purpose of the Congress, by the act, supra, was to have the schools and roads participate in the funds in equal shares. The motion to dismiss is therefore denied.

SINGER SEWING MACHINE CO. v. COOPER, County Treasurer.

(District Court, S. D. Ohio, W. D. May 12, 1919.)

No. 96.

- 1. Taxation ←=163—Foreign corporations may be taxed on credits.

 A foreign corporation, doing business in the state of Ohio, is liable to be taxed on credits.
- 2. EQUITY \$\infty\$ 65(2)—Foreign corporation will not be relieved from assessment where return was false.

Where a foreign corporation, doing business in Ohio, returned no taxable credits, though such statement was false, if a system of disposing of its goods on an installment plan passed title, the corporation will not by court of equity be granted relief against an assessment based on theory that it held title to such goods until fully paid for, for, if title passed as asserted by the corporation, it did not come into court with clean hands.

In Equity. Bill by the Singer Sewing Machine Company, a corporation of New Jersey, against Charles C. Cooper, Treasurer of Hamilton County, Ohio. On motion to strike. Defendant's motion denied.

Frank V. Benton, of Newport, Ky., for complainant.

John V. Campbell and Smith Hickenlooper, both of Cincinnati, Ohio, for defendant.

HOLLISTER, District Judge. Heard on motion to strike from answer. The questions involved in this motion arise under lengthy allegations in the bill and answer, which may, for present purposes, be stated comparatively briefly.

Complainant deals in sewing machines, which it delivers to its customers upon the execution by them of the following paper:

"This certifies that I, ——, now residing at No. —— street, in the —— of ——, state of ——, have rented and received from the Singer Sewing Machine Company, Inc. (whose corporate existence for all purposes is hereby admitted), hereinafter called the Company, through its shop at ——, the sewing machine and accessories belonging thereto, described by indorsement hereon, all in good order, which I am to use with care and keep in like good order, and for the use of which I agree to pay to the company at said shop, rent in advance, as follows:

"But if default shall be made in either of said payments, or if I shall sell, or offer to sell, remove, or attempt to remove, the said machine from my aforesaid residence without the written consent of the said Company, then and in that case, or at the expiration of the time for which the machine is rented, I

⁴ Seattle v. Liberman, 9 Wash. 276, 37 Pac. 433; Potter v. New Whatcom, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135; New York Security, etc., Co. v. Tacoma, 30 Wash. 661, 71 Pac. 194; Hemen v. Ballard, 40 Wash. 81, 82 Pac. 277; Quaker City National Bank v. Tacoma, 27 Wash. 259, 67 Pac. 710.

will return and deliver the same to the said Company in good order, save reasonable wear, and the said Company or its agents may resume actual possession thereof, and I hereby authorize and empower the said Company or its agents, to enter the premises wherever said machine may be, and take and carry the same away, hereby waiving any action for trespass or damages therefor and disclaiming any right of resistance thereto, and also waive all right of homestead and other exemptions under the laws of said state as against this obligation, and agree that when this lease is terminated I shall not on any ground whatever, statutory or other, be entitled to any allowance, credit, return, or set-off for payments previously made.

"Accepted for Singer Sewing Machine Company, Incorporated, by —

"Notice to the Person Signing This Lease.—Read the terms of this lease before signing it, as no statement, settlement, agreement, or understanding, verbal or written, not contained therein, will be recognized."

The bill alleges an agreement at the same time that a monthly payment of from \$1 to \$2 is to be made for the purchase of the machine on the installment plan, the payment continuing until the agreed purchase price is duly paid; that the customer shall have possession of the sewing machine, and become the owner of it and retain it until the full purchase price is paid; that, in order to secure the payment of the unpaid part of the purchase price, the above paper is delivered to the complainant.

The answer avers that hearings were had before the tax commission; that the plaintiff appeared "and furnished evidence of the value of plaintiff's property subject to taxation in Hamilton county and elsewhere throughout the state of Ohio for the years in question, including the number of sewing machines sold and leased by it, the nature of said sales, and the average value of goods and merchandise owned in the various counties of said state for said years."

The complainant's position is that it is not the owner of the machines so dealt with, but that the customer is the owner, and therefore complainant should not be taxed as owner.

From these allegations and averments the conclusion must be that the taxing authorities had before them "the nature of such sales" as described in the bill. Cases almost innumerable have been cited and considered, in all of which it has been held that, notwithstanding the written paper between the parties, all the facts may be considered, in order to determine their real purpose and intention; but in only two was such a "lease" involved as the paper above set forth. In most of them the legal title was retained by the seller, and the conclusion was that the transaction was a conditional sale.

It will serve no useful purpose to discuss the many cases at length, but in Singer Mfg. Co. v. Smith, 40 S. C. 529, 19 S. E. 132, 42 Am. St. Rep. 897, the so-called "lease" was identical with that under consideration, excepting that the blanks were filled out, and it was stated that the machine was valued at \$55. It was held that the transaction was a sale with a mortgage back to secure the balance of purchase money.

In Singer Sewing Machine Co. v. Holcomb, 40 Iowa, 33, the agreement on its face was a lease between the company, as the first part,

and the purchaser, as party of the second part, with no reservation of title; but it was held that parol evidence was admissible to show that, upon compliance with the conditions of the lease, the title vested in the lessee, but, under the Conditional Sales Act of Iowa, was invalid, because not recorded as against a creditor of the lessee.

These leases are not recorded, and no doubt the transactions would be considered to be conditional sales under the Ohio Conditional Sales Act (Code 1910, § 8568); but we are only considering the rights of the parties as between themselves, for the purpose of determining the issue between the lessor and the taxgatherer. Together with the other information before the taxing authorities, as alleged in the bill and averred in the answer, was the statement made to them by plaintiff in its returns for each of the several years in question: "Taxable credits, 0."

If, indeed, the title passed on the delivery of goods, and the customer became the owner, and the lease a mortgage back to secure the payment of unpaid purchase money, then these returns of no credits were false. The representation, of course, was that the machines were all paid for, and the necessary inference is that the customers were the owners. On such a showing, with the other facts alleged and averred, the taxing authorities had no right to tax complainant as the owner. If the customer is the owner, and the seller the mortgagee, the customer is at all times indebted to the seller for the balance of purchase money unpaid on tax-listing day, and the complainant must pay taxes, either on the machine as the owner, or as creditor of the customer.

[1] By what amounts to a fraud by the complainant in the transactions between itself and the taxing authorities, the complainant seeks to escape taxation altogether. The complainant, although a foreign corporation, is nevertheless taxable on credits. Hubbard v. Brush, 61 Ohio St. 252, 55 N. E. 829; Walker v. Jack, 88 Fed. 576, 31 C. C. A. 462; Western Assur. Co. v. Halliday, 126 Fed. 257, 262, et seq., 61 C. C. A. 271. These credits are taxable in Ohio; the complainant has made no return of them, has falsified with respect to them, and they amounted to a large sum for the years in question, much more, even, than appears as the value of the machines. The complainant is actually seeking the aid of a court of equity to assist it in escaping taxation altogether.

[2] In State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663, the suit was to restrain the collection of taxes assessed on certain railroads. One of the questions was that a part of the taxes were unjustly levied. Mr. Justice Miller, speaking of complainants, said (92 U. S. 617 [23 L. Ed. 663]):

"They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted."

And in Bank v. Kimball, 103 U. S. 732, 733 (26 L. Ed. 469), he said:

"That no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay; that he shall not be permitted, because his tax is in excess

of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity; * * * but that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder."

And it was said by Judge Welch in Frazer v. Siebern, 16 Ohio St. 614. 624:

"It by no means follows, however, that the plaintiffs are entitled to an unconditional injunction against the collection of the tax. They ask equity, and must do equity. They invoke the exercise of an extraordinary power of the court for their relief, and the court in its discretion should refuse that relief, except upon conditions that are equitable and just."

It is realized that these cases—and there are others—are not exactly in point, for the reason that in them the claim was made that the taxes on property of a certain class were excessive, though admittedly something was due. But they are illustrative of the attitude of courts of equity toward those seeking their aid against unjust levy of taxes, who do not themselves pay what is justly payable by them.

Complainant argues that a court of equity has no power to levy a tax on it for these credits, and that the only power to make an assessment is in the taxing authorities. It is true the court has no such power, and cannot make an equitable levy; but it is within the power of a court of equity to deny relief to a complainant who comes into court with a demand unconscionable under the circumstances.

Since the credits arise out of the same transaction, and since the representation made as to them was false, it is now held that the wrongdoing is so nearly connected with the subject of the suit as to warrant the application of the doctrine of "unclean hands."

The motion to strike out will be overruled.

SIMON et al. v. MOORE, Collector of Internal Revenue, et al. (District Court, E. D. Missouri, E. D. December 5, 1919.)

No. 5218.

Intoxicating Liquors \$\infty\$132—Effect of termination of war on War-Time Prohibition Act.

Semble, that War-Time Prohibition Act, enacted under the war power of Congress, ceased to be constitutionally effective when the war terminated and demobilization was completed as matter of fact, and in consequence the war power of Congress, under which alone legislation in derogation of the constitutional rights of the states, can be enacted or enforced, likewise ceased.

In Equity. Suit by Julian Simon and others against George H. Moore, Collector of Internal Revenue, and another. On motion to dismiss bill, and by complainants for temporary injunction. Motion to dismiss denied, and injunction granted.

D. J. O'Keefe and Charles A. Houts, both of St. Louis, Mo., for plaintiffs.

Walter L. Hensley, U. S. Atty., and Benj. L. White, Asst. U. S. Atty., both of St. Louis, Mo., for defendants.

FARIS, District Judge. Plaintiffs by this proceeding seek to enjoin and restrain the defendants, and their agents, employés, and subordinates—

"from in any manner enforcing or attempting to enforce, or causing to be enforced, against the plaintiffs, their officers, agents, servants, employés, and customers, or any of them, any of the pains, penalties, seizures, and forfeitures provided in and by the act of Congress of November 21, 1918 (40 Stat. 1047, c. 212) and of title 1 of the act of Congress of October 28, 1919, and from arresting or prosecuting, or causing to be arrested or prosecuted, the plaintiffs, their officers, agents, servants, employés, and customers, or any of them, for and on account of any alleged violation by them, or any of them, of title 1 of the act of Congress of October 28, 1919, and that said defendant collector of internal revenue be restrained from refusing to receive from plaintiffs, or any of them, the tax provided by law on the whisky, or any part thereof, belonging, respectively, to the plaintiffs herein, upon which said tax has not been paid, and from interfering with the removal from bond of such whisky, or any part thereof, upon which the tax has been paid, and that plaintiffs may have such other and further relief as to the court may seem just and equitable in the premises."

The matter came on to be heard upon plaintiffs' application for the issuance of a temporary injunction and upon the defendants' motion to dismiss plaintiffs' bill.

Since a similar case has been recently ruled in this jurisdiction—Griesedieck Bros. Brewery Co. et al. v. Moore, Collector, et al. (No. 5207, in Equity), in this court, which was ruled November 21, 1919, by Pollock, District Judge— and since some 12 or 15 similar cases have been only recently decided in the District Courts of other jurisdictions, at least two of which are now pending on appeal in the Supreme Court of the United States, no reason is known for taking up time and space in reciting aught but a bare skeleton of the pleaded facts. These facts are taken from the verified bill, which, as stated, defendants moved to dismiss, and from affidavits, not controverted, which were offered upon the hearing.

Plaintiffs, as appears from the style of the case, are either partners or corporations, who have been engaged in the city of St. Louis, Mo., for many years as wholesale liquor dealers, and are duly qualified as such under the laws of the United States and of the state of Missouri. Plaintiffs in the aggregate own 43,735 gallons of whisky, of the value of \$415,830, and 13,291 gallons of wine, of the value of \$32,127, on which (largely, if not wholly, during the year 1919) plaintiffs have been compelled to pay and have paid to the United States as internal revenue taxes the aggregate sum of \$220,495.36. In addition to this, plaintiffs in the aggregate own 34,645 gallons of whisky, of the value of \$63,312, which are yet in bonded warehouses, and on which no taxes have as yet been paid. All of this whisky was made at a time when by law it was permitted to manufacture whisky.

The act of Congress referred to in the above-quoted excerpt from plaintiffs' petition was approved on the 21st day of November, 1918. It is commonly known as the "War Prohibition Act," and according to its title it was "An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June 30, 1919, the purpose of the act entitled 'An act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes." One of the provisions of the above War Prohibition Act, and that one on which this case largely turns, reads thus:

"That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, * * * it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export."

I have italicized, for the purpose of emphasizing the very point of contention here, the language of the act which I deem decisive of the case. I have skeletonized the section by omitting the conceded warefficiency-promotive reasons set out in the original act, in order that I may present acutely the bare bone of contention in the instant case.

On the 28th day of October, 1919, the Congress passed, over the President's veto, an act commonly called the "Volstead Act," by the terms of which the War Prohibition Act was retained in full force and effect "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." The Volstead Act also provided details and legal machinery for the enforcement of national prohibition after the Eighteenth Amendment shall by efflux of time become effective. Violations of the provisions of the War Prohibition Act are by the Volstead Act made punishable by severe penalties of fine or imprisonment, or both fine and imprisonment. In addition to such fine and imprisonment, or both, other rather far-reaching provisions, mete for the enforcement of the War Prohibition Act, are provided for in the Volstead Act. Substantially, some of these which relate to the powers and duties of defendant Hensley, as district attorney of the United States, are:

"That the defendant United States attorney is vested with the power and charged with the duty of prosecuting criminally for the crimes denounced and defined therein, and in said War Prohibition Act, of any person who violates its terms; and said United States attorney is further vested with the power and charged with the duty of prosecuting criminally, as a maintainer of a public and common nuisance or abetter thereof, any person who maintains or assists in maintaining any room, house, building, boat, vehicle, structure or place of any kind, where any distilled spirits are sold, manufactured, kept for sale or bartered, and is further vested with the power and charged with the duty of having such place, and all such liquor, and all property kept and used in maintaining such place, declared a public and common nuisance, and abated as such in a suit to be brought by him in equity, and the persons concerned in conducting the same, enjoined and restrained from conducting or permitting the continuance of said described nuisance, and enjoined and restrained from manufacturing, selling, bartering or storing any of said distilled spirits, and is further vested with the power and charged with the duty

of subjecting to a lien the property of any person, which is used or occupied to the knowledge of the latter in violation of the provisions of said act, in the amount of all fines and costs assessed against the occupant thereof, for all such violations and to cause such property to be sold therefor, and is further vested with the power and charged with the duty of prosecuting any person who manufactures distilled spirits contrary to the expressed provisions of said acts of Congress."

Upon the question of fact, whether demobilization has occurred and whether, if the fact be, it has been proclaimed by the President, the bill, which, as stated, is not denied, pleads that the President, in his message vetoing the Volstead Act, among other things said:

"The subject-matter treated in this measure deals with two distinct phases of the prohibition legislation. One part of the act under consideration seeks to enforce war-time prohibition. The other provides for the enforcement which was made necessary by the adoption of the constitutional amendment. I object to and cannot approve that part of this legislation with reference to war-time prohibition. It has to do with the enforcement of an act which was passed by reason of the emergencies of the war, and whose objects have been satisfied in the demobilization of the army and navy, and whose repeal I have already sought at the hands of Congress. Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal."

Other facts of current history are in the case, through the petition, affidavits, or judicial notice—e. g., the date of the armistice with the Central Powers; the fact of the signing on the part of the latter of a treaty of peace with the Allies; the fact that a large majority of the chief powers of the latter (in fact, all except the United States) have already ratified such treaty; that the Congress adjourned its extra session without ratification of the treaty of peace, which had been lying before the Senate for many months; whether a state of actual war now exists, as contradistinguished from the mere fiction of existing war, arising from the failure of the Senate to take affirmative action—all these things and many more of like character may be judicially noticed.

The fact, shown by affidavit and not denied, that Congress had with predetermined foresight, and in a spirit of fairness, set forward the taking effect of national prohibition under the provisions of the Eighteenth Amendment by providing a year of grace for business adjustment, now, unfortunately for plaintiffs, cut short by the War Prohibition Act, is of sentimental value only. It may aid the argument, but it cannot materially affect the law; this for the reason that the Eighteenth Amendment does not in express words guarantee a year of grace. It merely has the effect to give it, by providing that this amendment shall be in force one year after its ratification by a constitutionally sufficient number of states.

I do not think that the words "conclusion of the present war," as used in the War Prohibition Act and in the Volstead Act, are modified by, or dependent upon, any proclaiming of the end of the war by the President. War is declared by Congress perforce the organic law; but in this connection it is interesting to note that, while Congress has power to declare war, a state of war—i. e., war in fact, and therefore in law—does not depend on the making of a declaration of war.

Actual hostilities may fix the time of the beginning of war, although no proclamation of war was issued, no declaration of war made, and no action taken thereon by the legislative branch of government. The Panama, 176 U. S. 535, 20 Sup. Ct. 480, 44 L. Ed. 577; The Buena Ventura, 175 U. S. 384, 20 L. Ed. 148, 44 L. Ed. 206; Baker v. Gordon, 23 Ind. 204. Surely it is at least conceded that war is ended when a treaty of peace is made, signed, and ratified by the Senate, whether any proclamation of such conclusion of the war is ever made by the President or not. I do not concede, for the purpose of this discussion, except within certain limits, that the ratification of a treaty of peace is an absolute condition precedent to peace. It may be of official peace, as distinguished from a state of peace, or of peace in fact. Certainly with the coming of peace in fact, looking now to this single phase of the case, the reason for war prohibition failed. Should not the law, concededly unconstitutional, except as a war measure, fail also?

I think, then, since there was no reason in law for coupling up the fact of demobilization and requiring both of these facts to be proclaimed by the President before they should become official actualities, the proclaiming mentioned in the acts, supra, has no reference to the "conclusion of the present war." Neither, in my view, does the grammatical construction necessarily require such concatenation. If this view is correct, then it is evident that the President has already determined—that is, has satisfied himself from facts within his knowledge—that demobilization has terminated; for, referring to this identical point, he said in his message vetoing the Volstead Act, and with specific reference to that act, this:

"It has to do with the enforcement of an act which was passed by reason of the emergencies of the war, and whose objects have been satisfied in the demobilization of the army and navy, and whose repeal I have already sought at the hands of Congress."

No one at all conversant with the federal Constitution will be so bold as to deny the proposition that the power therein conferred on the Congress to prosecute either an offensive or a defensive war is, not only ex necessitate rei, but by the very terms of the Constitution itself, the supreme power, and the most far-reaching power which is conferred on Congress by the Constitution. The apposite language of the Constitution is that Congress shall have power "to declare war, * * * to raise and support armies * * * to make rules for the government and regulation of the land and naval forces, * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Section 8, art. 1, Const. U. S. To this plain proposition the courts have ungrudgingly acceded. In the case of Northern Pacific Ry. Co. v. North Dakota, 250 U. S. loc. cit. 149, 39 Sup. Ct. 505, 63 L. Ed. 897, it was said: "The complete and undivided * * * war power of the United States is not disputable." This power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." Gibbons v. Ogden, 9 Wheat. 195, 6 L. Ed. 23. The only limitation existing (and this, it is obvious, is in fact no limitation, for to so denominate it would constitute a contradiction in terms) is that legislation under this constitutional power must have a real and substantial relation to the purposes of the War. Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297.

But the proposition is so self-evident as to render unnecessary any further consideration of it. Besides, counsel for plaintiffs with commendable candor concede that the act of November 21, 1918, was constitutional when it was passed; this is true perforce the power vested in Congress to wage war, the terms of which I set forth supra. The vexing question here is whether it is constitutional now.

If the World War is concluded, if demobilization has terminated, and if the latter fact has been determined and proclaimed by the President, then there is no earthly doubt that the War Prohibition Act is unconstitutional, because it is a plain encroachment upon the police powers guaranteed by the federal Constitution to the several states.

The word "proclaim" means, in its usual and ordinary signification, "to give wide publicity to; to make known by public announcement: to publish abroad: to disclose: to promulgate." Webster's Dictionary. Such meaning, and such only, is to be assigned to this word, unless there is something to indicate that it was used in the two acts supra in the technical sense, which means to make public announcement by formal proclamation. If it has the latter meaning, it is clear that no such proclamation has been made by the President. If it means, as the word is used in these acts, merely announcing the fact in a public document, then such proclaiming of the fact of demobilization has been made by the President. In a number of acts passed since the war began, which were intended to be merely temporary. and which provided for a restoration of the status quo ante by presidential act, it was specifically required that such official act should take the form of a formal proclamation (e. g., see Federal Control of Carriers Act, approved March 21, 1918; Control of Communication Act; Joint Resolution of July 12, 1918). Something of substance is to be argued from the very patent fact that by the language used in the War Prohibition Act no such formal or technical public announcement is clearly demanded.

Referring to the question whether it is a fiction of war or a state of war which is to be concluded, before the encroachment upon state's rights is to be abrogated, it ought to be within the power of a court of equity to look beneath a mere fictional status and find and decree the truth. In the deadly stress and exigency of war, private constitutional rights and guaranties must be overridden and trampled upon, and many solemn provisions of the federal Constitution must rest in abeyance, because the very life and existence of the government itself is in the balance. In such case the Constitution itself yields to the mandate of a higher law—the law of the struggle for existence. No pure democracy can successfully wage war. Successful wars are maintainable only by an autocracy of greater or less degree, depending in their strictness upon the menace of the situation. A democracy con-

fronted by war must of necessity pro hac vice convert itself into an autocracy of a sort; for power must be centralized, constitutional guaranties stand in abeyance, and private rights largely cease, till the struggle for existence is at an end. But when the menace ceases to threaten, when the war is over, the reign of autocracy should cease, and the democracy ought to and must beat back to its constitutional moorings, if free government under law is to endure among men.

I concede that it is settled law that, when Congress deals with a subject over which that body has power, it does not lie with the courts. in passing upon the validity of its acts, to inquire into or question the motives which actuated its action or nonaction. United States v. Des Moines, etc., Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099; Weber v. Freed, 239 U. S. 325, 36 Sup. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317. But the point here involved in my humble opinion cuts deeper than this. Here Congress has no power to act, except in the presence of conditions. Those conditions are that a state of war must exist. If there is no war, then there is no power to act. Must a court of equity, which largely owes its existence and usefulness to its power to sift truth from falsehood, and to look beneath the lid of things, and uncover and deal with otherwise hidden verities, stultify itself by saying there is war, when there is no war? If it is within the power of Congress to take away from the states rights which are vouchsafed to them by the Constitution, by the mere expedient of maintaining the fiction of war, when the reality has long ceased to exist, then such rights might indeed have short shrift. If such condition may continue in the teeth of the real fact for a year, it may continue for ten years, or indefinitely, and until such rights are forever lost, and the Constitution reduced to the status of a "scrap of paper."

Apparently some such view was held in mind by Foster, District Judge, in passing upon a similar case (Leiser v. Mooney), lately pending in the state of Louisiana, who said:

"Can Congress take advantage of an emergency and pass nation-wide legislation which in the ordinary course of events it would be without authority to pass, and then incorporate in that legislation a date to be determined by some one else, or a date determined of itself, and keep the law in effect that way when the emergency itself has ceased to exist, and consequently when the power of Congress to pass nation-wide prohibition has ceased to exist? Can they after fixing an event over which they have control, for the determination of certain legislation, then ignore that and adjourn, and so keep the legislation alive in contravention of the rights of the states? I do not think so. I think this War-Time Prohibition Act came to an end under every reasonable construction when the Congress adjourned without having rejected the peace treaty. The question of demobilization and the question of whether or not the war was at an end are questions of fact. I do not think Congress could deprive the courts of the right to determine those questions of fact by any clause incorporated in the bill. But, conceding that what they did was reasonable, it seems to me that it is now unreasonable."

In the view of Judge Foster I fully concur, but I take the view that, since the question of the constitutionality vel non of this matter is now pending before the Supreme Court of the United States, wherein a speedy decision will no doubt be reached, that I ought not to presume to express an opinion thereon. I have said so much merely to

accentuate my doubt of its constitutionality, and in order to show in a hurried way the divers ambiguities and lack of clearness in the law, as also the far-reaching consequences, upon any other view, by which this doubt is engendered. Griesedieck, etc., Co. v. Moore, supra.

But this case involves property rights of plaintiffs aggregating approximately half a million of dollars. Nearly half of this sum represents taxes paid in cash by the plaintiffs to the government on liquor which they cannot sell, if the act under discussion shall stand. Not only this cash payment, yet held in pocket by the government, but the whole value of this liquor, will, unless this injunction issue, be practically a total loss to plaintiffs; for, on account of reasons not necessary to take up space here to discuss, plaintiffs can neither export this liquor nor convert it into commercial alcohol without a result which amounts to confiscation of their entire outlay. In the face of this doubt and these compelling equities, and the falling short of the year of grace, fairness calls for the interposition of equity.

Something was urged against the right of plaintiffs to have an injunction staying the hands of public officers; this upon the view urged in argument that such enjoining of a public officer is in its effect tantamount to enjoining the government itself, which it is urged cannot be done. If this act is in fact invalid, for that it violates rights guaranteed to the several states, then it is difficult to see why an officer would have the power to enforce a law which is in fact no law. In such case an officer would in the last analysis stand in the attitude of a trespasser, or a mere intermeddler. Hammer v. Degenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724. The point turns, therefore, upon the other, relegated by me to the judgment of a

higher court.

Let it there be decided, and pending such decision, and until some further order be made in the premises, let the motion to dismiss be overruled, and let a temporary injunction issue as prayed for in the petition.

RHINEHART v. VICTOR TALKING MACH. CO.

(District Court, D. New Jersey. May 14, 1917.)

1. EQUITY 6-114-BILL BY INTERVENER NOT SUPPLEMENTAL BILL.

A bill filed by an intervener, who asserted rights in the cause of action, is not what is ordinarily known as a "supplemental bill," nor tested by rules applying to a supplemental bill, though so termed.

2. EQUITY 364—DISMISSAL FOR ABSENCE OF NECESSARY PARTIES.

It is the general rule in equity that all persons materially interested either legally or beneficially are to be made parties, so there may be a complete decree, and a court will sua sponte dismiss a bill, if it appears that to grant the relief prayed for would injuriously affect persons interested in the matter who are not parties.

3. EQUITY \$\infty\$ 114-RIGHT TO INTERVENE.

A stranger cannot be admitted on his own motion as a party to a pending suit, without the plaintiff's consent, unless there is a statute enabling him to do so.

4. Courts €=343—Effect of equity rule relating to intervention.

Equity rule 37 of the Supreme Court (198 Fed. xxviii, 115 C. C. A. xxviii), relating to intervention by strangers to suits, has the same effect as a statute.

5. Courts \$\infty 343\to Requisites of bill by intervener.

One intervening in a pending equity suit, pursuant equity rule 37 of the Supreme Court (198 Fed. xxviii, 115 C. C. A. xxviii), should file some formal pleading, besides the petition for intervention, setting forth facts sufficient to entitle intervener to intervene and to the relief prayed for, which pleading must be judged by the rules applicable to pleadings in general.

8. EQUITY 5-114-ESSENTIALS OF BILL OF INTERVENTION.

Pleading by which the intervener seeks to assert rights in a pending suit, which may be properly designated as bill of intervention, should undoubtedly call for an answer from, and be filed against, the complainant, as well as against the defendant, and, if it does not do so, is defective.

7. COURTS 343-RIGHT TO INTERVENE UNDER EQUITY RULE.

While one intervening pursuant to Supreme Court equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) must have some interest in or claim to the demand in suit, or some connection with, interest in, or lien on the subject-matter of the litigation, yet where the intervener had either an equitable assignment to part of the recovery or equitable lien on any recovery in suit, intervention should be allowed.

8. Assignments 52—Essentials of equitable assignment.

A contract between plaintiff and the intervener, which made a present appropriation in favor of intervener of part of the funds to be recovered, and was not a mere promise to pay out of a particular fund, amounts to a valid equitable assignment.

9. Liens 5-7-Creation of equitable lien.

An agreement whereby the intervener was to share any sums recovered, if considered merely as an agreement to pay, *held* to create an equitable lien, because indicating an intention on the part of both parties to make the fund recovered security for the obligation to pay the intervener.

10. CHAMPERTY AND MAINTENANCE €==1-WHAT LAW GOVERNS.

The English doctrine and statutes regarding champerty and maintenance have never been adopted as the law of New Jersey, and it is by no means clear that they are enforceable in the state of Pennsylvania.

(261 F.)

11. EQUITY & 114—BILL OF INTERVENTION SHOULD SHOW WHERE CONTRACT WAS MADE.

Where complainant entered into contract whereby intervener was to share in recovery, bill of intervention should show where contract was made and was to be performed, for otherwise the common-law doctrine as to champerty and maintenance might apply to defeat rights thereunder.

12. EQUITY @. 572(1)—LACHES AS GROUND FOR BEFUSING INTERVENTION.

Where complainant, who had contracted that the intervener should share in the recovery, instituted suit within apt time, the intervener's delay in asserting his rights cannot be denied on the ground of laches, unless defendant by reason of such delay changed his position when he obtained a release from the complainant, etc.

13. Courts \$\iff 343\$—Adequate remedy at law no bar to intervention.

The right of intervention, given by Supreme Court equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), cannot be denied on the theory that one desiring to intervene had an adequate remedy at law.

14. EQUITY \$\instructure 114-Essentials of bill of intervention.

Where complainant agreed that intervener should share in recovery, the intervener, who sought to become a party notwithstanding complainant had executed a release, must, as a condition to be allowed to intervene at a late date, set forth in his bill of intervention the release and the facts relied on to avoid it, so that defendant may have that matter disposed of on the pleadings.

In Equity. Bill by Bentley L. Rhinehart against the Victor Talking Machine Company. On motion to strike supplemental bill, filed by intervener, Robert L. Gibson. Motion granted, but intervener given leave to file an amended pleading.

McCarter & English, of Newark, N. J., for intervener. French & Richards, of Camden, N. J., for defendant.

HAIGHT, District Judge. This is a motion to strike out the pleading filed by the intervener, pursuant to the permission granted by the order of this court, made on the 19th day of February, 1917. The defendant has assigned 24 reasons why it should be stricken out. Many of them are, however, merely reiterations of others, expressed differently. They present several questions, which will be separately discussed.

[1-6] 1. The intervener bases his right to intervene on rule 37 of the Supreme Court (198 Fed. xxviii, 115 C. C. A. xxviii), alleging that he has an interest in the litigation between the plaintiff and the defendant. At the time the order, permitting the intervention, was entered, I considered that the intervener should file some formal pleading, other than the petition upon which the order was made, setting up his interest or right, and to which both the defendant and the plaintiff could plead, so that the issues could be properly framed. He has attempted to carry out this direction by filing what he has termed a "supplemental bill."

It is first objected by the defendant that the matters set up therein will not support what is commonly known to equity practice as a "supplemental bill." I think that this position is undoubtedly correct; but, as counsel for the intervener contends, the name given to the

pleading is of little or no importance, provided that the pleading itself properly sets forth the intervener's right or interest in the litigation, and is drawn so that it may be answered by any of the parties entitled to answer it. While it is undoubtedly the general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, binding upon them all, and that a court will, sua sponte, dismiss a bill, if it appears that to grant the relief prayed for would injuriously affect persons interested in the matter, who are not parties to the suit (Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499), it is also the rule, with one or two exceptions, that a stranger cannot be admitted, on his own motion, as a party to a pending suit, without the plaintiff's consent, unless there be a statute enabling him to do so (Shepard v. N. J. Consolidated Water & Light Co., 73 N. J. Eq. 583, 74 Atl. 140; French v. Gapen, 105 U. S. 509, 525, 26 L. Ed. 951).

Equity rule 37 of the Supreme Court, of course, has the same effect as a statute. Hence the general equity practice affords no precedents for the exact method by which the intervener is to assert his rights, or the form or designation of the pleading by which this is to be done. Nor is there any well-defined practice in these respects, in the states where the statutes permit intervention. It is clear, however, that there must be some formal pleading, and that it should set forth facts sufficient to entitle the intervener to intervene and to the relief prayed for, and that the rules applicable to pleadings in general apply with equal force to a pleading in intervention. See 14 Stand. Encyc. of Procedure, 321 et seq. In Leary v. U. S., 224 U. S. 567, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029, the pleading by which the intervener sought to assert her rights was spoken of as "the bill of intervention."

As the intervener's rights in this case are those of a plaintiff, I think that his pleading, likewise, may be properly designated as a "bill of intervention." As such, it undoubtedly should call for an answer from, and be filed against, the complainant, as well as the defendant. As it does not do so, it is defective in this particular at least. Consequently the motion to strike it out must prevail on this ground, if upon no other. This conclusion makes it really unnecessary to decide any of the other questions. As, however, I think the intervener should be permitted to file an amended pleading, and as those questions will undoubtedly arise again, I have deemed it proper to give my general views on them.

[7-9] 2. It is urged now, as it was at the time the permission to intervene was granted, that upon the face of the pleading the intervener has no such interest in the subject-matter of the litigation as would justify his admission as a party thereto. I had thought that this phase of the case was settled, so far as I could settle it, at the time the order before mentioned was made. However, I have re-examined the question, and considered it more carefully than I was able to at the time I made the order. The view which I entertained at that time has in no respect been shaken. Undoubtedly an intervener should have some

interest in or claim to the demand in suit, or some connection with, interest in, or lien upon the subject-matter of the litigation, before he should be permitted to intervene. Glass v. Woodman, 223 Fed. 621, 622, 139 C. C. A. 167 (8th Cir.); Smith v. Gale, 144 U. S. 509, 517, 519, 12 Sup. Ct. 674, 36 L. Ed. 521. As before stated, this interest must undoubtedly be set up in the bill of intervention, in the same manner as would be required if the bill were an original one, except as hereinafter mentioned. The "supplemental bill" is not open to any objection in this latter respect. The important question is whether the facts set forth therein demonstrate that the intervener has such an interest in the litigation as, within the rule before mentioned, entitles him to intervene.

The contract between the plaintiff and the intervener, upon which the latter bases his interest in the litigation, undoubtedly constitutes either an equitable assignment of one-half of any moneys which the plaintiff may recover in this litigation, or its effect is to create an equitable lien thereon. It answers all of the requirements stated by Judge Rellstab, in In re Stiger (D. C.) 202 Fed. 791, affirmed 209 Fed. 148, 126 C. C. A. 96, to be necessary for a valid equitable assignment. It makes a present appropriation of a part of the fund to be recovered in the suit, and is not, under any permissible construction, a mere promise to pay out of a particular fund. See, also, 3 Pomeroy's Equity Jurisprudence (3d Ed.) § 1280. In addition, if by any possibility the construction before mentioned is not a proper one, there would seem to be no doubt, under the United States Supreme Court decisions, but that the agreement creates an equitable lien upon any fund which may be recovered by the plaintiff in the suit. If it could be considered that there was merely an agreement to pay, as distinguished from a present transfer, the contract unquestionably indicates an intention on the part of both parties to make the fund to be recovered in this suit a security for the obligation to pay one-half thereof to the intervener, and thus would create an equitable lien thereon. Ingersoll v. Coram, 211 U. S. 335, 368, 29 Sup. Ct. 92, 53 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530; Wylie v. Coxe, 15 How. 415, 419, 14 L. Ed. 753; McGowan v. Parish, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955.

That part of the opinion in Trist v. Child, 21 Wall. 441, 447, 22 L. Ed. 623, which is cited by counsel for the defendant, was disapproved, as respects equitable liens, by the Supreme Court in Barnes v. Alexander, supra. The before-mentioned remarks in the former would seem to be applicable to an equitable assignment, as distinguished from an equitable lien. Having an equitable assignment of, or an equitable lien upon, part of the fund now in court, it is difficult to conceive why the intervener has not such an interest in the litigation as is contemplated by the Thirty-Seventh Supreme Court rule. Nor can I see how the fact that this right or interest accrued prior to the institution of the suit makes any difference on this point. I have not considered, on this phase of the case, the effect of the release set up in the defendant's supplemental answer to the original bill.

[10, 11] 3. It is next insisted that the agreement upon which the

intervener's rights are based is invalid under the rule against champerty and maintenance. On this phase of the case there is nothing in the "supplemental bill" to indicate where the contract was made, or where it was to be performed, except possibly that, as the defendant is a New Jersey corporation, it may be fairly gathered that the parties contemplated that the agreement would be performed in the state of New Jersey. The English doctrine and statutes regarding champerty and maintenance have not been adopted as the law of New Jersey. Schomp v. Schenck, 40 N. J. Law, 195, 29 Am. Rep. 219; Bouvier v. Baltimore & N. Y. R. R. Co., 67 N. J. Law, 281, 291, 51 Atl. 781, 60 L. R. A. 750; Bigelow v. Old Dominion, etc., Co., 74 N. J. Eq. 457, 490, 71 Atl. 153. Nor is it by any means clear that they are in force in the state of Pennsylvania, where, it is suggested by counsel for defendant, the contract was made. Dickerson v. Pyle, 4 Phila. (Pa.) 259; Chester Co. v. Barber, 97 Pa. 455: Ormerod v. Dearman, 100 Pa. 561. 45 Am. Rep. 391; Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181; In re Murray, 2 Pa. Dist. R. 681; Commonwealth v. Dupuy, 4 Clark, 1, 6 Pa. Law J. 223; Gribbel v. Brown, 202 Pa. 10, 51 Atl. 587; Williams v. City of Phila., 208 Pa. 282, 57 Atl. 578; Fenn v. McCarrell, 208 Pa. 615, 57 Atl. 1108. In Chester County v. Barber, supra, Mr. Justice Paxson, at page 463, said:

"Nor need we stop to consider whether the agreement as set out in the narr. is champertous, nor whether the English statutes in respect to this offense are in force in this state."

As late as Fenn v. McCarrell, supra, it was said by a special master, whose opinion was adopted by the Supreme Court, that "it cannot be said with certainty that such contracts are void." He then cited Chester County v. Barber. As there is nothing to show definitely where the contract was made or was to be performed, it is unnecessary at this time to decide by what law its validity is to be determined. It was held by Judge Benedict, in the Circuit Court for the Eastern District of New York, in Blackwell v. Webster, 29 Fed. 614, that the validity of a similar contract was to be determined by the law of the place where made. Judge Deady, in the Circuit Court of Oregon, seems to have entertained the view that the law of the place of performance governs. Hickox v. Elliott, 22 Fed. 13, 23; Id., 27 Fed. 830, 838. To the same effect is Wharton on Conflict of Laws (3d Ed.) vol. 2, § 49a; Richardson v. Rowland, 40 Conn. 565, 572; Roller v. Murray, 107 Va. 527, 59 S. E. 421. I think that the new pleading by which the intervener is to be permitted to assert his rights should set forth the place where the contract in question was made, as well as where it was to be performed. If this is not done, it may very well be that the court, being without information as to where the contract was made or was to be performed, would have to apply the general rules of the common law. Edwards v. United States, 103 U. S. 471, 474, 26 L. Ed. 314. That this contract would be invalid under those rules would seem to be quite clear, although I do not definitely so decide. Peck v. Heurich, 167 U. S. 624, 630, 17 Sup. Ct. 927, 42 L. Ed. 302.

[12] 4. It is also urged that the intervener is guilty of such laches

in the assertion of his rights that he should not be permitted to intervene. Without attempting to determine whether the New Jersey statute of limitations has run against his claim, or whether a federal court, sitting in equity, should, by analogy, adopt the state statute of limitations, as it is well settled that it is not required to do, it seems to me that the question of laches cannot arise as between the intervener and the defendant, except in connection with the release set up in the defendant's supplemental answer. This release is not mentioned in the "supplemental bill." The intervener's rights, as they existed at the time the suit was instituted, were dependent upon and coextensive with those of the plaintiff. If, therefore, the complainant has asserted his rights in due time, and the intervener seeks merely to assert his rights in and to the original claim against the defendant, the mere fact that he has delayed in asserting those rights, standing alone, cannot conceivably have injured the defendant. If, however, the defendant has changed his position by reason of the prior nonassertion of the intervener's rights, a different question is presented. But on the face of the papers, as they stand at present, there is nothing to show that the intervener's delay has injured the defendant, or that the defendant is in a position to invoke the doctrine of laches.

[13] 5. The contention that the intervener should not be permitted to intervene, because he has an adequate remedy at law against the plaintiff, is without merit. If he has such a remedy, he is not, I think, necessarily confined to it, in a case such as this. Wylie v. Coxe, 15 How. 415, 419, 14 L. Ed. 753; Haines v. Buckeye Wheel Co., 224 Fed. 289, 297, 139 C. C. A. 525; Bowen v. Needles National Bank (C. C.) 76 Fed. 176. See, also, cases cited in 14 Stand. Encyc. Proced. p. 312, 313. Under the Supreme Court rules the right to intervene seems absolute, subject only to the discretion of the court to

which the application is addressed.

[14] 6. Although I am not prepared to say that it is absolutely necessary that the intervener should set forth the before-mentioned release. and allege facts which will avoid its otherwise apparently conclusive effect, still I think that good pleading, as well as a proper exercise of discretion reposed in the court, in reference to permitting him to intervene, considering that he seeks to assert his rights at this late date, requires that he should do so, in order that it may be determined, upon the face of the pleadings, if possible, whether he has any rights which should now be protected. It would seem, under the doctrine announced by the Court of Errors and Appeals of this state, in Weller & Lichtenstein v. Jersey City, etc., Street Railway, 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442, that even though the release was procured by the defendant with full knowledge of the intervener's claim and interest, it is valid against him, because the agreement between the intervener and the complainant seems not to be an assignment of the cause of action, but rather of the sums to be recovered in the action. If, however, the release is invalid as against the plaintiff, the intervener may certainly avail himself of the rights of the former in that respect. So, if the validity of the release as against the plaintiff is not challenged, and its effect as against the intervener is sought to be avoided merely by the

fact that the defendant had notice of the intervener's rights, it would seem that the release would bar the intervener as well as the plaintiff. If this is so, I think that the defendant should be placed in a position where it can take advantage of such a situation on the pleadings, without the necessity of a formal trial or reference. The intervener's present pleading is, I think, therefore, in this respect also, defective. The amended pleading or bill of intervention must set out the release and the facts upon which its otherwise conclusive effect is sought to be avoided.

7. The motion to strike out the "supplemental bill" will be granted, but the intervener will be permitted to file an amended pleading (a bill of intervention) within 10 days from the date of the service upon his solicitor of a copy of an order entered hereon. The defendant will be required to file an answer or address a motion to the amended pleading within 20 days after the filing and service upon its solicitor of a copy of such amended pleading.

In re LETTERS ROGATORY OUT OF FIRST CIVIL COURT OF CITY OF MEXICO.

(District Court, S. D. New York. June 30, 1919.)

No. 477.

COURTS \$\infty\$ 512—Foreign summons not ordered served where foreign country could render personal judgment.

A court of the United States will not order service on an American resident of summons from a court of a foreign country in compliance with a letter rogatory requesting such service, where under the laws of such country the defendant might be subjected to a personal judgment on his default.

In the matter of letters rogatory issued out of the First Civil Court of the City of Mexico. On motion to vacate order for service of summons. Motion granted.

Almy, Van Gordon & Evans, of New York City, for the motion. Felder, Gilbert, Campbell & Barranco, of New York City, opposed.

AUGUSTUS N. HAND, District Judge. This is a motion to vacate an order directing the service of a summons within this district upon a resident to answer to a suit brought against him in the republic of Mexico for the payment of rent and redelivery of certain property which is claimed by virtue of a contract of lease made in the city of Mexico for the term of one year, from June, 1914, to June, 1915. The process was accompanied by a request from the judge of the court having jurisdiction in the city of Mexico that process of that court be served upon defendant in New York. This judicial request is said to come within the definition of letters rogatory in the civil law, is addressed to any one who may be a judge having jurisdiction over a civil case in the city of New York, and, as translated, reads as follows:

"In order that such decisions may be accomplished in the name of the national sovereignty existing between the two nations, allow me the honor of sending this requisitorial letter, begging that, when you get it, do me the favor of

deciding to accomplish it in its terms, and, when it is made, send it back to this court, assuring you my reciprocity in similar cases at your request."

I am referred to the following articles of the Civil Code of Mexico deemed to be applicable to the situation:

"Art. 25. Both Mexicans and foreigners residing in the federal district or in (Lower) California may be sued in the courts of this country, on obligations contracted with Mexicans or foreigners within or without the republic.

"Art. 26. They may also be sued in said courts, even though they do not reside in said places, if they have property which is affected by any obligations

contracted or if the same are to be performed in said places."

By reason of the foregoing provisions, it is apparently possible through the aid of this court to render the person sought to be served subject to a personal judgment in Mexico, because the contract sued upon was to be performed there. Such a result is contrary to our own system of jurisprudence, which treats the legal jurisdiction of a court as limited to persons and property within its territorial jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. It is undesirable, in my opinion, to aid a process which may require residents of this district to submit to the burden of defending foreign suits brought in distant countries, where they have no property, or as an alternative to suffer a personal judgment by default, which will be enforceable against them personally whenever they may enter the foreign territory. As a matter of policy, the matter would be quite different, if the effect of the service would only be a judgment enforceable against property of the defendant in Mexico.

While this court has power to execute letters rogatory in the sense in which the term is used in the American and English law, neither it nor, so far as I can discover from the reported decisions, any other American or English court, has by an order directing the service of process aided a foreign tribunal to acquire jurisdiction over a party within the United States. Letters rogatory have been so long familiar to our courts, and so exclusively limited by understanding and in practice to proceedings in the nature of commissions to take depositions of witnesses at the request of a foreign court, that I should hardly feel inclined to assume such a novel jurisdiction as is proposed without statutory authority, even if I regarded the case as one where, as a matter of sound policy, aid should be given to the foreign tribunal.

The New York Supreme Court reached a similar conclusion to the one I have arrived at, for much the same reasons that I have given, in the Matter of Romero, 56 Misc. Rep. 319, 107 N. Y. Supp. 621.

It is unnecessary to discuss whether the general power of this court to execute letters rogatory is inherent in it as a court, or is derived solely from section 875 of the Revised Statutes (Comp. St. § 1486). In re Letters Rogatory (C. C.) 36 Fed. 306; In re Pacific Railway Commission (C. C.) 32 Fed. 256; De Villeneuve v. Morning Journal Ass'n (D. C.) 206 Fed. 70.

The motion to vacate the order is granted, both on the ground that the judicial aid invoked is without precedent, and also because it is contrary to the ideas of American courts as to the limits of judicial jurisdiction.

WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO.

(District Court, N. D. Georgia, N. D. December 6, 1919.)
No. 67.

EQUITY \$\ightarrow\$264-Motion to strike part of answer.

Motion to strike out parts of a defendant's answer denied on the ground that the matters alleged raised relevant issues on which defendant was entitled to a hearing.

In Equity. Suit by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. On motion to strike out parts of answer. Denied.

See, also, 243 Fed. 687.

Brewster, Howell & Heyman, of Atlanta, Ga., and W. L. Clay, of Savannah, Ga., for plaintiff.

Tye, Peoples & Tye, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a motion to strike a portion of the answer of the Louisville & Nashville Railroad Company in this case, by which portion of its answer the defendant seeks to set up certain acts and doings on the part of the plaintiff by which it is estopped from claiming title to that portion of the telegraph lines conveyed to it by the Atlanta, Knoxville & Northern Railway on February 9, 1898, so far as it claims rights under said deed; also certain proceedings in the state courts of Georgia in and by which the plaintiff acknowledged that its rights were such as acquired under the contract of July, 1884; also that while its condemnation proceedings were pending in the state courts of Georgia the plaintiff filed in the United States Circuit Court for the Western District of Kentucky (now District Court) a bill against defendant, in which it set up said condemnation proceedings, and on them as a basis obtained an injunction against defendant, on which it obtained a restraining order, and afterwards a temporary injunction, which has been continued of force at plaintiff's instance and request until the present time, restraining and enjoining defendant from dispossessing plaintiff from occupying the lines of defendant in Georgia, and had kept the injunction of force, though the condemnation proceedings more than four years ago were discontinued by plaintiff.

Argument has now been had on this motion to strike a portion of the defendant's answer, and both parties have filed full briefs with the court on the question. The same question was before the court on a motion to strike certain portions of the plaintiff's amended bill; the paragraphs which the defendant moved to strike being paragraphs which were filed anticipatory of defendant filing the very defense which it now has in its bill before the court, and which plaintiff seeks to strike. I overruled a motion to strike that portion of the plaintiff's amendment which was anticipatory of the defendant's defense, and having allowed the plaintiff's pleadings to stand, as I have done, I think it would be wrong now to strike the answer of the defendant, which sets up the same matter exactly as the plaintiff was allowed to anticipate. In other words, without determining at all the merits of the defense, except to say that it does set up matters on which it ought to be heard as to what its rights are, I hold, further, that the defendant is not precluded, in making this answer, by what has occurred before the court already as to the motion with reference to the plaintiff's pleadings or in any way in the case.

I have never considered or determined, I think, anything whatever in regard to the rights the plaintiff has under the deed from the Atlanta, Knoxville & Northern Railway of 1898, except to agree with the Circuit Court of Appeals, and abide by what it had determined about that deed, after its decision was made; that is, that the deed from the Atlanta, Knoxville & Northern Railway to the plaintiff was superior to, and not affected by, the contract made in 1884 between the parties. The matters now set up in the answer, and which plaintiff moves to strike, have not been determined at all, as I remember what has been heretofore passed on.

I do not think that that portion of defendant's answer which plaintiff moves to strike should now be stricken, because I do not think the defendant has ever been heard upon the question it now makes—that is, has not been heard squarely before this court. I do not say that this portion of its defense now in question is meritorious. I simply say that it does raise, by proper pleadings, a question on which it is entitled to be heard.

The motion to strike, therefore, is denied.

CAVANAUGH et al. v. STARBUCK TOWING CORPORATION.

(District Court, E. D. New York. October 31, 1919.)

No. 4367.

Admiralty 6=32—District of suit in personam accompanied by foreign attachment.

A court of admiralty held to have jurisdiction of a suit in personam, although both parties resided in an adjoining district, where there was no evidence of want of good faith on the part of libelant; his motive being to secure foreign attachment on a vessel then in the jurisdiction of the forum.

In Admiralty. Suit by Daniel J. Cavanaugh and others against the Starbuck Towing Corporation. On exceptions to libel. Overruled.

Alexander & Ash and Edward Ash, all of New York City, for libelants.

Foley & Martin and J. A. Martin, all of New York City, for respondent.

CHATFIELD, District Judge. On exceptions to the libel, the respondent questions the right of the libelants to invoke admiralty jurisdiction in this district by an action in personam, when both parties reside in another district, which happens to be the adjoining district. The record shows no difficulty which would be experienced by the libelants in bringing their action in personam in the district within which they and the respondent reside. It is charged that the libelants' sole motive was to obtain security by way of foreign attachment of the respondent's vessel, which was then in this district, and which was frequently in both districts.

The respondent cites the case of Shewan v. Hallenbeck (D. C.) 150 Fed. 231, in which the libelant had begun action, but carefully avoided serving process (in a district where neither resided) until the respondent had left the district, in order to obtain a seizure of a boat which was then in that district. It was held that this was palpable misuse of process in order to embarrass the respondent and force him to give security, by a literal application of the rule equivalent to a trick. In The Athanasios (D. C.) 228 Fed. 558, the Hallenbeck Case is referred to, and the court discountenances the practice of avoiding the making of personal service for the mere purpose of obtaining security.

But in the present case there is no evasion of the rule, nor is there palpable avoidance of the spirit of the rule by holding strictly to the letter. The libelant has seen fit to bring his action in a district where he can obtain security. There is no way of going into his good faith, and he has indulged in no trick. As was said when this question was raised in the suit of Shamrock Towing Co. v. Manufacturers' & Merchants' Lighterage Co. and the Hax Trading Co., 262 Fed. 844, decided February 9, 1918, no legal distinction is presented because the two districts happen to be adjoining, rather than remote from, each other.

The exceptions will be overruled.

UNITED STATES v. BOWLING et al. (Circuit Court of Appeals, Eighth Circuit. December 2, 1919.) No. 5288.

- 1. Indians @=18-Determination of heirship on death of allottee.
 - Act June 25, 1910, § 1 (Comp. St. § 4226), conferring authority on the Secretary of the Interior to determine the heirs of an Indian allottee, who dies during the trust period "and before the issuance of a fee-simple patent," does not apply in case of death of a member of the Confederated Tribes, who received an allotment and patent under Act March 2, 1889, since the patent conveys the fee, subject to restrictions for the term of 25 years.
- 2. Indians &=18—Determination of Heirship on Death of Allottee.

 While the Secretary of the Interior has power to ascertain the heirs of a deceased Indian, when such action is essential to execution of his powers, such power does not extend to the case of a member of the Confederated Tribes, who received an allotment under Act Feb. 8, 1887, and Act March 2. 1889; section 5 of the former act (Comp. St. § 4201) making the laws of descent of Kansas applicable to such allotments.
- 3. Appeal and error \$\iff 733\$—Assignments of error too general.

 Assignments of error, in an action tried to the court, that the judgment rendered is contrary to law, and that the court erred in rendering judgment in favor of defendants, are too general to raise any question in the appellate court.
- 4. Appeal and error \iff 1008(2)—Evidence not reviewable in action tried to court.

In an action at law, tried to the court by stipulation, where the finding is general, the question of the sufficiency of the evidence to support such finding cannot be raised in the appellate court.

In Error to the District Court of the United States for the Eastern District of Oklahoma, Ralph E. Campbell, Judge.

Action by the United States against George E. Bowling and others. Judgment for defendants, and the United States brings error. Affirmed.

Cliff V. Peery, Asst. U. S. Atty., of Muskogee, Okl. (W. P. Mc-Ginnis, U. S. Atty., of Muskogee, Okl., and J. C. Wilhoit, Sp. Asst. U. S. Atty., of Okemah, Okl., on the brief), for the United States.

Halbert H. McCluer and Roland Hughes, both of Kansas City, Mo. (Vern E. Thompson, of Miami, Okl., on the brief), for defendants in error.

Before SANBORN, Circuit Judge, and MUNGER and YOU-MANS, District Judges.

MUNGER, District Judge. From a judgment in favor of the defendants in a suit in ejectment the plaintiff has prosecuted this error proceeding. The parties waived a jury and tried the case to the court. There was a general finding in favor of the defendants and a judgment of dismissal. The land in controversy was patented on April 8, 1890, to Pe-te-lon-o-zah, also known as William Wea, a member of the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians. The patent contained a restrictive provision that

the lands should not be alienated, nor subject to levy, sale, taxation, or forfeiture, for 25 years. The effect of this provision in restraining alienation of this tract of land was stated by the Supreme Court in Bowling v. United States, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080. The act of Congress of February 8, 1887 (24 Stat. 388, c. 119), provided generally for allotments of land in severalty to the Indians, but contained an express exception that it did not apply to the lands of this confederated tribe. On March 2, 1889, an act of Congress (25 Stat. 1013, c. 422) was passed extending the provisions of the act of 1887 to this tribe, but subject to some exceptions. The act of 1887 had provided for the issuance of patents to the allottees, and that the patents should be of the legal effect and should declare that the United States would hold the allotted land in trust for the allottee for 25 years, and that at the expiration of that time the United States would convey the land by patent, to the Indian or his heirs, in fee. The act of 1889 authorized allotments to members of this confederated tribe, and also provided as follows:

"The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void."

The act also contained a provision that any act or part of an act of Congress theretofore passed that conflicted with the later act, either as to land or money, was thereby repealed.

William Wea, after receiving his patent under the act of 1889, died on January 23, 1894. The petition in this case alleged that the action was brought on behalf of the United States and of the heirs of William Wea, and that certain persons, named in Exhibit B attached to the petition, were duly declared to be the heirs at law of William Wea by the Secretary of the Interior on October 19, 1914, pursuant to the acts of Congress with reference thereto. This statement of the finding of heirship by the Secretary of the Interior was stricken from the petition, on defendants' objection, and an exception was saved. At the trial the plaintiff offered in evidence a copy of a departmental record in the office of the Secretary of the Interior, showing that the Secretary had found the heirs of William Wea to be the same persons as those who had been named in Exhibit B attached to plaintiff's petition. On objection, this was excluded as immaterial, and plaintiff excepted to the ruling.

[1] By assignments of error based upon these rulings the question is presented whether the Secretary of the Interior had authority to make a finding of the rightful heirs of William Wea, controlling the court in the trial of this case. The authority of the Secretary is

asserted because of the language of the act of Congress of June 25, 1910 (36 Stat. 855, c. 431 [Comp. St. § 4226]), as follows:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

This statute did not authorize the finding of the Secretary of the Interior in this case, because, before its enactment, a fee-simple patent had been issued to William Wea (Libby v. Clark, 118 U. S. 250, 6 Sup. Ct. 1045, 30 L. Ed. 133), although it was subject to the restrictions on alienation therein contained. The statute, by its terms as quoted and as appears from its context, applied only to cases where allotments were made and the titles were withheld in trust, to be followed by the issuance of a fee-simple patent at the end of the trust period. In other clauses of the same section, the Secretary was given discretion to issue a patent in fee to the heirs of the allottee, if he decided them competent to manage their own affairs, or to issue patents in fee upon partition of the lands between the heirs, and by the language of the following section an allottee was given the right to dispose of the allotment by will, prior to the expiration of the trust period, and prior to the issue of a fee-simple patent.

[2] The claim is also made that the Secretary of the Interior had the sole authority to determine who were the heirs of William Wea, regardless of this statute, because the United States has retained the general control of controversies over the title and possession of allotments. Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039; McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct.

346, 51 L. Ed. 566.

It must be conceded that the Secretary has the power to ascertain the heirs of a deceased Indian, when such action is essential to an execution of his powers, such as the issuance of a final patent to the heirs, or the approval of a conveyance by the heirs, as required by statute. Egan v. McDonald, 246 U. S. 227, 38 Sup. Ct. 223, 62 L. Ed. 680; Hallowell v. Commons, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409; Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Oregon v. Hitchcock, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935. But in this case the land had been patented to William Wea, and under the provisions of section 5 of the act of February 8, 1887 (Comp. St. § 4201), the laws of the state of Kansas regulating the descent and partition of land were made applicable. Wea had died in 1894, and the descent of these lands had been fixed at that time. The title of the heirs was not dependent upon any action of the Secretary of the Interior, because Congress had released its control over the descent or partition of these lands. The ordinary judicial processes of declaring the heirs or of partitioning the land amongst them thereafter applied. Beam v. United States, 162 Fed. 260, 89 C. C. A. 240; United States v. Park Land Co.

(C. C.) 188 Fed. 383. See, also, Finley v. Abner, 129 Fed. 734, 64 C. C. A. 262. There was therefore no error in striking the exhibit

from the plaintiff's petition, nor in excluding it as evidence.

[3] There are two other assignments of error. One is that the judgment rendered is contrary to law, but this is too general and indefinite to be considered. Chicago, M. & St. P. Ry. Co. v. Anderson, 168 Fed. 901, 94 C. C. A. 241; Ireton v. Pennsylvania Co., 185 Fed. 84, 107 C. C. A. 304; Craig v. Dorr, 145 Fed. 307, 76 C. C. A. 559; Chicago Terminal Transfer R. Co. v. Bomberger, 130 Fed, 884. 65 C. C. A. 64; Northern Central Coal Co. v. Barrowman, 246 Fed. 906, 159 C. C. A. 178. The other assignment, that the court erred in rendering judgment in favor of the defendants, is also too general. Western Union Telegraph Co. v. Winland, 182 Fed. 493, 104 C. C. A. 439; Choctaw, O. & G. R. Co. v. Jackson, 192 Fed. 792, 114 C. C. A. 12; Felker v. First Nat. Bank, 196 Fed. 200, 116 C. C. A. 32; Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401, 136 C. C. A. 25, Ann. Cas. 1917D, 64; Fisher Mach. Works Co. v. Dougherty, 231 Fed. 910, 146 C. C. A. 106: Deering Harvester Co. v. Kelly, 103 Fed. 261, 43 C. C. A. 225; The Myrtle M. Ross, 160 Fed. 19, 87 C. C. A. *175*.

[4] The basis for these contentions, as disclosed by the argument and briefs, is that the evidence does not support the general finding of the court. The record does not show that there was any request of the plaintiff for a finding of facts or for a declaration of law in its favor, and as a trial by jury was waived, the sufficiency of the evidence is a question that cannot now be raised, even if a proper assignment of error had been made to state the question. Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622; Chicago, M. & St. P. Ry. Co. v. George A. Hormel & Co., 240 Fed. 381, 153 C. C. A. 307, and cases cited.

The judgment of the trial court is affirmed.

AMERICAN REFINING CO. v. BARTMAN et al.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1919.) No. 5304.

1. Frauds, statute of &=>112-Definite statement of price in contract for sale of goods.

Contract for sale of gasoline, to be shipped as ordered during the year, held to satisfy the statute of frauds, by definitely stating the price, notwithstanding the provision, "Prices to be mutually satisfactory at time of shipment," in view of another provision, which was clearly to govern, and the actions of the parties under it.

2. Contracts \$\iff 162\$—Disregabling inconsistent expression where intent clear.

Where the intentions of the parties are clearly ascertainable from the contract and their mutual actions under it, inconsistent expressions in it must be disregarded.

3. Sales \$\infty 54\to Construction of contract by parties.

Where contract for sale of 40 cars of gasoline between parties to a prior existing contract for sale of 60 cars, to be shipped as ordered during the year, was sent for execution in a letter defining it as an "additional contract 40 cars gasoline," and stating it was on the "same basis" as the earlier one, its construction in a later letter from the seller as one for delivery within the year, being accepted by the buyer, was binding on the parties.

CONTRACTS ☐ 10(4)—MUTUALITY OF SALES CONTRACT AS CONSTRUED BY PARTIES.

Contract for certain number of cars of gasoline, having been construed by the parties as calling for shipment as ordered during a certain year, the objection of lack of mutuality, in that no time was fixed for delivery except as buyers might order, could not be sustained.

5. Sales \$\infty 71(4)\$—Construction of contract as limiting amount to needs of business.

Contracts for sale of 60 and 40 cars of gasoline, to be delivered as ordered during the year, are not open to construction as limited to the amount the buyers needed to conduct their business during the year.

6. Sales \$\insigm 174\to Availability of buyer's breach in refusing to pay after breach by seller.

The seller, having in three important respects, one of which prevented further deliveries, breached the contract of sale of a definite amount, to be delivered as ordered during the year, cannot avoid future performance and liability because of a subsequent breach by the buyer in refusing to make further payments till assured of deliveries.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Martin J. Wade, Judge.

Action by Max Bartman and another, partners under the name of the Gasoline Filling Station, against the American Refining Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

A. A. Davidson, of Tulsa, Okl. (Preston C. West, Roger S. Sherman, Grey Moore and James A. Veasey, all of Tulsa, Okl., and John H. Brennan, of Bartlesville, Okl., on the brief), for plaintiff in error.

Ben R. Estill, of Kansas City, Mo. (A. F. Evans and Frank P. Walsh, both of Kansas City, Mo., on the brief), for defendants in error

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. From recovery for breach of contracts to supply gasoline defendant brings its writ of error.

The company, an oil wholesaler, entered into two form contracts

with the partners, who were retailers of gasoline, as follows:

M- American Refining Company:

Date 4-5-1915.

Ship to Gasoline Filling Station

At 1724 Grand Av. When-As ordered during 1915.

How ship, S. Fé or Katy

Terms usual.

Salesman, ---. Buyer, -

60 T/cs 60/62 Gravity Gaso

Prices to be mutually satisfactory at time of ship-

For each advance in K. C. tank wagon prices the f. o. b. refining prices to advance 1/2 the amount--

This based on present prices of 6c refinery Kans, rate of freight and K. C. market 9.80

J. F. Campion.

Gasoline Filling Station, by Alex A. Smith.

Order No. 202

Date 5/5/1915

- American Refining Company:

Ship to Gasoline Filling Station

At Kansas City, Mo. When—As ordered.

How ship,

Terms 1/10 net 30

Salesman, J. F. Campion. Buyer, A. A. Smith.

40 T/cars 60/62 Gasoline. For each advance in K. C. tank wagon market the f. o. b. Refy. prices to advance 1/2 the amount

This based on present prices of 6c refinery Kansas rate of freight and K. C. wagon market 9.80 American Refining Co., By J. F. Campion, Treas.

The latter of the above instruments, after being executed by Campion for the company, was mailed to the partners, in the following letter:

Walter Hennig, President; Thos. H. Kennedy, Vice-President; E. A. De Meules, Secretary; J. F. Campion, Treasurer.

American Refining Company, Refiners of Petroleum, Gasoline, Naphtha, Kerosene, Neutrals, Cylinder Stock, Paraffine, and All Petroleum Products.

Export Station, New Orleans, La. St. Louis Office, 711 La Clede Gas Bldg. Cable Address, "Amrefco," Western Union Code.

General Offices and Refinery:

Muskogee, Oklahoma, May 7, 1915.

Additional Contract 40 Cars Gasoline.

Gasoline Filling Station, 1724 Grand Avenue, Kansas City, Mo.—Gentlemen: Attention Mr. A. A. Smith. You will remember, when I was last in Kansas City, you told me to book you another forty cars of 60/62 gasoline on same basis as your previous contract for 60/62 gasoline. I am inclosing you order No. 202, which I believe you will find entirely satisfactory. If you do, please sign the original and return for our file.

Thanking you for the business, and hoping to see you soon, I am

Yours very truly, [Signed] J. F. Campion, Treasurer.

Shipments began April 6, 1915, and continued to November 30, 1915, by which time 58 cars had been delivered. There was entire harmony until November 4th, up to which time 47 cars had been delivered. Upon that date the company attempted to avoid responsibil-

ity under the contract on the ground that Campion had no authority to make the contract for the company, and in fact had made it on the theory that the company was acting as the commission agent for another company, the Jane Oil & Gas Company. The partnership refused to release the company and to accept the Jane Oil & Gas Company in its place, but said they would not object to the company making its deliveries through the Jane Oil & Gas Company, or any other medium. The parties maintained these positions thereafter. During Novem-. ber the successor to the Jane Oil & Gas Company, the Peerless Refining Company, furnished 11 cars. On November 24th Campion wrote that the contract of May 5th was for deliveries in 1915. On December 2d the partnership wrote asking deliveries of the remaining 42 cars (2 under the April 5th contract and 40 under that of May 5th) in December, at the rate of 1 or 2 a day. December 6th the Peerless Company wired that it would ship 3 cars per week (12 during the month), "but you must first give us satisfactory assurance of prompt payment." Up to this time every car had been promptly paid for under the terms of the contract, which allowed 30 days, and there is not the slightest evidence in the record of any reason to suspect future default in payments. The partnership replied that they would make no further payments to the Peerless until the "American Refining Company gives to us satisfactory assurance they, or some one for them, will complete our shipments under the terms of our contract with them." At that time shipments ordered were past due, and had not been shipped. Further shipments were refused, though repeatedly ordered. Something over \$5,000, due after this correspondence on November shipments, were deposited by the partnership with a trustee, to be used in these payments if shipments were maintained. It was never paid. The partnership, which had an established business, with three filling or sales stations, was compelled to purchase gasoline at higher prices.

The propositions advanced here by the company are:

"First. That the alleged contract of April 5th is void under the statute of frauds, in that no price is fixed for the gasoline to be shipped thereunder.

"Second. That the alleged contract of May 4th is void for want of mutuality. "Third. That if the contracts are to be held valid and enforceable, they call only for such quantity of gasoline as the plaintiffs needed to conduct their business for the remainder of the year 1915 and no more, and that substantially such amount was furnished; the damages for failure to deliver the remainder being more than offset by the money owing from the plaintiffs for gasoline furnished and not paid for.

"Fourth. That the plaintiffs breached the contracts by announcing their refusal to pay for shipments made, except upon a condition not within the terms

of the alleged contracts."

[1, 2] The first contention is based on the statement in the contract of "prices to be mutually satisfactory at time of shipment." If this were the only or the controlling provision in the contract regulating prices, there would be much force in this contention. But there is also the provision that—

"For each advance in K. C. tank wagon prices the f. o. b. refining prices to advance ½ the amount— 'This based on present prices of 6c refinery Kans rate of freight and K. C. market 9.80."

This latter provision is clear, definite, and unambiguous. Payments were made throughout upon this basis, without the slightest question from either party. There was no doubt in their minds upon this point. The former provision cannot be given force without antagonizing the latter, which was clearly to govern. Where the intentions of the parties are clearly ascertainable from the contract and the mutual actions of the parties under it, inconsistent expressions must be disregarded. This contract, so construed, was definite as to price and fully met the requirements of the statute of frauds.

[3, 4] The basis for the claim that the second contract lacks mutuality is that there was no time fixed for the delivery of the gasoline, except as the partnership might order it. This contract was transmitted to the partnership for execution, in a letter which defined it as being an "additional contract 40 cars gasoline" and which stated that the contract was on the "same basis" as the earlier one. This letter is properly a part of the understanding between the parties. Taking this contract and letter, together with the earlier contract, it is evident that the intention was that this contract was for an amount in addition to that called for by the existing contract, and that the 40 cars should be shipped as ordered during 1915. Toward the end of that year, November 26th, the Peerless Company, which was acting for the company, placed that interpretation upon it in a letter where it said:

"That portion relative to deliveries reads as follows: 'As ordered during 1915'—which is in accordance with what I told you, when you were here. Of course, the order of May 5th for 40 cars was simply an increase of the first order of 60 cars, and the letter of the American Refining Company of May 7th indicates this, and states that the order for 40 cars was booked 'on same basis as your previous contract for 60/62 gasoline.' Therefore the arrangement under which you are now receiving gasoline from us will terminate December 31, 1915. In compliance with your request, Mr. Aiken has submitted a proposition to furnish your 1916 requirements. * * * "

The partnership accepted that construction, and promptly ordered delivery during 1915. The company should not now be permitted to escape on the ground that the contract lacked distinctness and mutuality in this very respect.

[5] The third contention contains no merit, for the contracts cer-

tainly and clearly state 60 and 40 cars respectively.

[6] The fourth contention is very singular under the facts of this case. The company had distinctly breached the contract by declaring that it was not bound thereby. It seems, however, to have hesitated to definitely refuse performance, and had arranged with the Jane Oil & Gas Company, later the Peerless Refining Company, to carry out its part of the contract, although it never ceased contending that it was not bound by the contract. Then the Peerless Company, while acting for the company, without any reason or excuse, and when every payment due for cars theretofore delivered had been promptly made, stated (December 6th) that it would make no more deliveries until given "satisfactory assurance of prompt payment." It also stated that it would even then deliver only 12 cars during December, when the contracts called for, and the partnership had ordered, 42 cars. If, in the face of this situation, the refusal of the partnership to make fur-

ther payments until assured of deliveries under the contract was a breach of the contract, because made "upon a condition not within the terms of the alleged contracts," then certainly the demand for assurance of payment was equally a breach for the same reason. Having breached the contract in three important respects, one of which prevented further deliveries, the company is in no position to avoid future performance and liability because of a subsequent breach by the partnership. White Oak Fuel Co. v. Carter, 257 Fed. 54, — C. C. A. —.

The judgment is affirmed.

BOSTON WEST AFRICA TRADING CO. v. QUAKER CITY MOROCCO CO.

(Circuit Court of Appeals, First Circuit. November 18, 1919.)

No. 1413.

1. BANKRUPTCY \$\infty 74\$—Computation of indebtedness in determining jurisdiction

In computing the indebtedness of an alleged bankrupt for jurisdictional purposes, claims paid by preferential or fraudulent transfers are to be included.

2. Bankruptcy @==159, 175—Fraudulent transfer of property an act of bankruptcy.

Where the owner of all the stock of a trading corporation, when it was indebted and within four months prior to the filing of a petition in bankruptcy against it, transferred the greater part of its bank deposit, which constituted practically its sole assets, to himself in payment of alleged claims, leaving insufficient to pay other claims, such transaction constituted, not only a preference, but a transfer with intent to hinder, delay, and defraud creditors.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

In the matter of the Boston West Africa Trading Company bankrupt. From order of adjudication, made on petition of the Quaker City Morocco Company, the bankrupt appeals. Affirmed.

For opinion below, see 255 Fed. 924.

Lee M. Friedman, of Boston, Mass. (Friedman & Atherton, of Boston, Mass., on the brief), for appellant.

Joseph B. Jacobs, of Boston, Mass. (Louis L. G. De Rochemont and Arthur J. Santry, both of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an appeal from the District Court for the District of Massachusetts adjudicating the appellant an involuntary bankrupt. As stated in the opinion of the District Court:

"The only points which require discussion are: (1) Whether the respondent [now appellant] owed debts to the amount of \$1,000 at the time when the petition was filed; and (2) whether the payment to Argous was an act of bank-ruptcy."

[1] The appellant's counsel has addressed to us an elaborate argument, asking us to overturn the established practice of nearly 20 years—that in computing the total indebtedness in order to determine whether the alleged bankrupt owes debts amounting to not less than \$1,000, claims paid by preferential or fraudulent transfers shall be counted. It would require extraordinary reasons to justify us at this late day in attempting to change what has so long been regarded as the accepted interpretation of the Bankruptcy Act (Act July 1, 1898, c.

541, 30 Stat. 544 [Comp. St. §§ 9585–9656]).

We are not at all impressed with the soundness of the contention. If sustained, it would open a wide door to fraud. We regard it as inconsistent with the general principles of equality which underlie the whole Bankruptcy Act. The question was carefully considered by Judge Dodge in the Massachusetts District Court in the case of In re Jacobson (D. C.) 181 Fed. 870. We are satisfied with that decision and with the reasoning upon which it is based. See, also, 7 Corpus Juris, 67, 68, § 96; In re Norcross, 1 Am. Bankr. Rep. 644; In re Cain, 2 Am. Bankr. Rep. 379; In re Tirre (D. C.) 95 Fed. 425; In re Mc-Murtrey (D. C.) 142 Fed. 853.

[2] The other question is whether a payment made to one Argous

was a preference, or a fraudulent conveyance, or both.

Argous had caused the appellant to be organized, and seems to have furnished or owned its entire capital stock. After a period of apparently not very successful trade in West Africa, Argous decided to

liquidate the corporation, against which he had certain claims.

On December 5, 1917, Argous transferred to himself \$19,000 out of the corporation's total bank deposit of \$19,617.57, substantially the entire assets of this corporation. \$12,492.49 he applied as payment of certain advances made by him to meet his guaranties for the corporation. The balance, \$6,507.51, he at first treated as a loan to himself, for which he gave the company a demand note. Subsequently this sum of \$6,507.51 was applied by himself to the payment of claims made by him against the corporation, excepting only the sum of \$29.80, for which a new demand note was given, which continued to be held by the company at the time of the filing of the petition. This transfer was clearly made by Argous to himself for the purpose of enabling him to deal, practically on his own terms, with the claim made against the corporation by the Quaker City Morocco Company, which claim Argous appears to have regarded as unfair, perhaps invalid. This claim was the subject of conversation between one Henkel-who had been the appellant's representative engaged in buying skins in Africa—and Argous in Boston on December 3, 1917. It also appeared that one Schroeter, who was the president of the appellant and a New York broker engaged in the sale of hides and skins, had expressed the opinion, communicated to Argous, that the claim of the Quaker City Morocco Company was valid. This opinion of Schroeter, Argous resented. Under date of December 7, 1917, he writes from Boston to the "Boston West Africa Trading Company New York," a letter really intended for Schroeter and Henkel. In this he states:

"I have your letter of the 6th inst., with reference to claims, and would say that I will not pay any of them at the present time. In the first place, I will not permit any one to handle my money in such a reckless manner, without even consulting me in the matter. I have something to say where my money goes to, and I will not allow Mr. Henkel or Mr. Schroeter to distribute my funds for me in such a manner. * * *

"With reference to the claims, I understand that Mr. Schroeter put in the contract to the Quaker City conditions which he was not authorized to put there, but which he did on his own account in order to make the sale. This information was given me by Mr. Henkel. Since such is the case, it seems to me that claims which have been made, because of the contract being written without any such authority, should be borne by the one who is responsible for them. I told Mr. Henkel that the Boston West Africa Trading Company would naturally have to stand for its obligations to the extent of its capitalization. I do not want any one to imagine that I am an easy mark, and all you have to do is to render claims and have me pay them. You will have to prove everything before you get any more money out of me."

In this letter Argous refers to the corporation's money as "my money." He apparently regarded his ownership of the entire capital stock of the company, and his right to press his claims against the company, as warranting him in appropriating to himself everything that the corporation had, leaving other claimants to meet, not only objections to their claims, but absence of assets to satisfy their claims, if they should sustain them in the courts. Clearly Argous had no such legal right. He could not be the judge in his own case. His transfer to himself was not only a preference; it was a conveyance made with intent to hinder, delay, and defraud the other creditors of the corporation. This intent is a necessary legal inference when a debtor transfers all its property without arranging to pay its debts. Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119; Matthews v. Thompson, 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550.

The decree of the District Court is affirmed, with costs.

HATTON v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, First Circuit. November 15, 1919.) No. 1415.

Master and servant \$\iffill\$=125(1), 217(13)—Evidence in action for death of servant insufficient to show negligence, but showing assumed risk. The presence of ice on a station platform, which caused a gangplank placed by trainmen between a car door and the platform to slip, allowing a heavy barrel they were moving over it to fall, by reason of which one of them was killed, held not to establish negligence of the company, there being no evidence that it had knowledge of the ice or showing how long it had been there, and deceased, who saw and knew of the ice, held to have have assumed the risk therefrom.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Action by Anna F. Hatton, administratrix, against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed. J. Lyman Gray, of Springfield, Mass. (Morrisey & Gray, of Westfield, Mass., on the brief), for plaintiff in error.

John L. Hall, of Boston, Mass., for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an action under the federal Employers' Liability Act of April 22, 1908 (chapter 149, 35 Stat. at Large, 65), as amended by the Act of April 5, 1910 (chapter 143, 36 Stat. at Large, 291), by an administratrix to recover for injuries to and the death of her intestate. In the court below a verdict was directed for the defendant, and the plaintiff excepted.

The declaration contains four counts. In the first two counts the negligence charged is that—

"of the officers, agents or employés of said carrier [the defendant] in allowing a barrel of brass to fall so that the plaintiff's intestate was struck upon the head and his skull fractured."

In the third and fourth counts the intestate's injury is alleged to have been caused by—

"a defect or insufficiency, due to the defendant's negligence, in its cars, machinery, appliances, tools, works or other equipment, causing a barrel of brass to fall so that the plaintiff's intestate was struck upon the head and his skull fractured."

In answer to a motion of the defendant to specify more definitely the particulars in which the plaintiff claimed that it was negligent, the plaintiff specified as follows:

"That the officers, agents or employes of the defendant were negligent in allowing a barrel of brass to fall upon the plaintiff's intestate by reason of defects and insufficiencies in the defendant's cars, machinery, appliances, toois, works or other equipment"

—in other words, that she relied on the charge of negligence specified in the third and fourth counts.

The defenses set up were a general denial, contributory negligence and assumption of risk; and the questions presented are (1) whether there was any evidence bearing upon the charge specified from which it could reasonably be found that the defendant was negligent; and, if so, (2) whether any reasonable conclusion could be drawn from the evidence other than that the plaintiff's intestate assumed the risk.

The plaintiff's intestate, Charles J. Hatton, received the injury here complained of on December 4, 1916, while employed by the defendant upon one of its freight trains operating between New Haven, in the state of Connecticut, and Westfield, in the state of Massachusetts. When his injury was received, he and three other trainmen were engaged in removing a barrel of brass weighing some 1,400 or 1,500 pounds from a freight car to a station platform by means of a gangplank. At the time of the accident the three fellow employés were on the freight car pushing the barrel of brass and Hatton was standing on the gangplank pulling or the barrel, and while thus en-

gaged the end of the gangplank resting upon the car was pushed or pulled off the car and tipped, causing the barrel to fall between the car and the platform and throwing Hatton upon the plank or plotform, causing the injury to his head, from which he, a week later died.

There was no evidence that the gangplank was insufficient or defective in any particular. It was a wooden plank about 3 feet in width. 5 feet in length and 21/2 inches thick. Each end was beveled off and provided with a strip of iron to protect it from wearing out. The distance from the car to the platform was about a foot and a half. It did not appear whether the floor of the car was above or below the station platform. The floors of some of the cars are higher and some are lower than the station platform. The platform was made of wood and was about 120 feet or three cars in length. On the platform was some ice. How long the ice had been there the evidence does not disclose. That its presence on the platform was known to Hatton is shown by the fact that on being inquired of as to how the accident happened he said the plank slipped on some ice. It did not appear who placed the gangplank from the car to the platform. After the gangplank was placed, Wheeler, one of the trainmen, said in the presence of Hatton and the other men, "I don't think the plank will stay there," and Hatton replied. "We will give it a try." It was daylight, all objects were plainly visible, and there was no special hurry about the work of unloading.

Hatton was an experienced trainman and had run on this division for a period of about five years. He was familiar with the loading and unloading of freight cars and with the use of gangplanks in doing such work. He had opened cars, put down planks and unloaded freight many times, and had previously assisted in unloading barrels

of brass at the station in question.

The fact that there was ice on the platform would not of itself warrant a jury in finding that the defendant was negligent. To justify such a conclusion it should have appeared that the defendant knew of its presence and had unreasonably failed to remove it, or that the ice had been there such a length of time that, in the exercise of ordinary care, it ought to have known of it and removed it. Smith v. Railroad. 73 N. H. 325, 61 Atl. 359. Under the circumstances here disclosed we think there was no evidence from which reasonable men could conclude that the defendant was negligent.

We are also of the opinion, if it could be said the defendant was negligent, that the only conclusion fair-minded men could draw from the evidence would be that the plaintiff's intestate knew of the danger and appreciated the risk. Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Jacobs v. Southern Ry. Co., 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Éd. 970; Boldt v. Penn. R. R. Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385.

The judgment of the District Court is affirmed, and the defendant in error recovers its costs in this court.

GALBRAITH v. VALLELY.*

(Circuit Court of Appeals, Eighth Circuit. November 15, 1919.) No. 200.

Bankruptcy &==288(3)—Summary proceedings; claim of assignee for benefit of creditors.

A general assignee, on bankruptcy of the assignor within four months, is not an adverse claimant with respect to his claim for expenses and services, and so entitled to have his rights tested in a plenary suit, since the assignment is itself an act of bankruptcy, and is avoided entirely by bankruptcy proceedings, which vest the court with the right to possession of all the property, which may be recovered in a summary proceeding.

Petition to Revise Order of the District Court of the United States for the District of North Dakota.

Petition of John P. Galbraith against John Vallely, trustee in bank-ruptcy, to revise order of District Court. Affirmed.

Fred B. Dodge, of Minneapolis, Minn. (Todd, Fosnes, Sterling & Nelson, of St. Paul, Minn., on the brief), for petitioner.

Before HOOK and STONE, Circuit Judges.

STONE, Circuit Judge. This is a petition by a common-law assignee under a general deed of assignment for the benefit of creditors to revise an order of the District Court, as a court of bankruptcy, affirming the jurisdiction of a court of bankruptcy in a summary proceeding to require such assignee to pay over to the trustee moneys claimed as expenditures and compensation in connection with the administration under the assignment. The petitioner contends that as to such expenditures and compensation he claims adversely to the trustee, and that he can retain the amounts claimed by him as properly expended and as properly due him for compensation until his right thereto is tested in a plenary suit. The referee so found, and was reversed by the trial court.

We think this contention governed by the principles announced in Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, to the effect that subsequent bankruptcy proceedings avoid the assignment as a whole, but that the assignee is entitled to reimbursement and compensation for expenditures and services only to the extent that such are beneficial to the estate. In the face of the facts that bankruptcy avoids the assignment as a whole, and that the assignee acts with full notice thereof, and of the possibility of bankruptcy, it is rather an anomaly to permit any rights to arise from the assignment. However, as the assignee is not a mere volunteer, as the assignment is lawful (Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507), as it is effective unless bankruptcy occur within four months (Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377), and as such bankruptcy may not happen, it is but just that benefits rendered the estate should, to the extent of such benefit, be returned to the assignee. All that is necessary to accomplish this result is to regard the assignee, to the above

*Certiorari granted 252 U. S. 576, 40 Sup. Ct. 344, 64 L. Ed. 724. For opinion below, see 253 Fed. 390. Order reversed 256 U. S. 46, 41 Sup. Ct. 415, 65 L. Ed. 823.

extent, as a preferred creditor who may prove his claim in the bank-

ruptcy court.

This preference springs rather from the character of the claim than from any superior right against the property. We take it that the theory of this preference is that services lawfully rendered for the purpose of, and having the effect of, preserving and assembling the assets for the creditors should have precedence over the claims of such creditors. But it is not necessary to the preservation of such preference that the assignee be placed in the further advantageous position of an adverse claimant to property in his possession. Furthermore, it is undesirable that he should be so placed, because it would result in many, if not most, instances in hampering the speedy and economical administration of the bankruptcy proceedings through the necessity of prosecuting plenary suits. This delay and expense should not be permitted to arise from a situation constituting in itself an act of bankruptcy (Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [Comp. St. § 9587]; West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1078), and which is avoided in entirety by bankruptcy proceedings. As the possession of the assignee upon avoidance of the assignment through the bankruptcy proceedings becomes the possession of the bankrupt (Bryan v. Bernheimer, 181 U. S. 188, 192, 21 Sup. Ct. 557, 45 L. Ed. 814; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372), such possession may be recovered in a summary proceeding in the bankruptcy matter (Babbitt v. Dutcher, 216 U. S. 102, 113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405).

The order of the trial court, reversing the order of the referee, is affirmed, and the cause remanded for proceedings not inconsistent with

this opinion.

GOLDMAN v. COHEN (two cases).

(Circuit Court of Appeals, First Circuit. November 21, 1919.)
Nos. 1430, 1431.

BANKEUPTCY \$\infty\$=165(1)—PAYMENT ON NOTE AS PREFERENCE TO ACCOMMODATION INDORSERS, ALTHOUGH NOT TECHNICALLY CREDITORS.

Under Bankruptcy Act, §§ 60a, 60b (Comp. St. § 9644), preferential payments on notes made by an insolvent debtor within four months prior to his bankruptcy held recoverable from accommodation indorsers of the notes, who were benefited thereby and who had knowledge of the maker's insolvency when the payments were made, and assented thereto; it not being essential to such right of recovery that the persons benefited be technically creditors.

Appeals from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Suits by George I. Cohen, trustee in bankruptcy, against Lew Goldman and Myer Goldman. Decree for complainant, and defendants separately appeal. Affirmed.

See, also, 250 Fed. 599, 162 C. C. A. 615.

Charles H. Dow, of Boston, Mass. (Samuel Sigilman, of Boston, Mass., on the brief), for appellants.

Joseph B. Jacobs, of Boston, Mass. (Jacobs & Jacobs, of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. In the court below the plaintiff, trustee in bankruptcy, was allowed to recover from the defendants five payments made by the bankrupt, Sternburg, to the holders of five notes on which Sternburg was maker and the defendants accommodation indorsers. The notes were paid at maturity, and at the time of each payment Sternburg was insolvent. An involuntary petition in bankruptcy was filed against him December 9, 1916, and he was adjudicated a bankrupt June 9, 1917.

It was found that the defendants had such information concerning the affairs of the bankrupt as to furnish reasonable cause for them to believe that he was insolvent as early as November 2, 1916, and that the five payments here in question were made from November 4 to December 4 of that year, and were preferences. It was further found that the defendants knew that Sternburg intended to make the payments before they were made, and assented to his making them.

From a decree allowing the plaintiff to recover the payments thus made, the defendants appealed, and assigned three errors, only one of which is now relied upon, namely, that the findings of fact are insufficient to support the decree.

In support of this assignment of error, the defendants contend that they were not creditors, but accommodation indorsers, and to entitle the plaintiff to recover from them the payments made to the holders of the notes it was necessary for the court below to have found, not only that the defendants knew Sternburg was insolvent, and knew of the intended payments and assented to them, but procured them to be made; that participation to the extent of knowing that Sternburg, while insolvent, intended to make the payments before they were made, and assented to them, was not enough. It is apparently conceded that, if the defendants, by reason of their being accommodation indorsers, were creditors of the bankrupt at the time of the payments, their knowledge that Sternberg, while insolvent, intended to make the payments and assented to them would render them voidable preferences and the defendants liable.

The plaintiff's right to recover is based upon section 60b of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 562, as amended June 25, 1910, c. 412, § 11, 32 Stat. 799 (Comp. St. § 9644), so much of which as is material to this case is as follows:

"If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, * * * shall then have reasonable cause to believe that the * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

When the transfer of a debtor's property will constitute a preference is set forth in section 60d, so much of which as is material reads as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, * * * made a transfer of any of his property, and the effect of the enforcement of such * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

As the holders of the notes to whom the payments were made were creditors of the bankrupt and the payments will enable them to obtain a greater percentage of their debts than other creditors of the same class, there can be no doubt that the payments were preferences within the meaning of sections 60a and 60b.

It is urged that the payments are not voidable preferences as to the defendants, as they were not creditors; that the payments were not made to them, but to the holders of the notes; and that, not being creditors, they should not be charged the sums paid the holders, unless they procured the payments to be made in fraud of the act. But we do not regard it as necessary to the validity of the decree that the defendants should have been creditors. They were accommodation indorsers on the notes, and must have paid them, if Sternburg did not, and were the parties to be benefited by the payments, whether they were creditors or not. Being benefited by the payments, and knowing that they were to be made and would effect preferences, the payments became voidable preferences, recoverable of the defendants. This question was passed upon in Paper et al. v. Stern, 198 Fed. 642,

644, 117 C. C. A. 346, 348, where Judge Sanborn, speaking for the Court of Appeals in the Eighth Circuit, said:

"If Naftalin [the bankrupt] was insolvent at the time of the transfer here in issue, so that he could not pay his creditors in full, it is evident that the appellants, who were guarantors of the payment of his note to the bank, and who must have paid it, if he did not, were the parties to be benefited by this transaction, whether they were creditors or not; so that the objection here urged would not be fatal to the decree, if the appellants were not creditors."

As the payments were preferences within the meaning of the act, and the defendants were benefited thereby, their knowledge and assent to the payments, knowing they were preferences, renders them voidable, and recoverable from the defendants.

The decree of the District Court is affirmed; the appellee to recover his costs in this court.

BOULDIN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1919.)

No. 3359.

1. INDICTMENT AND INFORMATION 6=61—STATE OF WAR WITHIN JUDICIAL KNOWLEDGE OF COURT AND ALLEGATION THEREOF UNNECESSARY.

In an indictment for an act made an offense if committed when the United States is at war, it is not necessary to allege that a state of war then existed; that being a fact of which the court may take judicial notice.

2. ABMY AND NAVY \$\igsim 40\)—VIOLATION OF ESPIONAGE ACT; QUESTIONS FOR JURY. In a prosecution for attempting to cause insubordination, disloyalty, and mutiny in the army, the question whether defendant had knowledge of an article printed and circulated in a paper of which he was owner, editor, and manager held one for the jury.

In Error to the District Court of the United States for the Western Division of Texas; Duval West, Judge.

Criminal prosecution by the United States against G. W. Bouldin. Judgment of conviction, and defendant brings error. Affirmed.

J. F. Hair and Ed Haltom, both of San Antonio, Tex., for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge. Plaintiff in error (hereafter called defendant) was charged with a violation of section 3 of the Act of June 15, 1917, known as the Espionage Act (40 Stat. 219, c. 30 [Comp. St. 1918, § 10212c]). The indictment substantially alleges that on November 24, 1917, at San Antonio, Tex., defendant did unlawfully and willfully attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States, by publishing on the front page of the "San Antonio Inquirer," a newspaper of which he was editor and manager, an article headed in black-faced type. "Sol-

diers of the 24th," referring to the 24th U. S. Infantry, a negro regiment, of which a number of its members were then on trial at San Antonio for mutiny. The article is set out in full in the indictment. We excerpt the following:

"Be brave; don't feel discouraged; rest assured that every woman in all this land of ours, who dares feel proud of the negro blood that courses through

her veins, reveres you; she honors you.

"We would rather see you shot by the highest tribunal of the United States army, because you dared protect a negro woman from the insult of a Southern brute in the form of a policeman, than to have you forced to go to Europe to fight for a liberty you cannot enjoy.

"Negro women regret that you mutinied, and we are sorry you spilt innocent blood; but we are not sorry that five Southern policemen's bones now

bleach in the graves of Houston, Texas.

"It is far better that you be shot for having tried to protect a negro woman than to have you die a natural death in the trenches of Europe, fighting to make a world safe for democracy that you can't enjoy. On your way to the training camps you are jim-crowed. Every insult that can be heaped upon you, you have to take, or be tried by court-martial if you resent it."

Defendant interposed a motion to quash the indictment on various grounds; the only one of which requires notice is that the indictment failed to allege that the United States was then at war. The motion to quash was overruled. The case went to trial, and at the close of the evidence defendant moved for a verdict of acquittal, which was denied. A verdict of guilty resulted, and a motion to arrest judgment was overruled.

- [1] Eleven errors are assigned. The first seven run to the refusal to quash the indictment. The indictment follows the language of the statute, and it was not necessary to its validity that it should allege the United States was then at war, as that was a matter that could be taken notice of by the court and the jury. The motion to quash was properly overruled.
- [2] The eighth assignment is to the overruling of the motion to direct a verdict of acquittal. There was evidence tending to show that the defendant was editor, manager, and owner of the paper, had personally mailed copies of the paper, that a copy of it was mailed to one of the members of the 24th Infantry then on trial, that it has a circulation of about 1,500 among the negroes in and around San Antonio, and copies of it were on file in barber shops kept by negroes and frequented by negroes of draft age. There was also evidence tending to show that the defendant had no personal knowledge of the article, was not the author of it, and did not know that it was published in his paper.

The question of defendant's knowledge and intent was for the jury. There can be no doubt that the article was well calculated to create insubordination, disloyalty, and refusal of duty among the young negroes subject to draft. The jury was at liberty to conclude from the facts that defendant was the editor and manager of the paper and personally mailed out copies; that he had personal knowledge of the article and knowingly circulated it. It was not necessary for the prosecution to show that the defendant had in mind any particular unit of the United States army, or any particular person, when circulating the article.

The ninth assignment of error is to the refusal of the court to grant a new trial. This was purely a matter of discretion with the trial court, and no error can be assigned to its action thereon.

The tenth and eleventh assignments of error are to the judge's charge. The objection to the charge is not to anything said, but rather to the failure of the court to define the offenses of insubordination, disloyalty, mutiny, and refusal of duty. As the charge does not appear in the record, we must assume that it covered the law and the facts of the case fully. We find no error in the record.

Judgment is affirmed.

THE WALRUS.

MURPHY et al. v. GORTON-PEW VESSELS CO.

(Circuit Court of Appeals, First Circuit. November 21, 1919.)
No. 1416.

1. SEAMEN &= 6, 20—REFUSAL TO FURTHER SERVE, AFTER SIGNING ABTICLES, DESERTION.

Oral contracts by fishermen to serve on a vessel for monthly wages and a share of the catches, regardless of the number of voyages made, held not terminated, but continued, by the subsequent signing of articles in the same terms, to comply with a new government regulation; and the refusal of the signers to further serve held desertion, which entitled the vessel to recoup the resulting loss from the wages then due them.

2. Admiralty \$\infty 36-Recoupment of damages allowable.

Damages accruing to a respondent from a transaction out of which the cause of action arose may be recouped in admiralty, as well as at common law.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Suit in admiralty by Daniel Murphy and others against the steam trawler Walrus; the Gorton-Pew Vessels Company, claimant. From the decree, libelants appeal. Affirmed.

Wendell P. Murray, of Boston, Mass., for appellants. Frederick H. Tarr, of Gloucester, Mass., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a libel by eight fishermen to recover wages, including shares in the catches, earned during the month of May, 1918, while they were engaged as a part of a crew on the steam trawler Walrus. Seven of the libelants claim wages for the first 25 days in the month of May, and one of them for 15 days from the 10th of May.

[1] The original agreement under which they were hired was oral. It was not an agreement to pay by the trip or voyage to the fishing banks and return, but to pay monthly wages and shares in the catches, however many trips were made each month; and the payments were to be made on the 1st of the month for the wages and shares in the

catches of the preceding month, or as soon thereafter as the steamer

came to port.

During the month of May the Walrus came into port with catches on the 5th and the 21st. After coming in on the 21st it became necessary for her crew to sign shipping articles to comply with a government regulation which had then become effective, and on May 25th the crew went before the United States shipping commissioner at Gloucester and did so.

On the afternoon of May 26th, when the steeamer was about to proceed on another trip to the fishing ground, the libelants, although requested to go on board, refused to do so. Because of their failure in this respect the steamer was unable to go to sea for more than 36 hours

and sustained a loss of \$1,250.

It was found in the court below that the articles signed on the 25th were a continuation of the oral agreement, and did not differ therefrom, except that, under the articles, the duration of the monthly employment was not to exceed "12 calendar months"; that the wages and shares of the seven libelants who had served 25 days in May was \$225 each, and of the other libelant \$125. It was also found that the oral contract was not terminated by signing the articles on the 25th; that the libelants were still bound thereby and were deserters; that the loss sustained by the steamer was to be charged against the libelants in proportion to the amount of wages severally due them; and that any balance should be paid them.

We think that the decree of the District Court should be affirmed. The assignments of error present no questions of law material to a decision of this case, for they are based upon assumed facts not found by the trial court (viz. that libelants' services were rendered under distinct voyage contracts ending May 5th and May 21st), and, so far as they seek to question any findings of fact, we are precluded from considering them, as the evidence has not been reported.

[2] Damages that accrue to one from a transaction out of which the cause of action arises may be recouped in admiralty as well as at common law. Gillingham v. Charleston Towboat Co. (D. C.) 40 Fed. 649, 650, 651. The employment of the libelants as fishermen upon the steamer Walrus during the month of May and the rendition of services in that capacity during the month constituted a single transaction, and the damages sought to be recouped are the direct result of their desertion and failure to perform the services which they had undertaken to render during that time. Pilot Boat No. 5 (D. C.) 54 Fed. 537.

The decree of the District Court is affirmed; the appellee to recover its costs in this court.

E. H. VAVRA & CO. v. KALAMAZOO CARTON CO. et al. (Circuit Court of Appeals, Sixth Circuit. December 12, 1919.)

No. 3239.

PATENTS \$\iiiist\$ 328—Infringement; Paper coating machine.

The Vavra patent, No. 1,198,976, for a machine for applying paraffine to paper, held not infringed.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; C. W. Sessions, Judge. Suit in equity by E. H. Vavra & Co. against the Kalamazoo Carton Company and others. Decree for defendants, and complainant appeals. Affirmed.

John G. Elliott, of Chicago, Ill., for appellant. Otis A. Earl, of Kalamazoo, Mich., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. The complainant below appealed from a decree that the defendants did not infringe claim 1 of patent No. 1,198,976, issued September 19, 1916, to E. H. Vavra, upon a machine for applying paraffine to paper. The claim is quoted in the margin.

The machine shown in the drawings comprises a tank filled with melted paraffine, forming a bath through which the paper is passed by suitable feed rollers. As the paper rises toward the top of the tank, it passes between two fabric-wrapped rollers of relatively large diameter, which are so spaced from each other as to permit the desired thickness of coating, and that only, to remain upon each surface of the paper. Since the desired coating is very thin, and the paper is likely to be somewhat compressed, the effective distance between these rollers is that, substantially, of uncompressed paper. Because they thus determine the thickness of the coating, and permit no more than this predetermined thickness to adhere to the paper as it leaves the tank, the patentee terms them "gage rollers." In the form shown, they are set horizontally. One of them is submerged, so that its upper surface is just about level with the surface of the bath, and the other is about half submerged. It results that the point where they come together and bite the paper and gage the coating is considerably below the top level of the bath. Since the rollers, at their ends, do not reach the sides of the tank, there is evidently a tendency for the melted paraffine to flow in from the ends between the rollers above the point of paper contact, and this would seem to destroy the gaging effect of the

 $T^{\prime\prime}$ Claim 1. A coating machine, comprising in combination a pair of contacting rollers, one of which rollers has its upper side located in a plane approximately that of the level of the coating material, and means for simultaneously rotating said rollers in opposite directions, whereby the coating material is prevented from overflowing said rollers, and their surface above their point of contact is utilized to gage the thickness of the coating adhering to the articles passing from contact with the rollers."

rollers and again submerge the paper; but it is said that, on account of the slowness with which the paraffine flows, the rapidity with which it cools, and the tendency of the outwardly revolving rollers to carry around with them such paraffine as does flow between their ends, this result does not happen, and the paraffine does not enter far enough from the ends of the rollers to reach the paper after it leaves the contact point between the rollers.

In defendants' device, the paper does not pass through the bath. The application of the paraffine and such gaging as there is are simultaneously accomplished by a set of two rollers, one directly above the other, and the under one of which has its lower part (less than half) revolving in the surface of the bath. Each of these rollers has a felt surface. The lower one, therefore, carries up a substantial quantity of the paraffine, and part of this is transferred to the surface of the upper roller, because they are in a pressure or squeezing contact with each other. The felt surface of both rollers being thus saturated, the paper is passed through, and a portion of the paraffine somewhat penetrates the paper, and another portion remains as a coating upon the outside. These rollers also wipe or squeeze off what would otherwise be superfluous paraffine, and prevent it from passing through between them. In the patentee's form, sheets of paper are to be fed continuously, without intervening spaces; while in defendants' form, the paper must be in short pieces, with enough spaces between them, as they progress, so that the lower roller may in the intervals transfer to the upper a sufficient quantity of the wax.

It is manifest that this form does not meet the terms of the claim. The claim language clearly fits only a construction where the bite of the rolls is below the surface of the bath. It is the "rotating said rollers in opposite directions," which is the operation referred to in the first word of the functional clause, "whereby the coating material is prevented from overflowing said rollers," and it could not be more plainly said that the rollers are so located that the melted wax would overflow them except for their rotation. In addition is the express statement that

one of the rollers is substantially submerged.

Comparison with other claims does not militate against this limitation. There is no other claim which is not distinguishable from this in the precision with which the rollers are located. The others, re-

ferred to, definitely fix both rollers, instead of one.

To meet this obvious difficulty, plaintiff insists that the real invention lay in the gaging function of the rollers; that, for this purpose, it was immaterial where they were placed with reference to the bath; that the specification contemplated a vertical adjustment of these rollers; and, hence, that the claim is entitled to a breadth of construction which would make the defendants' form an equivalent. We are not able to accede to this insistence. A vertical adjustment is contemplated, but its operating purpose is that of accommodating them to the rise and fall of the level of the bath, so as to maintain both rollers always in substantially the partially submerged condition shown. The gaging function was not new with Vavra. Every set of rollers through which the paper passed shortly after emerging from

the paraffine was necessarily a gaging set, and rolls of this character are shown in several former patents. Plaintiff argues that the "gaging" of the patent is the sponge-like and absorbent action of the felt surface above the point of greatest squeeze; but this action is not suggested in the specification or the claim in suit. Such definition as the specification gives of "gaging" is to the contrary; and, if such action exists, it was not new with Vavra. A felt or similar surfacing of the rollers was a common earlier expedient.

It seems plain enough that passing the paper through a bath was an efficient and desirable method of causing a paraffine coating and some penetration, and that a squeezing away of the excess, or a gaging, was a necessary subsequent operation, but that even a slight interval between the first operation and the second was somewhat objectionable, because of the tendency to set. We think that, in view of the state of the art, Vavra's only inventive thought was that he could move the squeezing or gaging rollers down into the bath, and still prevent the paraffine from flowing back onto the paper above the gaging point. His claim uses apt terms to specify this thought and the mechanism for accomplishing it; and, even if the express and careful limitation of the claim language to this form could be overlooked, the theory of equivalency cannot be permitted to carry the claim beyond the scope of the actual invention.

The decree must be affirmed.

THE EDOUARD ALFRED.

(District Court, E. D. New York. October 22, 1919.)

1. Collision \$\iiii 96\$, 106—Navigation rules; Vessel leaving slip.

Boats maneuvering to leave a slip are not navigating on a course, within the starboard hand crossing rule, until they have proceeded far enough away to definitely indicate their intended course, and until that time the special circumstance rule applies.

2. Collision €==102-Vessel leaving slip; mutual faults.

A collision in East River between a steam lighter leaving a slip and a tug navigating along the ends of the piers held due to faults of both vessels; the lighter being in fault for not keeping a better lookout, and not continuing its slip signal until it reached the end of the pier, and the tug for not reducing speed at once on accepting a crossing signal, which made the lighter the privileged vessel.

In Admiralty. Suit for collision by the Empire Water Company, Incorporated, owner of the steam lighter Livingston, against the steam tug Edouard Alfred. Decree for libelant for half damages.

Foley & Martin, of New York City (J. A. Martin, of New York City, of counsel), for libelant.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, of New York City, of counsel), for claimant.

CHATFIELD, District Judge. On the morning of October 7, 1918, the steam lighter Livingston, 81 feet over all and 25 feet wide,

which had been lying overnight some 400 or 500 feet in from the end of the pier at Thirty-First street, Brooklyn, started for Pier 8, Hoboken. This pier extends diagonally into the wide stretch of water where Gowanus Canal emerges into New York Bay. There are several hundred feet of clear water between the end of the pier and boats moored at the wharves upon the opposite side of the creek. The Livingston apparently blew a whistle which was intended as a slip whistle, and headed straight out parallel to the north side of the pier, and at a distance which ultimately proved not much more than 25 feet therefrom. In so doing she passed around a derrick lighter which had been lying between the Livingston and the outer end of the pier. Her pilot house was located some 60 feet back of the bow, and she had no lookout, except the man stationed in the pilot house. As the pilot house cleared the end of the shed upon the pier (which is No. 18, East River), the boat was making some 3 or 4 miles an hour.

The captain in the pilot house then observed the Edouard Alfred, a tug boat, coming up the Gowanus Canal, and approaching the shore, so that she was not much over 100 feet out, and slightly below the line of the southerly side of Pier 18. The Livingston blew one whistle, followed by another single whistle, and then by an alarm. The Edouard Alfred made no change in speed or course, so far as observed by the Livingston, which continued her course and speed straight across the bow of the Edouard Alfred. The Livingston, whose stern at the time the boats sighted each other, was some 80 feet inside the end of the pier, proceeded to a point where her stern was 80 feet outside of the pier, or a total distance of about 160 feet, when the bow of the Edouard Alfred struck her at a point estimated by the witnesses as 100 feet outside the end of the pier and about 20 feet forward of the Livingston's stern. As the width of Pier 18 is also about 100 feet, and as the collision occurred about 25 feet up the channel (that is, to the northeast of the northerly line of the pier), it is apparent that the Edouard Alfred traveled about the same distance as the Livingston. At the time of the collision the Edouard Alfred had her engines reversed and her helm ported; but the way of the Edouard Alfred had not been stopped, nor had her course been sufficiently diverted to starboard to carry her under the stern of the Livingston.

No question arises as to signals. The single whistle of the Livingston was accepted by the Edouard Alfred, and the captain of the Edouard Alfred, as well as all of its witnesses, testifies that the Edouard Alfred ported her helm and attempted to pass astern of the Livingston, except as this maneuver was interfered with by the reversal of the engines of the Edouard Alfred when danger of collision was observed. We thus have a situation where the Livingston assumed (and indicated by whistle signal) right of way across the bow of the Edouard Alfred. This was acquiesced in by the Edouard Alfred, which proceeded too far before beginning to hold back or before turning to starboard, so as to give the Livingston the right of way which admittedly belonged to her.

[1] If the accident had occurred under the same circumstances in the bay, with the boats emerging from behind some obstructing ob-

ject, such as a large steamer, it is certain that the Edouard Alfred would be the burdened vessel, as they were approaching on crossing courses, and as the Edouard Alfred had the Livingston upon her starboard hand. In the case at bar, however, the Livingston was not navigating in open water, and in recent cases, such as The Bouker No. 2, 254 Fed. 579, 166 C. C. A. 137, and Moran and Coleraine, 254 Fed. 766, 166 C. C. A. 212, the Circuit Court of Appeals had held that boats maneuvering to leave a slip are not navigating upon a course until they have proceeded sufficiently away from the slip to have definitely assumed the course upon which they are to move away from the locality. The Court of Appeals in each of these cases held that the special circumstance rule applies, that the boat having the other upon her starboard hand is not necessarily the burdened vessel, and has in each case held both vessels responsible for failure to avoid danger, where greater care would have prevented collision.

[2] Assuming that the Livingston, in leaving the slip in question, was therefore not a vessel upon a course, and as the Edouard Alfred was approaching at about the same rate of speed as the Livingston was moving out, let us consider the situation under the special circumstance rule. The Edouard Alfred claims that the Livingston was too close to the side of the slip, and did not blow a slip whistle. This, in effect, comes down to a charge that the Livingston did not continue blowing a slip whistle, so as to attract the attention of the Edouard Alfred as the Livingston approached the end of the pier. The evidence seems to show that the Livingston blew a whistle as she started to leave the slip. She had ceased to blow this whistle before her master observed the Edouard Alfred coming up the stream; that is, before her bow had emerged from the slip. She immediately thereafter blew a one-whistle

signal, and this the Edouard Alfred accepted.

There is little reason for disbelieving the testimony of the witnesses who testify that the Livingston had blown a signal which was substantial compliance with the slip whistle rule. The Edouard Alfred was complying with the narrow channel rule; that is, she was to starboard of midstream, but had reached a point close to the ends of the piers. There were no other boats in the neighborhood, interfering with the movements of either vessel. The Edouard Alfred must have made some way to starboard when her helm was ported, and was not so close to the pier end as to interfere with her own steerageway; but she was too close to the pier ends to enable the Livingston to have a free choice in selecting a course upon which she would proceed toward Hoboken. Undoubtedly the Livingston could do but one thing, and that was to proceed across the Edouard Alfred's bow, and indicate to the Edouard Alfred that she was going to do so.

The Edouard Alfred claims that the Livingston was negligent in failing to increase her speed, so as to gain the necessary 20 feet by which the Edouard Alfred ultimately failed to clear the Livingston's stern. The Edouard Alfred also contends that the Livingston knew that the Edouard Alfred was a slow, clumsy boat in maneuvering. But the court is unable to find that the Livingston was at fault for not appreciating the fact that the Edouard Alfred would be unable to turn suf-

ficiently to starboard and to stop her course a sufficient amount to make the Livingston's escape so near that the added impetus of hooking up the engines while going 150 feet would be necessary. In fact, the Livingston could hardly appreciate this until just before the collision, and it would then be too late to accomplish anything by attempting to

proceed under a jingle.

On the other hand, the Edouard Alfred may fairly be held to have failed to appreciate the distance which the Livingston would cover and the rate of approach of the two vessels, inasmuch as the Edouard Alfred struck the Livingston a severe blow, after having covered more than the distance within which some witnesses testify that the Edouard Alfred could be stopped. She apparently had made no progress at all toward shore, even under a helm put to port for that very purpose. The Edouard Alfred accepted the position of the burdened vessel; but it is not believable that under such circumstances so little diminution of speed and change of course could have resulted, if she had promptly observed the danger. Neither boat had a lookout stationed directly at the bow, but the captain of the Edouard Alfred claims that he saw the Livingston at about the time her bow actually came out from behind the pier and her pilot house showed in front of the pier shed. The absence of a lookout on the Edouard Alfred, therefore, made no difference in the situation.

The Livingston had men working upon its deck, but no one standing at the bow. The height of the Livingston was such that a lookout on the deck could have signaled the approach of the Edouard Alfred (which might have been in that position legitimately without being open to the charge of running in close under the pier heads), and could have warned the Livingston to slacken its speed. As it was, the bow of the Livingston reached the end of the pier before the captain reached a point where he could determine what course to pursue. The lack of lookout, therefore, upon the Livingston, while perhaps customary upon such boats, should not be treated as an excuse for failure on the part of its captain to use such precautions as would make up for the lookout. The presence of the lookout would undoubtedly have resulted either in a slackening of speed on the part of the Livingston, if the vessels were in fact so close to each other that the collision was unavoidable, or would have allowed the earlier sounding of a whistle, if the position of the vessels, at the time the first single whistle signal was given, was such that the collision could not be avoided. But, even so, there was additional negligence with respect to the slip whistle. The Livingston, apparently, had ceased blowing her slip whistle before getting near the end of the pier, while the Edouard Alfred did not listen carefully for all whistles, or she would have noticed the Livingston's whistle, even though blown when well up the slip, and thus might have been more careful in running along the pierheads.

It would follow that the Edouard Alfred was clearly at fault for her conduct throughout the entire proceeding; but the Livingston was at fault as well, and it would appear to be a case where the damages

should be divided, and a decree may be entered accordingly.

CITY OF TOCCOA v. MARCHBANKS.

(District Court, N. D. Georgia. December 9, 1919.)
No. 135.

REMOVAL OF CAUSES 4, 79(1)-"SUIT"; CONDEMNATION PROCEEDING.

A condemnation proceeding, under Civ. Code Ga. 1910, § 5206 et seq., by serving notice, selection of assessors by the parties, and filing of their award after hearing with the clerk of the superior court, from which award an appeal may be entered in writing within 10 days for trial before a jury in such court, held to become a "suit," within the removal statute (Judicial Code, § 28; Comp. St. § 1010), on the filing of the award in the court, and the time for filing petition for removal held limited to the 10 days allowed for entering appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit.]

At Law. Action by the City of Toccoa against J. D. Marchbanks. On motion to remand to state court. Motion granted.

Fermor Barrett, of Toccoa, Ga., and W. A. Charters, of Gainesville, Ga., for plaintiff.

J. C. Edwards, of Clarkesville, Ga., and S. C. Upson, of Athens, Ga., for defendant.

SIBLEY, District Judge. By an act passed in 1894 (Code Ga. 1910, § 5206 and following), all corporations or persons authorized to take or condemn private property for public purposes are required to proceed as follows:

Failing to agree on compensation, a notice directed to the owner or owners of the property to be condemned, describing the property or franchises and the amount of interest to be condemned, fixing a time of hearing, giving the name of an assessor selected by condemnor, and requesting the owner to select an assessor, is to be served by the sheriff in person, 15 days before the date fixed for the hearing. Guardians ad litem may be appointed by the clerk of the superior court or ordinary for persons under disability. If the owner fails to name an assessor, the ordinary, or, if he is disqualified, the clerk of the superior court, selects one. The two assessors agree upon a third. but, on failure after five days to agree, the judge of the superior court selects the third. The three assessors have power to fix and alter the time of hearing, issue subpœnas, and compel attendance of witnesses, as in the superior court, are to be sworn to do "exact justice between the parties according to law," are to hear the evidence produced by either party, who may appear in person or by attorney, are to assess the value of the property taken, consequential damages to other property and consequential benefits, and render an award in a prescribed form as to each item, directing that the condemnor shall pay the condemnee the difference between the damage and the benefit. The award is filed within 10 days, and recorded in the office of the clerk of the superior court of the county where the property is situated, and either party, within 10 days, may"enter in writing an appeal from the award to the superior court of the county where the award is filed. And at the term succeeding the filing of the appeal it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property condemned or the amount of damage done, with the same right to move for a new trial and file a bill of exceptions as in other cases at common law."

The appeal does not delay the work of the condemnor, if he pay the amount of the award to the owner or into court for him. The payment, or acceptance thereof, does not prevent either party from prosecuting an appeal. If no appeal is entered within 10 days from the filing of the award, and payment is not made, the clerk of the superior court—

"shall issue execution upon such award or judgment, which may be levied upon any property of the corporation or person condemning."

In all cases the clerk shall enter the notice and award thereon upon the minutes of the court, and the condemnor shall pay the costs

as provided by law in civil cases in the superior court.

Under this statute, the city of Toccoa notified Marchbanks, a citizen of another state, of a purpose to condemn for a public waterworks 17 acres of described land, naming July 3, 1917, as the date of hearing. The second assessor was named by Marchbanks, and a third named by the judge of the superior court on October 8, 1917. The assessors being sworn, a hearing was fixed by agreement of parties for October 22, 1917, and Marchbanks, on that date, filed before the assessors a pleading setting up at length his contention for damages in an amount of \$26,000. The assessors made a net award of \$255, October 29, 1917, which was duly filed in the superior court of Stephens county. On October 31, 1917, Marchbanks appealed from the award.

The next term of the superior court should have been held in February, 1918, but was not held. A special term was held in May, 1918. At said term, on May 6, 1918, a petition and bond for removal were filed in said case, and the record in the cause was filed in the District Court of the United States on October 3, 1918. A motion to remand was filed by the city of Toccoa at the next term, on November 4, 1918, upon the general ground that the District Court was without jurisdiction in the premises.

No hearing was had thereon until November 7, 1919, when an amendment was allowed, contending that the removal was too late, in that Marchbanks had pleaded before the assessors, taken part in the contest before them, accepted payment of the award, and suffered a term of the superior court to elapse before attempting to remove the case, and the removal was too late.

The matter seems of first impression in Georgia, and as the order to be granted is final, it is thought proper to state the reasons for it.

The elements of federal jurisdiction are conceded. The contention is as to when this proceeding became "a suit of a civil nature," within the meaning of Judicial Code, § 28 (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. § 1010]), and at what time "the defendant is required by the laws of the state or the rule of the state court in

which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," under Judicial Code, § 29 (section 1011).

In the many decisions of the federal courts upon the statutes of other states, the matter seems in some perplexity and doubt. The case must be decided upon a proper interpretation of the Georgia statute. In Weston v. City of Charleston, 2 Pet. 463, 7 L. Ed. 481, Chief Justice Marshall said:

"The term 'suit' is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

Regarding condemnation proceedings, in Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449, the Court said:

"The right of eminent domain always was a right at common law. * * * That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land by virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

In this case the United States was proceeding in a Circuit Court of the United States. If the state itself, by a direct act, were undertaking to assert the right of eminent domain, the Eleventh Amendment of the Constitution would have to be considered. Even where the right of eminent domain was asserted through a private corporarion, Mr. Justice Brewer, then Circuit Judge, in Colorado Midland Ry. Co. v. Jones et al. (C. C.) 29 Fed. 193, thought it inappropriate for the federal courts to interfere unless the sole question to be determined was the amount of the compensation to be paid. It must, however, be taken as settled by the decision in Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, that when the right to take has been conferred upon conditions stated in statutes, that the construction and application of the statutes is a judicial mater, a controversy regarding which may be removed to the federal courts, although the propriety of the taking, as well as the compensation, is to be determined. This was recognized by the judges dissenting in that case, in Mason City Railroad Co. v. Boynton, 204 U. S. at page 578, 27 Sup. Ct. 321, 51 L. Ed. 629.

The question remains, however, as to when the procedure authorized by the state becomes a suit, that is, a judicial controversy before a court, and that is the point on which the decisions seem at variance. In Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the proceeding before the appraisers, though made on notice, was said to be "in the nature of an inquest to ascertain value, and not a suit at law in the ordinary sense," and the right of removal after appeal from it was upheld. So in Pacific Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, the initial procedure before a mayor and a jury was held to be similar, and that a removal on appeal was not too late. In Searl v. School District, 124 U. S. 197, 8 Sup.

Ct. 460, 31 L. Ed. 415, the proceeding was initiated by a petition in court, naming the landowners, who were served with summons, and then freeholders were appointed to assess. It was there held:

"The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing the defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of Boom Co. v. Patterson and the Pacific Railroad Removal Cases, a step taken by the party seeking to make the appropriation ex parte and antecedent to the actual commencement of the adversary proceeding inter partes, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. Because under the Colorado law the appointment of the commission is a step in the suit after the filing of the petition and the service of summons upon the defendant, it is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is therefore a suit at law from the time of the filing of the petition and the service of process upon the defendant."

The case of Madisonville Traction Co., supra, involved a similar procedure, save that the commissioners were appointed ex parte and the owners subsequently summoned to show cause why their award should not be confirmed by the court. The court again held the proceeding a judicial proceeding from the beginning, and removable prior

to the appeal.

There would seem no doubt that, where the appraisers are appointed and act without notice to the condemnee, and particularly when their action covers, not alone a special piece of property, but all property involved in a proposed improvement, that their procedure should be considered "a mere inquest," such as is a coroner's inquest or the presentment of a grand jury, which bind no one. It would seem equally clear that, where a petition is filed in a permanent court, contemplating service upon an adversary party, and such service is actually made, the procedure after such service is in its nature judicial, and that a suit is pending in a court.

The Georgia statute is intermediate, in that the appraisers are appointed on notice and proceed only after notice; but they are not appointed by a permanent court, and are apparently under the direct control of no permanent court until they make their award. Notwithstanding the casual action of the ordinary, or judge, or clerk of the superior court, in their organization, they cannot be said to be a part of either court, for they are under the control of neither. It is doubtful whether the superior court could even enforce the filing of

their award, save by a formal mandamus.

The assessors are to determine only the question of compensation, and an appeal from their finding is so limited. Any question of the propriety of the taking must be raised in Georgia by petition in equity for an injunction. Atlanta Terra Cotta Co. v. Georgia Electric Co., 132 Ga. 537, 64 S. E. 563. But they alone can fix the compensation. It would seem that, being sworn to decide according to law, deriving their powers, not from the consent of the parties, but from the law,

having power to compel the attendance of witnesses, to hear evidence, and to make a judgment, which will fix the rights of the parties, if not appealed from, there is present every element of a court and a suit therein. There being no constitutional requirement in Georgia to the contrary, their award might be made final (Savannah, Florida & Western Railway Co. v. Postal Telegraph-Cable Co. et al., 112 Ga. 941, 38 S. E. 353), and at one time was final (Oliver v. Union Point & White Plains Railroad Co., 83 Ga. 257, 9 S. E. 1086).

If this were still the case, I should have no hesitation in holding them to be a court, though temporary in character, and that the proceeding before them might be removed to the District Court as soon as they were organized by the selection of a majority of their members; the federal judiciary then taking the place of the state judiciary in all that might be required of the latter. Under similar circumstances this conclusion was reached in the case of Mineral Range R. Co. v. Detroit Copper Co. (C. C.) 25 Fed. 515, cited with approval in the Searl Case, above. Otherwise the naked question of compensation, confessedly a controversy which is removable, would, by the forms and procedure adopted by a state for its adjudication, be withdrawn from the federal judicial power. As to the view the state court has taken of the status of the appraisers as a court, see Hutchinson v. Copeland et al., 146 Ga. 357, 91 S. E. 206, Charleston & Western Carolina Ry. Co. v. Hughes, 105 Ga. 12, 30 S. E. 972, 70 Am. St. Rep. 17, and N., C. & St. L. Ry. Co. v. Western Union Tel. Co., 142 Ga. 525, 83 S. E. 123.

There are, however, practical difficulties in applying the removal preedure at this stage. The appraisers would doubtless have to be treated both as the court to which the petition and bond for removal are to be presented and also as the clerk who would transmit the record, since there is no record in the hands of any one else. Moreover, the actual practical benefit to be derived from a removal would seem to be confined to the selection of the third assessor by the District Court judge, instead of by the judge of the superior court.

Taking, however, the Georgia procedure as it stands, involving a full right of appeal and an ultimate lodgment of the entire proceedings in a permanent, unmistakable court, I would be unwilling to hold with the contention of the condemnor that a removal, even if it may be sought before the appraisers, must be sought there, or the right lost. Viewing the procedure as a whole, it would seem a fair interpretation of it to regard the matter as in fieri, or preparatory, until the award is made up and filed, with the notice, with the clerk of the superior The matter, viewed in a broad light, then stands in a court of record with the notice and the award together indicating a definite demand for definite property for a specific purpose, to be taken at a fixed price—a demand which the condemnee, if he does not wish to acquiesce in it, must, as in other cases in court, take measures to defend himself against. The case at this point is unmistakably a suit of a civil nature, pending in a permanent court, after due notice to the defendant therein.

The fact that in this case the condemnee filed a pleading before the assessors may be treated as immaterial. The statute required no such thing. If they had been the final tribunal, although no written answer were required, of course removal would have to be sought at the time the condemnee was compelled to appear for trial and there plead orally; but I think it may be fairly said that "the statute of the state (there being no rule of court involved) required" nothing of the defendant until, the award being filed, it declared that he must, within 10 days therefrom, in order to escape its becoming a final judgment against him, fixing the amount he might recover, "make, in writing, his appeal therefrom." This appeal is the only thing required by the condemnation statute, from beginning to end, for the condemnee to do. The issue that is to be made up for trial by a jury the statute does not require to be made up by the defendant. but by the judge, and this cannot serve as the point of time at which removal is to be sought, as contended by Marchbanks. Practically it would be quite unreasonable to permit the condemnee to wait, not only until the appraisers had heard the case, made their award, filed it, and appeal had been entered, but until the case was actually called for trial before a jury, with parties and witnesses present, to make his demand for removal. Promptness is certainly aimed at in the seeking of this remedy.

Considering the filing of the appeal to be the only plea or answer required by the state statute of the condemnee, I take the time fixed for that as the time at which removal must be sought, under Judicial Code, § 29, and that the right of removal expires with the 10 days after the filing of the award. Whether it be possible to treat the Georgia procedure as judicial from its inception, and whether the removal may be sought at any time prior to the filing of the award, should the condemnee consider it important to seek it at that time, neet not be, and is not now, decided. But see Kaw Valley v. Metropolitan Water Co., 186 Fed. 315, 108 C. C. A. 393; Des Moines Water Co. v. City of Des Moines, 206 Fed. 657, 124 C. C. A. 445. It is held, however, that the removal must be sought during the period allowed for the filing of the appeal. This being true, the removal in this case was sought too late, and the case should be remanded. Compare Martin's Adm'r v. B. & O. R. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Heller v. Ilwaco Mill & Lumber Co. (C. C.) 178 Fed. 111; First Nat. Bank v. Appleyard & Co. (C. C.) 138 Fed. 939; Head v. Selleck (C. C.) 110 Fed. 786.

Marchbanks, however, contends that this ground of the motion to remand is taken too late, and the right to remand, therefore, had been waived by the city of Toccoa. A waiver implies a voluntary surrender of a right, or at least the doing, or the omission, of some act, of the taking of some position, that clearly indicates a purpose to surrender the right, or the acceptance of some inconsistent benefit that would estop. In this case the city of Toccoa has certainly not intended to waive any right of remand, but has from the beginning insisted that the cause should go back to the state court. The mere

finding of additional grounds therefor is in line with their consistent contention, and shows no waiver of the right to remand, nor an estoppel to assert it.

The case will therefore be remanded to the superior court of Steph-

ens county.

RAILWAY STEEL SPRING CO. v. CHICAGO & E. J. R. CO. (District Court, N. D. Illinois. November 1, 1919.) No. 57.

1. Constitutional law 54—Eminent domain 70—Power to determine just compensation for property taken not legislative.

The ultimate determination of the amount of compensation which an owner shall receive for the use of his property, taken from him by the government for the public benefit, is a judicial function, and Congress has no power to fix such compensation, nor the rules by which it shall be measured.

2. Railroads 5-51/2, New, vol. 6A Key-No. Series-Inadequate compensa-

TION FOR USE UNDER FEDERAL CONTROL.

The amount of annual compensation offered by the Director General of Railroads for the use of a railroad then in the hands of a receiver, while under federal control, *held* inadequate, and the receiver instructed to decline the offer and to proceed under Federal Control Act, § 3 (Comp. St. 1918, § 3115%c), to have the amount of just compensation determined.

In Equity. Suit by the Railway Steel Spring Company against the Chicago & Eastern Illinois Railroad Company. On petition by receiver for instructions.

See, also, 246 Fed. 338.

Will H. Lyford, of Chicago, Ill., for receiver.

Arthur H. Van Brunt, of New York City, and Howard M. Carter, of Chicago, Ill., for Central Trust Co. of New York.

Roberts Walker, of New York City, and Mitchell D. Follansbee and M. C. Bragdon, Jr., both of Chicago, Ill., for Bankers' Trust Co.

Donald F. McPherson (representing Cutting, Moore & Sidley), of Chicago, Ill., for Equitable Trust Co. of New York.

Edward H. Blanc, of New York City, and F. B. Johnstone, of Chi-

cago, Ill., for Farmers' Loan & Trust Co.

Brode Davis, of Chicago, Ill., for Metropolitan Trust Co. of City of New York.

S. O. Levinson, of Chicago, Ill., for stockholders' committee.

CARPENTER, District Judge. Upon reading and filing the petition of Thomas D. Heed, receiver, heretofore appointed and now acting in the above-entitled cause, for instructions as to further procedure to secure just compensation for the use of Chicago & Eastern Illinois Railroad under federal control, and the report of negotiations on benalf of said receiver with the Director General of Railroads, relating to such compensation; upon motion of counsel for the receiver, and it appearing that counsel representing all parties to this proceeding had due notice of the hearing on said petition, and that the general counsel

to the Director General of Railroads also had notice of this hearing and declined to appear; and the court having taken proofs of the facts and circumstances set forth in said petition and in said report, and being now satisfied that the prayer of said petition ought to be granted, and that it is a proper exercise of the court's discretion and power in the premises to enter an order herein, adjudging whether or not \$3,280,-000.88, the amount of annual compensation offered by the Director General to the receiver, would constitute just compensation for the possession, use, and operation of the Chicago & Eastern Illinois Railroad during federal control, and to direct the receiver to accept such amount of compensation and proceed with the negotiation of a contract with the Director General of Railroads based upon such compensation, or to reject such amount of compensation and to proceed in accordance with the third section of the Federal Control Act (Act March 21, 1918, c. 25, 40 Stat. 454 [Comp. St. 1918, § 311534c]), and the court having heard arguments of counsel for the receiver and of counsel for the stockholders and for the trustees under each of the mortgages which have been foreclosed in this cause, and for the bondholders' committees which represent the majority in amount of the bonds secured by such mortgages, to the effect that the said amount of compensation is inadequate and unjust, and should not be accepted by the receiver; and due deliberation being had, the court finds the following facts and conclusions of law:

The Chicago & Eastern Illinois Railroad, comprising sundry railroad lines in the states of Illinois and Indiana, on the 28th day of December, 1917, was in the possession and custody of this court, through its receiver, William J. Jackson. On said date, the President of the United States, acting through the Secretary of War and under the authority conferred upon him by the act of Congress approved August 29, 1916, took possession and assumed control of said railroad, together with other railroads, under a formal proclamation, in which the President declared that it had then—

"become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion as far as may be necessary of other than war traffic thereon, for the transportation of troops, war material and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war."

It was further stated in such proclamation that, for the purposes of accounting, such possession and control should date from 12 o'clock midnight on December 31, 1917.

By the first paragraph of section 1 of an act of Congress, approved March 21, 1918, called the Federal Control Act (Comp. St. 1918, § 31153/4a), the President was authorized to agree with and to guarantee to any carrier making operating returns to the Interstate Commerce Commission that, during the period of such federal control, it should receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917.

The sixth paragraph of section 1 of the Federal Control Act was as follows:

"If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just."

By an order entered in this cause April 27, 1918, the receiver's counsel was directed to negotiate, with the President of the United States or his duly authorized representative, an agreement for the maintenance and upkeep of said railroad during the period of federal control, for the determination of the rights and obligations of all parties to the agreement, arising from or out of federal control, including the compensation to be received or guaranteed, as in said federal act more fully provided. In such order counsel was directed, from time to time to make report of the result of such negotiations, and it was also ordered that no such agreement should be made or should become effective until it should have been approved by the court, on hearing, after notice to counsel for all parties to the record in this cause, and to the general counsel to the Director General of Railroads.

Pursuant to said order of the court, a report of negotiations with the Director General and his representatives was filed herein October 17, 1919, together with a petition by the receiver for instructions as to further procedure to secure just compensation for the use of said railroad while under federal control. On said last-mentioned date a hear-

ing was had on such petition and report.

This railroad property was placed in the custody of this court to be operated and especially conserved for those most entitled to it, the security holders, the stockholders, and the creditors. It is the duty of the court to determine whether that has been done and would be done by accepting the Director General's offer of \$3,280,000.88, as annual compensation for the possession, use, and operation of the said railroad during the period of federal control. The court must determine whether such amount constitutes just compensation, and, if it determines that the receiver ought to have compensation in a greater amount than is so offered, the court cannot, in good conscience, authorize him to accept the amount offered.

[1] The ultimate determination of the amount of compensation which an owner shall receive for the use of his property, taken from him by the government for the public benefit, is a judicial function. While Congress has the power to determine what property shall be taken for the public use, it has no power to fix rules by which the amount of compensation to be paid for such use shall be determined. In Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, the Supreme Court discussed an act of Congress (Act Aug. 11, 1888, c. 860, 25 Stat. 400) authorizing the Sec-

retary of War to purchase a lock and dam. The act provided, in the event of inability to make voluntary purchase, the lock and dam should be condemned, provided "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated." The Supreme Court, at page 327 of 148 U. S., at page 626 of 13 Sup. Ct. (37 L. Ed. 463), said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The Legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but, when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. * *

"We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property." 148 U. S. 328, 13 Sup. Ct. 627, 37 L. Ed. 463.

[2] The Director General having offered to the receiver compensation in excess of the so-called standard return, the court must assume that the Director General has found the condition of the defendant's railroad to be so exceptional as to make the standard return plainly inequitable as a fair measure of just compensation, and under the sixth paragraph of the first section of the Federal Control Act, the Director General was fully authorized to agree to pay to the receiver such amount as, under all the circumstances of this case, he should find just.

It was further provided, under the third section of the act, that, failing an agreement with the Director General as to the amount of compensation, the carrier or the government might have the amount of compensation determined by a board of referees, and the Director General was authorized to make an agreement with the carrier for compensation, not exceeding the amount determined by such board of referees. Failing an agreement upon an amount of compensation so determined, the third section authorized the determination of the amount thereof by the Court of Claims.

The decision of this court on the receiver's petition, and the decision of a board of referees or the Court of Claims, if called upon to act, pursuant to the third section of the Federal Control Act, must be based upon the established principles of law and equity which have been laid down by the courts for the determination of just compensation, and cannot be controlled by the measure of compensation recommended by the President and authorized by Congress in the first paragraph of the Federal Control Act.

The railroad property which constituted the Chicago & Eastern Illinois Railroad at the time it was taken over by the Director General of Railroads, December 31, 1917, had had an unbroken record of financial success for 25 years prior to the year 1913, when the receivers were appointed, and during all that time it earned all of its operating expenses, fixed charges, and taxes, and a dividend of 6 per cent. on its

preferred stock, and during the last 10 years of that period dividends at the average annual rate of 7.15 per cent. on its common stock. During the year ended June 30, 1913, in which the receivers were appointed, the traffic of the road increased to such an extent that its operating revenues were more than a million dollars in excess of those of any previous year and exceeded the economical carrying capacity of the railroad. Such receivership was not caused by the insolvency of the defendant railroad company, but was caused by the insolvency of another railroad company which owned the stock of the defendant company.

Under the orders of this court, the receivers entered upon a program of reconstruction and improvement of the defendant's railroad, and, during the years of 1913 to 1917, inclusive, the aggregate sum of \$31,020,878 was expended upon said railroad and charged to maintenance, as compared with \$18,456,175, the aggregate charges to maintenance of the same lines of railroad during the preceding period of 5 years, and \$8,229,944 was expended and charged to additions and betterments.

The result of these higher expenditures for maintenance and of the additions and betterments which have been placed upon the property during the same period has been to enable this road to carry 10,488,274 tons of coal in 1917 and 11,394,967 tons of coal in 1918, whereas its capacity was strained in 1913 to carry 7,548,321 tons of coal. The increased expenditures for maintenance of equipment during the receivership are also conclusively shown to have enabled the receivers to gain 3,027 good-order cars since the beginning of the test period, and to increase the credit balance for equipment rents for the use of this road's equipment on other railroads from \$254,028, the average annual amount thereof during the seven years preceding the test period, to \$1,080,957 for the calendar year 1917.

Notwithstanding these facts, which it appears have been made known to the Director General, the effect of his award of compensation is that, at the end of $4\frac{1}{2}$ years of receivership, the value of the use of this property per year to its owners is less by \$1,955,042 than its average net value to its owners during the 7 years next preceding the year in which the receivers were appointed, and that the annual compensation to the receiver during federal control should be \$1,128,029 less than the actual railway operating income of the property during the calendar year 1917.

"The rule for the measure of damages for the temporary occupation of lands by the government is the value of such temporary occupancy at the time of entry, as though the claimant had leased and the government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the government has the option of discontinuing the implied tenancy on any day or of continuing it indefinitely." Johnson v. United States, 2 Ct. Cl. 391.

At the time the government took possession of this railroad, it had a greater carrying capacity than ever before. The number of its freight cars which were in good order was greater than at any previous time during the receivership. It was about to receive seven large Santa

Fé type locomotives, for use upon its Illinois Division, which was then, for the first time, in condition for the operation of such large engines. The United States was engaged in a great foreign war, and the industrial demand for the carriage of coal and other freight and for the carriage of passengers was greater than ever before, and there was no prospect of an early termination of the war. The government soon thereafter purchased for this railroad 20 additional large locomotives and 1,000 additional freight cars, and, on the earnest protest of the receiver against such purchase of cars, was only willing to reduce the number purchased to 500 cars. The only reasonable ground for the purchase of such additional equipment must have been that the Director General contemplated the movement over this railroad of a substantially greater amount of traffic than was carried by the road during the year 1917. It would be unconscionable to impose upon the owners of this property the cost of this additional equipment, at high war-time prices, and still fix the receiver's compensation upon the basis of a less amount of traffic than the road had carried during the previous year, with a less average amount of equipment in good order than the road had in service at the time the government took possession.

"For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its value." Monongahela Navigation Co. v. United States, 148 U. S. 312. 328, 13 Sup. Ct. 622, 627, 37 L. Ed. 463.

"The question of just compensation is not determined by the value to the

government which takes, but the value to the individual from whom the prop-

erty is taken." 148 U.S. 343, 13 Sup. Ct. 633, 37 L. Ed. 463.

The just compensation to which the receiver is entitled in this case should be measured by the earning capacity of this property on the 31st day of December, 1917, and such earning capacity should be determined by the application of the freight and passenger rates which were then in force or authorized and approved by the Interstate Commerce Commission and the state commissions of Illinois and Indiana, to the volume of business which this railroad could reasonably be expected to have carried during the period of federal control, if the railroad had remained in the control of the receiver or the defendant company.

The railway operating income of this property during the calendar year 1917 amounted to \$4,408,030, and as the record clearly shows that the rates for the carriage of traffic on this railroad were materially higher at the close of the year 1917 than they were during the first 10 months of that year or during the test period, the conclusion is irresistible that the value of the use of the railroad was higher at the close of the year 1917 than at any previous time. The investment in road and equipment on this property, as shown by the receiver's books as of the 31st day of December, 1917, was \$81,756,217, and the owners of this railroad were entitled to a reasonable return upon such amount of investment during the period of federal control.

As of the 31st day of December, 1917, after deducting the miscellaneous earnings, the annual fixed charges accruing against this property and the annual expenses of the receiver in its administration, which were not assumed by the Director General of Railroads, aggregated \$3,771,844.21, and the amount of just compensation to which the receiver was entitled should have included that amount, and, in addition thereto, a sum equal to a reasonable dividend upon \$19,367,500 of outstanding capital stock of the defendant company. To such total amount should be added interest at reasonable rates upon all additions and betterments to road and equipment placed upon or charged to this property by the Director General during federal control.

This is not the ordinary and usual case of a railroad in receivership, which was not making any money and had to be operated under the jurisdiction of the court in order to perform its public functions. It is a unique case, in that this receivership was made necessary by the insolvency of a large railroad system of which this successful railroad was a part, and the controlling purpose of the operations of the receivers has been to separate this property from the larger system, and to enlarge and improve its facilities and capacity, in order that it might better serve the territory through which its lines passed and produce larger income and greater profits for its owners. The court finds that such purpose had been accomplished at the time when the Executive Department of the government assumed possession and control of this property, and that the compensation to which the owners of the property are entitled for its use during the period of such federal control should be measured by the value of the use of the property on December 31, 1917, and not by the net financial results of its abnormal operations during the so-called test period of 3 years ended June 30, 1917, during which the property was being rebuilt, improved, and enlarged by the devotion of its income to those purposes, rather than by accruing net earnings to be devoted to the normal purpose of paving interest and dividends.

It is therefore ordered, adjudged, and decreed by the court:

- 1. That the amount of \$3,280,000.88, offered by the Director General of Railroads to the receiver herein, as annual compensation for the possession, use, and operation of the Chicago & Eastern Illinois Railroad during the period of federal control, is inadequate, and would not constitute just compensation.
- 2. That the receiver is instructed to decline said amount of compensation offered by the Director General of Railroads, and to proceed forthwith, under the third section of the Federal Control Act, to secure the determination of the amount of just compensation by a board of referees, to be appointed by the Interstate Commerce Commission, and to report to this court the amount of such compensation so determined.
- 3. It is further ordered that the receiver is authorized to employ such other counsel, accountants, and other assistants as he may deem necessary, to assist the general counsel in presenting this matter to such board of referees.

SANDERS v. WESTERN UNION TELEGRAPH CO. (District Court, N. D. Georgia, N. D. December 6, 1919.)

REMOVAL OF CAUSES \$\ightarrow\$11\to Right of removal where both parties are non-residents.

A suit brought in a state court by a citizen of another state against a nonresident defendant who is a citizen of a third state, where the requisite amount is involved, is one "of which the District Courts of the United States are given original jurisdiction," within the meaning of Judicial Code, § 28 (Comp. St. § 1010), and is removable by defendant.

At Law. Action by Mrs. Lula Walker Sanders, administratrix of the estate of R. W. Walker, deceased, against the Western Union Telegraph Company. On motion to remand to state court. Denied.

W. B. Sloan, E. D. Kenyon, and C. N. Davie, all of Gainesville, Ga., for plaintiff.

Brewster, Howell & Heyman, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case was brought originally in the superior court of Hall county. The plaintiff at the time of the commencement of the suit was, and still is, a citizen of the state of South Carolina; the defendant was, and still is, a corporation and citizen of the state of New York, and nonresident of the state wherein this suit was commenced; that is, both plaintiff and defendant are citizens of other states than the state of Georgia, where the suit was brought, and nonresidents of the state of Georgia.

The case has now been heard on a motion to remand it to the state court, from which it was removed, on the ground that this court has no jurisdiction to entertain the case. The main question as to the right of removal and of the court to entertain this case is whether or not the decision in the Wisner Case, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, has been in effect overruled by subsequent decisions of the courts, and especially by the Supreme Court of the United States. The decision in the Wisner Case was to the effect that the District Courts of the United States (at that time the Circuit Courts) were without jurisdiction to entertain the case where neither party was a citizen and resident of the state where the suit was brought and of the district in which the United States court was held to which it was removed. This decision of the Supreme Court in Ex parte Wisner has given rise to much discussion since it came out. Two headnotes in the Wisner Case will perhaps show what is decided so far as material here:

"No suit which could not have been originally brought in the Circuit Court of the United States can be removed therein from the state court.

"Under sections 1, 2, 3, of the Act of March 3, 1875, 18 Stat. 470, as amended by the Act of March 1, 1887, 24 Stat. 552, corrected by the Act of August 13, 1888, 25 Stat. 433, an action commenced in a state court, by a citizen of another state, against a nonresident defendant who is a citizen of a state other than that of the plaintiff cannot be removed by the defendant into the Circuit Court of the United States."

In the opinion of Chief Justice Fuller this, among other things, was said:

"But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties."

The first time the Wisner Case came up for consideration in the Supreme Court after its decision was in the Moore Case, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164. In that case it was held:

"While consent cannot confer on a federal court jurisdiction of a case of which no federal court would have jurisdiction, either party may waive the objections that the case was not brought in, or removed to, the particular federal court provided by the statute.

"Nothing in Ex parte Wisner, 203 U. S. 449 [27 Sup. Ct. 150, 51 L. Ed. 264], changes the rule that a party may waive the objection to the jurisdiction in respect to a particular court where diversity of citizenship actually exists."

In the opinion in the Moore Case by Mr. Justice Brewer it was said: "In order, however, to prevent future misconception we add that nothing in the opinion in the Wisner Case is to be regarded as changing the rule as to the effect of a waiver in respect to a particular court"

—the rule, of course, being, as stated in the headnote, that the plaintiff, by his appearance and plea, might waive the question of the court to which the suit was removed by the defendant. Chief Justice Fuller in that case filed a dissenting opinion, and in this opinion, among other things, he says:

"In my judgment, section 1, in cases where litigants are citizens of different states, confers jurisdiction only on the Circuit Court of the district of the plaintiff's residence and the Circuit Court of the district of the defendant's residence. And it is not conferred on the Circuit Court of the district of neither of them, and cannot be even by consent. If this were not so, as Mr. Justice Harlan said in Bors v. Preston, 111 U. S. 255 [4 Sup. Ct. 407, 28 L. Ed. 419], "it would be in the power of the parties by negligence or design to invest those courts with a jurisdiction expressly denied to them," or where, it may also be said, such jurisdiction was not expressly conferred. This view was expressed in Ex parte Wisner, 203 U. S. 449 [27 Sup. Ct. 150, 51 L. Ed. 264], and although it is true that the proposition need not have been there announced, because in that case it was correctly decided that there was not a consent to the jurisdiction by both parties, yet the rule was so laid down, and the result of the opinion in this case is to disapprove of and overrule In re Wisner, so far as that proposition is concerned; and as I adhere to that view I dissent."

The view of the Chief Justice as there expressed evidently was that jurisdiction was not conferred on the court of a district in which neither of the parties resided, and yet he thought that this rule as laid down in the Wisner Case was reversed, as I understand it, by the decision in the instant case; that is, the Moore Case.

The next case decided by the Supreme Court was Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. The court there held:

(261 F.)

"Where diversity of citizenship exists, so that the suit is cognizable is some Circuit Court, the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits. In re Moore, 209 U. S. 490 [28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164], overruling anything to the contrary in Ex parte Wisner, 203 U. S. 449 [27 Sup. Ct. 150, 51 L. Ed. 264]."

Coming to the decisions discussing the Wisner Case in the District Court and Circuit Court of Appeals, the first case I find is M. Hohenberg & Co. v. Mobile Liners, Inc. (D. C.) 245 Fed. 169, a decision by Judge Ervin, of the District Court for the Southern District of Alabama, decided in 1917. Judge Ervin did not undertake at that time to discuss the Wisner Case or its effect, but held, as to the meaning of the removal statute, where neither party was a citizen and resident of the district:

"Where a federal District Court has jurisdiction of a suit by reason of diversity of citizenship and the amount in controversy, and such suit is brought in a state court of a state of which defendant is not a resident, his right to remove the cause into the federal court for that district, given by section 28 of the Judicial Code (Act March 3, 1911, c. 231, § 28, 36 Stat. 1094 [Comp. St. 1916, § 1010]), is absolute, and cannot be contested by plaintiff on the ground that he could not have brought the suit in that court over defendant's objection."

In Matarazzo v. Hustis (D. C.) 256 Fed. 882, the case of M. Hohenberg & Co. v. Mobile Liners, Inc. (D. C.) 245 Fed. 169, was cited as authority for refusing to remand, although other questions were involved in that case.

In the case of James v. Amarillo City Light & Water Co., 251 Fed. 337, Judge Ervin, of Alabama, presiding in the District Court for the Northern District of Texas, rendered an opinion on this question of the rule in cases where neither party was a citizen or resident of the district where the suit was brought in the state court. In that decision Judge Ervin goes into the question of the effect of the decision in the Wisner Case, and cites other cases since that decision was made. Judge Ervin referred, also, to his former decision in the case of M. Hohenberg & Co. v. Mobile Liners, Inc. (D. C.) 245 Fed. 169. He concludes his opinion as follows:

"Finding, therefore, that the Wisner Case bases its holding as to non-removability upon its further finding of want of jurisdiction, and that the court has since reconsidered that question, I am constrained to decline to follow the Wisner Case. An order will be entered, denying the motion to remand."

Perhaps the strongest case on this subject of all the cases in which there has been a discussion since the Wisner Case as to its effect, and whether it had been expressly or impliedly reversed, and whether it should be followed as authority, is the case of Louisville & Nashville Railroad Co. v. Western Union Telegraph Co. (D. C.) 218 Fed. 91, a decision by Judge Cochran, of Kentucky. Judge Cochran goes fully into the question and cites decisions which had been made by the Circuit and District Courts before the Wisner Case was decided, and also decisions since that case, including the Moore Case, supra, and the Harding Case, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252,

37 L. R. A. (N. S.) 392. After a most ample and thorough discussion of the question, Judge Cochran concludes in this way:

"In view of these several considerations, I am confident in the belief that the Supreme Court will overrule it directly the first opportunity it gets, and, so believing, I think I am justified in refusing to follow it."

He then refuses a motion to remand the case he was considering. An examination of Judge Cochran's decision will show the fullest consideration of the whole question of the jurisdiction of the court to consider a case by removal from the state court, where neither party is a citizen or resident of the district.

The next case which it seems proper to consider in this connection is a case before the Circuit Court of Appeals of the Second Circuit. Guaranty Trust of New York v. McCabe, 250 Fed. 699, 163 C. C. A. 31, decided in March, 1918. In that case a majority of the court apparently held that the decision in the Wisner Case was still controlling as to nonremovability of the case when neither party was a citizen of or resided in the district—Judge Learned Hand dissenting. The matter of the alienage of one of the parties seems to have been involved in that case; but, so far as we are now concerned with it, the decision seems to have been by the majority of the court, with one dissenting judge, as I have stated.

The cases of Ex parte Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, and Ex parte Nicola, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, seem to be cases where the Supreme Court simply declined to issue the writ of mandamus to the court below for the remand of a case, where the District Court had declined so to do. It is claimed on the one hand that, as the Supreme Court at that time was allowing mandamus to be used as a remedy for the purpose indicated, it in effect overruled the Wisner Case, and, on the other hand,

that it does not go to that extent.

In Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, the Supreme Court, in an elaborate opinion by Chief Justice White, held that mandamus was not the proper remedy. The case there was:

"By a motion for leave to file a petition for mandamus, George F. Harding seeks the reversal of the action of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in taking jurisdiction over a cause as the result of a refusal to grant a request of Harding to remand the case to a state court."

Perhaps the last headnote in that case will express sufficiently what was decided:

"In this case, Ex parte Hoard, 105 U. S. 578 [26 L. Ed. 1176], and cases following it, applied, as expressing the general principle involved; Virginia v. Rives, 100 U. S. 313 [25 L. Ed. 667], and cases following it, distinguished, as applicable only to exceptional instances not involved in this case; Ex parte Wisner, 203 U. S. 449 [27 Sup. Ct. 150, 51 L. Ed. 264], In re Moore, 209 U. S. 490 [28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164], and In re Winn, 213 U. S. 458 [29 Sup. Ct. 515, 53 L. Ed. 873], disapproved in part and qualified."

The question here involved has come before this court in the case of First National Bank v. Merchants' Bank et al. (C. C.) 37 Fed.

(261 F.)

657, 2 L. R. A. 469, and in that case, as I said, after citing the authorities up to that time, my conclusion was:

"My conclusion as to the proper construction of these two sections is different. I do not think that it can be said that jurisdiction is given by the language quoted from the latter part of section 1. It relates to the locality in which suits may be brought by original 'process or proceeding,' and is intended for the benefit of defendants. It provides where they may be required to answer suits originating in the federal courts. Jurisdiction is conferred on the Circuit Courts by the first part of section 1, and that jurisdiction, when founded on citizenship, is between citizens of different states, provided the jurisdictional amount is involved; and it is to that portion of the section, instead of the latter part, fixing the place where suits may be brought by original 'process or proceeding,' section 2 refers."

I afterwards had the question up in this court in Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co., 130 Fed. 585, and in that case I took the same view that had been expressed by me in the case between the banks in 37 Fed., just referred to. The headnote is as follows:

"Under the Judiciary Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509), a cause is removable by a defendant who is a nonresident of the state, on the ground of diversity of citizenship, although neither party is an inhabitant of the district."

In that case I cited a number of authorities; the strongest, perhaps being Wilson v. Western Union Telegraph Co. (C. C.) 34 Fed. 561, decided by Mr. Justice Field and Circuit Judge Sawyer, from which I quote from Mr. Justice Field as follows:

"The evident object of this motion is to obtain a reconsideration of the decision of the Circuit Court in the case of County of Yuba v. Mining Co., rendered in August, 1887, and reported in 32 Feû. 183. It was there held that, under section 1 of the act of 1887, the Circuit Court could not take cognizance of an action brought against a party in a district of which he was not an inhabitant, and that, under section 2, no removal could be made to the Circuit Court of the United States of an action brought in a state court against a party who was not an inhabitant of the district. In that case the plaintiff was a county of the state of California, and the defendants were corporations of the state of Nevada. The opinion in the case was written by my Associate, the Circuit Judge, but I concurred in it, and in the judgment which followed. I have, however, long been satisfied that we fell into an error, and I am happy that we have so early an opportunity of correcting it,"

And also from the same opinion this:

"Passing, now, to the second section of the act of 1887, we find the cases mentioned in which a removal of suits of a civil nature may be had from the state court to the Circuit Court of the United States. They embrace, among others: First, suits of a civil nature arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which by the previous section of the act the Circuit Courts are given original jurisdiction, but which are pending, or may be brought in a state court; * * * and, second, other suits of a civil nature of which the Circuit Courts are given original jurisdiction by the first section, but which are pending, or may be brought, in a state court. These may be removed by the defendant or defendants therein, being nonresidents of the state. In one of these classes of suits a removal may be asked by the defendant or defendants without regard to his or their residence; in the other class a removal can be asked only when the defendant or defendants reside without the state.

According to this construction of the two sections, the corporations of Nevada, defendants in the Yuba County Case, had a right to its removal to the Circuit Court of the United States, and we erred in remanding it back to the state court. So, in the present case, the defendant, the Western Union Telegraph Company has a right to its removal to the Circuit Court; and, the removal being made, the motion to remand the case back to the state court must be denied. Since the decision in the Yuba County Case, the same question has been before several Circuit Courts, and the decisions rendered by them, after a careful consideration of the subject, have been against the one we made, and which we now overrule. See Fales v. Chicago, etc., Railroad Co. (C. C.) 32 Fed. 673; Gavin v. Vance (C. C.) 33 Fed. 84; Loomis v. Coal Co., Id. 353; St. Louis, V. & T. H. Railroad Co. v. Railroad Co., Id. 385."

And from the case of Fales v. Chicago, etc., Railroad Co., cited by Mr. Justice Field as above, this:

"It seems to me that the question of federal cognizance is confounded with the question of the place of bringing suit by original process. The latter question has nothing to do with the right of removal. The question whether the action might have been brought by original process in any federal court was material, in order to determine whether it was a case of federal cognizance, but that question being decided in favor of the federal jurisdiction, the question of the proper place or district in which the suit might have been brought by original process is wholly immaterial on the question of removal."

And, in addition, this:

"If, however, the plaintiff, having a cause of federal cognizance by reason of diverse citizenship, chooses to bring suit thereon in the state court, then he has made his election, and he cannot afterwards remove the case into the federal tribunal. If such a suit is brought in the courts of the state of which defendant is a resident, then it cannot be removed, because it is supposed the defendant can have no objection to a trial by the courts of the state of which he is a resident. If, however, a suit is brought in a case of federal cognizance in a court of a state of which defendant is not a resident, then the election is given to such nonresident defendant to carry the case by removal into the federal court."

There are cases to the contrary, of course. A number of courts have felt bound to follow the decision in the Wisner Case, and have refused to remand cases for that reason. I have myself declined to remand cases, as in the case of Bottoms v. St. Louis & S. F. R. Co. (C. C.) 179 Fed. 318. Later being satisfied, however, that there is a serious question as to whether the Wisner Case should be followed in this matter, and having anticipated the argument which has been made in this case (it has been ably argued by counsel on both sides, and every known authority, I think, has been cited), I will be compelled to go back to the opinion I entertained when I decided the Rome Petroleum & Iron Co. Case, supra.

I conclude this, both from the decisions of the courts, after carefully going through all of them, and from the statute itself. There is no doubt that section 28 of the Judicial Code, relative to removal of cases, when it uses the language "of which the District Courts of the United States are given original jurisdiction by this title," refers not to the language of section 51 as to where suits shall be brought "by original process or proceeding," but refers to the general provisions of section 24, giving the courts generally jurisdiction, among other things, of suits between citizens of different states where the juris-

dictional amount is involved. It deals with the jurisdiction of the District Courts generally, and not with the matter of venue in particular districts; and if the views which I entertained when I decided the Rome Petroleum & Iron Co. Case were sufficiently controlled by the decision in the Wisner Case, so that I followed it in the Bottoms Case (C. C.) 179 Fed. 318, I have now gone back clearly to the opinion I first entertained, and which I endeavored to express in the Rome Petroleum & Iron Co. Case.

Among other cases to which my attention has been called (and as to this case especially since the argument on this motion) is the case of St. Louis & San Francisco Railroad Co. v. Cassie Kitchen, 98 Ark. 507, 136 S. W. 970, 50 L. R. A. (N. S.) 828; and while this is an important case, it has not changed the opinion which I have arrived at after consideration again of the whole subject.

Believing, as I do, therefore, that if the Supreme Court of the United States has not by its action in cases decided by it since the Wisner Case in effect reversed that case, I think, as Judge Cochran did in the case of Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., that if the Supreme Court was deciding this question now, it would squarely reverse the Wisner Case, and hold that a remand should not be granted in a case like this.

Feeling that way, I am compelled to hold that this case was removable, and consequently should not be remanded; and it will be so ordered.

UNITED STATES v. BAKER.

(District Court, S. D. Texas, at Houston. November 10, 1919.)

No. 229.

MASTER AND SERVANT
 ——HOURS OF SERVICE ACT; "CONTINUOUSLY OPERATED NIGHT AND DAY STATION."

Where telegraphic train dispatch service is maintained by a railroad company at a station continuously during the 24 hours, the fact that during the nighttime the messages are by arrangement handled by operators of another company does not prevent the station from being a "continuously operated night and day station" within Hours of Service Act, § 2 (Comp. St. § 8678), where operators may not, without violation of the act, be kept on duty more than 9 hours in any 24-hour period.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Continuously Operated.]

- 2. MASTER AND SERVANT \$\insigma 13\$—Hours of Service Act liberally construed.

 The Hours of Service Act (Comp. St. §§ 8677-8680) is highly remedial, and should be liberally construed, and the fact that a penalty is provided for its violation does not change the rule.
- 3. MASTER AND SERVANT &==13—INTENT IMMATERIAL IN PROSECUTION FOR VIO-LATION OF HOURS OF SERVICE ACT.

The fact alone of violation of the Hours of Service Act (Comp. St. §§ 8677-8680) subjects the offending company to the prescribed penalty, and an unlawful intent is not necessary.

At Law. Action for penalties by the United States against James A. Baker, Receiver of the International & Great Northern Railway. Judgment for the United States.

D. E. Simmons, U. S. Atty., of Houston, Tex., and Monroe C. List. Sp. Asst. U. S. Atty., of Washington, D. C.

Wm. H. Wilson, of Houston, Tex., for defendant.

HUTCHESON, District Judge. This is a suit by the United States for penalties for violation of that portion of section 2 of the federal Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [section 8678, United States Compiled Statutes]), which reads as follows:

"That no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day-time, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week"

—the government alleging in 10 counts that the defendant, during the 24-hour period beginning at the hour of 7 o'clock a. m. to the hour of 6 o'clock p. m., at its office and station at Navasota, Tex., required and permitted its telegrapher, M. Menger, to be and remain on duty for a longer period than 9 hours in said 24-hour period. The defendant denies the violation of the act, claiming that the station or place was a daytime station only.

[1] The cause was submitted upon the pleadings and an agreed statement of facts, which statement is on file with the clerk, and is referred to as a part hereof, and is contained in a note attached here-This statement, with exhibits attached, shows: That under a contract between the Houston & Texas Central Railroad Company and the receiver it was provided that between the hours of 6 p. m. and 6 a. m. the Central Company should furnish the International Company telegraphic service at the price of \$50 per month; that this service was performed by operatives employed and paid by the Central Railroad, the receiver having no jurisdiction, control, or authority over them, but dealing directly with the company. That from 7 a. m. to 6 p. m. M. Menger, a telegraph operator employed by the receiver, acted as telegrapher. When he went off duty, no telegraphic service whatever was carried on in the I. & G. N. station building, until he returned at 7 a. m. All train orders issued between 6 p. m. and 6 a. m. for the movement of trains over defendant's line of railroad were issued by defendant's chief train dispatcher located at Mart, Tex., and transmitted over the telegraph to the H. & T. C. operator on duty in the H. & T. C.-Santa Fé tower, who delivered same to the crews of the receiver's trains to whom they were directed. When Menger had orders for trains which failed to arrive by 7 p. m., he would carry these orders to the H. & T. C. operator, who would sign for same in the defendant's transfer book, and thereafter deliver it to the proper train crew. Each morning, before Menger went on duty, he would telephone the tower to see if any train orders were undelivered, and, if so, would go after them and sign for same in the transfer book, thereafter delivering same from the station in the usual manner.

As stated by the government in its brief, the determination of this case involves but a single question: Was the Navasota office one, or was Navasota a place, continuously operated day and night, or was it an office or place operated only during the daytime? The question of whether or not the defendant had any control or authority over the operatives of the H. & T. C. who handled the messages pertaining to the receiver's road during the absence of the regular operator is wholly immaterial. The slightest reflection upon the scope and purpose of the act will satisfy any candid mind that the law is concerned, not with the method by which messages are accepted and received, but merely with the fact of prohibiting the employment at work for more than 13 hours of any operator at an office operated continuously night and day. If the contention of the defendant that the fact that for a part of the 24-hour period its messages were handled by persons employed not by itself, but by another company, makes the station a daytime station only, were sound, the act could be nullified throughout the length and breadth of the United States, wherever conditions of joint operation existed as at Navasota, by one company running its office 12 hours, the other 12 hours, and interchanging service with each other during the period that the respective operators hired by each were off duty.

Such a result, if reached by design, would not be tolerated; nor does the fact that the result is reached without design in any wise change the legal effect of the situation. What the law is concerned with in this case is not the method by which the receiver provides for the handling and transmission of his messages during the night hours, but with the fact that during some period of the 24 hours he obliges his operator to remain on duty more than 9 hours. What the precise nature of the arrangements the receiver made with the Houston & Texas Central was is wholly immaterial in this case, since the fact is undisputed that the receiver did have arrangements at the place, Navasota, for receiving messages day and night, and did for a part of the time at that place have an operator working more than 9 hours.

[2] Counsel for the defendant invokes the rule that penal statutes must be strictly construed. He misapprehends the nature and purpose of this act. This act, being highly remedial, should be liberally construed, and the fact that a penalty is provided for its violation does not change the rule. United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136. The Supreme Court of the United States, in Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, discussing a closely analogous statute, the Safety Appliance Law (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St §§ 8605-8612]), says:

"The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect remedial, while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs; that rule not requiring absolute strictness of construction."

That the maintenance at a single place or station of separate buildings or local quarters for the receipt of telegrams does not operate to avoid a violation of the law is settled by numerous authorities, among them A. T. & S. F. v. United States, 236 Fed. 906, 150 C. C. A. 168; Illinois Central v. United States, 241 Fed. 667, 154 C. C. A. 425; G. R. & I. v. United States, 249 Fed. 648, 161 C. C. A. 556. By the same reasoning, the letting out of part of the work to an independent contractor would be of no avail.

[3] There is nothing in the record to show that the condition complained of exists by reason of an effort on the part of the receiver, by subterfuge, to defeat the purpose of the law, and in nothing that I have said have I meant to so hold. In a case of this kind, where the words "knowingly and willfully" are not employed, and the carrier is made liable if it requires or permits any employé to be or remain on duty in violation of statutory provisions, the fact of doing the thing prohibited by the statute constitutes the offense, although there is no turpitude nor wrong arising out of willfulness or special intent.

In the case of A., T. & S. F. v. United States, 236 Fed. 907, 150 C. C. A. 169, the evidence showed that the operation complained of in the action had not been instituted by the company after the taking effect of the Hours of Service Act, but had existed long prior thereto. The court said:

"This course of handling the business was adopted by the company for reasons of convenience, not to evade any law. It began before the passage of the Hours of Service Act. * * * And what could not be done as a new departure would be equally inadmissible as an old custom."

While it thus appears clear that the presence or absence of a specific intent to employ a subterfuge to violate the law is not material in determining the question of its violation vel non, it is equally clear that, in determining the amount of penalty which should be assessed therefor, specific intent should have just weight. Finding as I do a violation of the law through the doing of the act which the law forbids, without any evidence of the presence in the mind of the receiver of a specific intent to violate it, or that the method employed for the doing of the work was arrived at as a subterfuge, I shall, in finding for the United States, assess the minimum penalty upon each count.

The United States may therefore have judgment against the receiver for \$100 on each of the 10 counts, or a total of \$1,000.

Stipulation.

Now come the plaintiff and the defendant in the above numbered and styled cause, by their respective attorneys, and in order to facilitate the trial thereof hereby stipulate and agree:

(1) That a jury may be, and is hereby expressly, waived.

(2) That this cause may be heard and determined by the court upon the following facts, which are agreed to be true in all particulars:

The defendant is, and was during the times mentioned in plaintiff's petition, the duly appointed and qualified receiver of the International & Great Northern Railway, a corporation organized and doing business under the laws of the state of Texas; said railway company being then and there a common carrier engaged in interstate commerce by railroud in said state.

During the year 1917 said defendant operated what is commonly known as the Ft. Worth Division of said railway company, extending from Spring, Tex., to Ft. Worth, Tex., a distance of approximately 272 miles. At Navasota, Grimes county, Tex., defendant maintained a certain telegraph office and station, at which was employed, in addition to the agent and helpers, one M. Menger, the telegraph operator and employe mentioned in said petition. The regular assigned hours of said Menger were from 7 a. m. to 6 p. m., with one hour off about noon for dinner, during which time (except the hour for dinner) he was regularly required to use the telegraph to report, transmit, receive, and deliver orders pertaining to and affecting the movements of trains engaged in interstate and intrastate commerce over said line of railroad. Said Menger was also required to remain on duty until 7 p. m. in the event that a train for which he had an order had not arrived at 6 p. m., in order to deliver the train order. No telegraphic service whatsoever was ever carried on in said station building between 7 p. m. and 7 a. m.

About 850 feet south of said station is located a building known as the H. & T. C.-Santa Fé tower, at which were employed three telegraph operators; said tower being operated continuously for 24 hours each day. Each of said operators worked a trick or shift of 8 consecutive hours. These operators were in the employ of the Houston & Texas Central Railroad Company, which line of railroad runs parallel to, and immediately adjoins, the line of the International & Great Northern Railway at Navasota.

In accordance with the terms of a certain contract in force in 1917, copy of which is attached hereto, marked Exhibit A, and made a part of this stipulation, all train orders issued between 6 p. m. and 6 a. m. for the movement of trains over defendant's line of railroad were issued by defendant's chief train dispatcher, located at Mart, Tex., and transmitted over the telegraph to said H. & T. C. operator on duty in said tower, who delivered same to the crews of the trains to whom they were directed.

Whenever Menger had an order for a train which failed to arrive by 7 p. m., he carried this order and delivered it to the H. & T. C. operator on duty in said tower; the latter would sign for same in defendant's transfer book, which Menger carried with him; the tower operator would thereafter deliver said order to the proper train crew, and then notify defendant's said train dispatcher at Mart that the order had been executed. Each morning before Menger went on duty at the station he would telephone said tower to see if any train orders remained undelivered; if so, he would go after them and sign for same in the transfer book, thereafter delivering same from the station in the usual manner.

On each of the days mentioned in plaintiff's petition defendant required and permitted the said Menger to be and remain on duty from 7 a. m. to 6 p. m., excepting during the noon hour for dinner, and while so on duty he was required to use the telegraph to report, transmit, receive, and deliver orders pertaining to and affecting the movements of trains engaged in interstate commerce over defendant's line of railroad. On two of the days in question orders were transferred and delivered in the manner set forth above, as shown by copies of the transfer book, attached hereto, marked Exhibits B, C, and D, and made a part of this stipulation. On October 20, 1917, Menger remained on duty until 7 p. m. on account of a train for which he had an order failing to arrive.

While Menger has been required to remain on duty until 7 p. m. in the event a train for which he had an order had not arrived at 6 p. m. in order to de-

liver the train order, this, however, has only occurred four or five times, as every effort has been made by defendant to avoid having any train orders outstanding at Navasota at 6 p.m. However, it was almost a daily occurrence for Menger to have transferred to him orders uncompleted or not delivered at 7 a.m.

The International & Great Northern Railway and its receiver, the defendant, have no jurisdiction or authority over the operation of the tower at Navasota, nor over the employes who work in the tower. Said railway, or its receiver, does not employ or pay the operators in the tower, nor has said railway or its receiver anything to do with the selection or discharge of said operators, but simply have a contract with the Houston & Texas Central Railway for the latter to perform certain telegraphic services for said International & Great Northern Railway during certain periods of the day, for which the latter railway and its receiver pay a stipulated consideration.

Menger received his telegraphic orders from said chief train dispatcher of the International & Great Northern Railway at Mart, Tex. D. E. Simmons, United States Attorney, Monroe C. List, Special Asst. to United States Attorney, Attorneys for Plaintiff. Wm. H. Wilson, Attorney for Defendant.

Exhibit A.

Contract No. 6406.

State of Texas, County of Harris.

This agreement, entered into this the 15th day of August, A. D. 1916, between the Houston & Texas Central Railroad Company, hereinafter styled Central Company, party of the first part, and the International & Great Northern Railway Company and James A. Baker, receiver, hereinafter styled International Company, party of the second part, witnesseth:

The Central and International Companies entered into contract with each other covering crossing and interlocker at Navasota, Tex., on October 23, 1901, and the Central Company and Gulf, Colorado & Santa Fé Railway Company likewise entered into contract for the construction and operation of an interlocker plant at Navasota, Tex., on October 1, 1903.

The Central Company has telegraph operators installed in the interlocking plant covered by contract between it and the Gulf, Colorado & Santa Fé Railway Company, but the service they render is only for the Central Company, and on date of this contract the International Company desires to have said operators serve it between the hours of 6 p. m. and 6 a. m. to handle its train movements during the nighttime between said hours; and

Whereas, it would be impractical for the Central Company to install such service in the interlocker covered by contract between the Central and International Companies, and desires to furnish such telegraphic service from the interlocker covered by contract with the Gulf, Colorado & Santa Fé Railway Company:

Now, therefore, the Central and International Companies hereby agree with each other that the Central Company shall furnish the International Company telegraphic service in the Gulf, Colorado & Santa Fé-Central Company interlocker between the hours of 6 p. m. and 6 a. m., and the International Company shall pay for such services fifty (\$50.00) dollars per month. Either party may cancel this agreement, however, on thirty (30) days' written notice to the other, and after the termination of said period no further telegraphic service will be performed by the Central Company for the International Company, nor shall that company be required to make any payments for service rendered after such service has ceased.

Witness the signature of the parties hereto this the day and year first above written. Houston & Texas Central R. R. Co., by George McCormick, V. P. & G. M. The International & Great Northern Ry. Co., by A. G. Whittington, G. M., for Receiver.

Approved as to form: Baker, Botts, P. & G., General Attys.

WIENER V. UNION TRUST CO.

(261 F.)

Exhibit B.

International & Great Northern Railway Company,

James A. Baker, Receiver.

Oct. 19th, 1917 Time 7 A. M. Navasota Station The following train orders and messages are now outstanding:

Train Orders. Messages. Form Nos. 19 31 To Whom Addressed. No. To Whom Addressed. No. 530 and all concerned 1 N. G. R. 4 Engine 126 5 Signature of Operator Relieving: Menger.

Signature of Operator Relieved: ----.

Exhibit C.

International & Great Northern Railway Company.

James A. Baker, Receiver.

Oct. 20th, Time 7 A. M. Navasota Station 1917 The following train orders and messages are now outstanding:

Train Orders. Messages. Form Nos. To Whom Addressed. 19 31 To Whom Addressed. No. 20 All concerned. 1 N. G. R. Signature of Operator Relieving: Menger. Signature of Operator Relieved: Huff.

Exhibit D.

International & Great Northern Railway Company.

James A. Baker, Receiver.

Oct. 20th, Time 7 P. M. Navasota Station 1917 The following train orders and messages are now outstanding:

Train Orders. Messages. Form Nos. 19 To Whom Addressed. No. To Whom Addressed. 31 Conductor and Engineer 20 No. 530 and all concerned. Signature of Operator Relieving: Ross. Signature of Operator Relieved: Menger.

WIENER v. UNION TRUST CO.

(District Court, E. D. Michigan, S. D. December 1, 1919.)

No. 5948.

1. BANKRUPTCY \$\ightarrow\$161(1)-Time of giving preference.

A transaction by which a corporation, more than four months prior to its bankruptcy, made a verbal and later a confirmatory written assignment of stock in other corporations as security for a loan, held not to constitute a voidable preference, although the certificates of stock were not delivered until within four months of the bankruptcy.

2. Appeal and erbor \$\iff 1028-Erroneous rulings cured by verdict.

Where it is evident that a correct result has been reached, questions concerning the correctness of particular rulings, not affecting such result, are immaterial.

At Law. Action by Isaac Wiener, trustee in bankruptcy of the Progressive Circuit, Incorporated, against the Union Trust Company, executor of Frank B. Hibbler, deceased. Verdict for defendant, and plaintiff moves for new trial. Motion denied.

Joseph L. Stern, of Cleveland, Ohio, and Butzel & Butzel, of Detroit, Mich., for plaintiff.

John E. Moloney, of Detroit, Mich., for defendant,

TUTTLE. District Judge. This is a motion for a new trial. The action was brought by plaintiff, as trustee in bankruptcy of the estate of the Progressive Circuit. Incorporated, a corporation, to recover from the executor of the will of Frank B. Hibbler, deceased, hereinafter called defendant, an alleged preference received from said corporation and claimed to be voidable under section 60b of the Bankruptev Act, Act July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. The declaration contained two counts. The first count § 9644). was based upon the Bankruptcy Act, and charged that on October 6, 1914, the defendant, while a creditor of the bankrupt, holding its demand note, dated October 1, 1914, in the sum of \$5,000, received a preference from the bankrupt, in that he secured from said bankrupt the delivery to himself of certain certificates of stock in another corporation, of the value of \$5,000, in full payment of the indebtedness of said bankrupt to him, and that at the time of receiving such stock the bankrupt was insolvent, and defendant knew of such insolvency, and that such transfer operated as a preference in his favor. The second count was based upon the New York Stock Corporation Law (Consol, Laws N. Y. c. 59), and alleged in substance that on October 6, 1914, that law provided that no corporation which should have refused to pay any of its obligations then due should transfer any of its property to any of its officers, directors, or stockholders for the payment of any debt, or upon any other consideration than the full value of the property paid in cash; that no conveyance, assignment, or transfer by an insolvent corporation with intent to give a preference to a particular creditor should be valid; that every person receiving property by such prohibited transfer should be bound to account therefor to the creditors or stockholders or other trustee of such corporation; that every transfer or assignment contrary to this statute should be void; and that every director or officer of the corporation who should violate this section should be personally liable to the creditors and stockholders thereof to the full extent of any loss sustained by them by such violation. It was further alleged that the defendant, while president and a director of the bankrupt corporation, which had been organized under the laws of New York, unlawfully and knowingly accepted a preference from said corporation with intent to secure a preference, and that by reason of such violation of the statute the creditors and the estate of the bankrupt had sustained damages in the sum of \$5,000, being the value of the stock so obtained as a preference by the defendant. There was also a count based on the common counts.

Said executor pleaded the general issue, and gave notice that it would show in its defense that the assignment of the stock referred to in the declaration as having been made on October 6, 1914 (that date being within four months prior to the filing of the petition in bankruptcy of the bankrupt corporation), was actually made on July 14, 1914, according to the terms of a certain offer made in writing by said corporation, through its secretary and treasurer, to the defendant, and duly accepted by him, which agreement was in the form of a letter dated July 14, 1914, and addressed to said defendant, as follows:

"Confirming verbal agreement, we herewith assign to you our stock, par value of \$2,500, in the Cleveland-Empire Company, as collateral security for your loan to us of \$5,000. We further agree to assign and send to you, as additional collateral for this loan, \$5,000 in stock of the Club Theater Company of Baltimore, Maryland, as soon as same is issued. Stock certificates in both companies will be sent you at the same time, you to advise us at your earliest convenience whether you desire a collateral note for \$5,000 in place of the one we gave you last week.

"Yours very truly, Progressive Circuit, Inc.,
"By James D. Barton, Secretary and Treasurer."

At the conclusion of plaintiff's proofs the second count, based upon the New York Stock Corporation Law, was withdrawn by the court from the consideration of the jury, and the cause submitted to the jury on the first count. A verdict was returned of no cause of action, and the plaintiff has moved for a new trial on grounds of which only the following are argued or mentioned by plaintiff in his brief: (1) That the court erred in its instructions to the jury regarding the nature and effect of the letter of July 14, 1914, a date prior to the statutory four months period. (2) That the court erred in receiving in evidence the letter just mentioned. (3) That the court erred in dismissing from the consideration of the jury the second count of the declaration. These contentions will be discussed in the order named.

[1] 1. It is urged that the court erred in charging the jury concerning the legal effect of the letter of July 14, 1914, and its relation to the issues involved. On this subject the court charged the jury in substance that, if they found from the evidence in the case that the aforesaid instrument of July 14th, signed by the secretary and treasurer of the bankrupt, represented the true agreement and transaction between the parties, and that such agreement was made more than four months before the filing of the petition in bankruptcy, and that in accordance therewith the said shares of stock of the Cleveland-Empire Company were subsequently turned over to the defendant, the jury should return a verdict of no cause of action.

I am satisfied that there was no error in the instructions on this subject. The instrument of July 14th shows upon its face that, confirming a verbal agreement made at or prior to the date just mentioned, which was more than four months prior to the date of the filing of the petition in bankruptcy, January 16, 1915, the bankrupt corporation then and thereby assigned to the defendant the Cleveland-Empire Company stock in question. If, then, the letter correctly set forth the real transaction between the parties, the transfer complained of occurred before the four months period. Under the evidence, this was a question for the jury, and was properly submitted to it.

It will be noted that the instrument referred to shows upon its face that it is a legal assignment, that is, a transfer of the property alleged to have been preferentially transferred; and if such transfer antedated the four months period before the filing of the bankruptcy petition, it did not constitute a voidable preference under the Bankruptcy Act. It is also clear from the language of this instrument that it was not made pursuant to a prior verbal agreement, but was merely confirmatory of such verbal agreement, which was itself an assignment of the stock in question, at least in equity. It is plain, therefore, that the transaction constituted, if not a legal, at least an equitable, assignment of this stock, and created an equitable lien thereon in favor of the defendant. In this view of the matter, the subsequent written assignment, and the still later delivery of the certificates of said stock, were merely formal and incidental to the real transfer, made prior to the statutory period. Sexton v. Kessler & Co., 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Clark v. Sigua Iron Co., 81 Fed. 310, 26 C. C. A. 423 (C. C. A. 3); McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554 (C. C. A. 7); Union Trust Co. v. Bulkeley, 150 Fed. 510, 80 C. C. A. 328 (C. C. A. 6); Lowell v. International Trust Co., 158 Fed. 781, 86 · C. C. A. 137 (C. C. A. 1); Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641 (C. C. A. 6); 5 C. J. 911.

- 2. The contention that the letter in question was erroneously received in evidence is without merit. The signature of the person by whom it was signed as secretary and treasurer of the bankrupt corporation was properly identified, and the letter was written on the letter head of said corporation, on which the name of the writer, as secretary and general manager thereof, was printed. When first offered and received in evidence, counsel for plaintiff stated that there was no objection. Later a motion to strike it out was made, but no grounds for such motion were urged beyond the claim that it was "incompetent," and was inadmissible under the Michigan statute prohibiting the opposite party from testifying to facts equally within the knowledge of a deceased person in certain cases. This evidence was offered on behalf of such deceased, and not by the opposite party, and is clearly not within the scope of such statute. Furthermore, no exception was taken to the ruling admitting this letter, or to the refusal to strike it out. The objection is overruled.
- 3. The New York statute invoked and relied on by plaintiff is section 66 of the Stock Corporation Law (chapter 61, Laws 1909, being also know as chapter 59, Consolidated Laws of New York), providing as follows:

"No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages

for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. * * * No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be a director or an officer to the full extent of any loss they may respectively sustain by such violation."

There was no evidence that on or prior to July 14, 1914, the bank-rupt corporation had refused to pay any of its notes or other obligations, or that it was insolvent, or that its insolvency was imminent, or that it had made the arrangement shown by the letter in question with the intent of giving a preference to the defendant over other of its creditors, or that it had made such arrangement in contemplation of its insolvency. It therefore appeared that the only feature of a preference under this statute, which would not be also an element of a preference under the Bankruptcy Act, was the lack of any limitation upon the time within which such preference must have occurred in order that it should be voidable.

[2] Now, under the evidence in the case and the instructions of the court, the jury must have found, either that the alleged preferential transaction occurred within the period of four months prior to bankruptcy, but that the essential elements of a preference under the Bankruptcy Act were lacking, or else that the transaction complained of occurred as indicated by the letter of July 14th and therefore was not a voidable preference, even if followed by delivery during the four months period. It is therefore unnecessary to consider the question whether the count based on the New York statute was properly withdrawn from the consideration of the jury, because, where it is evident that a correct result has been reached, questions concerning the correctness of particular rulings not affecting such result are immaterial. Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431; Donohue v. Boston & Maine R. R. Co., 209 Fed. 824, 126 C. C. A. 548; Vagaszki v. Consolidation Coal Co., 225 Fed. 913, 141 C. C. A. 37; Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227.

The other grounds for a new trial stated in the motion therefor, while not argued or mentioned in the briefs, have been carefully considered, and are, in my opinion, plainly without merit.

For the reasons stated, the motion for a new trial is denied.

COWHAM v. McNIDER.

(District Court, E. D. Michigan, S. D. December 5, 1919.) No. 198.

- 1. EQUITY \$\infty\$368—DISREGARD OF IMMATERIAL ERRORS UNDER EQUITY RULES.

 Under equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii), requiring the court at every stage of the proceeding to disregard any error or defect which does not affect substantial rights, on a motion to set aside an order permitting complainant to dismiss without prejudice, that such order was irregularly obtained, without notice, is immaterial, and complainant's right to dismiss will be determined on the merits.
- 2. EQUITY \$\iiists 359\$—DISMISSAL WITHOUT PREJUDICE.

 Complainant is entitled to dismissal of a bill at any time before hearing thereon, conditioned on payment of the costs incurred, unless such dismissal will deprive defendant of the right to obtain affirmative relief, prayed for before the motion to dismiss, or unless such dismissal will result in substantial prejudice to defendant, other than the prospect of further litigation regarding the same subject-matter.
- 3. Equity €=359—Dismissal without prejudice.

 A complainant *held* entitled to dismiss without prejudice, notwithstanding the pendency of a motion by defendant for leave to file an amended answer asking affirmative relief.

In Equity. Suit by Nellie L. Cowham against Charles H. McNider. On motion by defendant to set aside an order of dismissal. Denied.

James O. Murfin, of Detroit, Mich., for plaintiff. Warren, Cady, Ladd & Hill, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This matter comes before the court on motion by defendant to set aside an order dismissing without prejudice the bill of complaint herein. The meritorious question involved is whether the plaintiff is entitled to have such bill dismissed upon payment of the costs incurred.

The bill was filed for the purpose of rescinding a certain sale of corporate stock by the plaintiff to the defendant, alleged to have been induced by means of false and fraudulent representations by defendant concerning the value of such stock. In her bill plaintiff offered to return the purchase price received by her, and prayed that defendant be ordered to return to her said stock.

In his answer, the defendant denied all of the material allegations in the bill, and further alleged that he never purchased any shares of stock from said plaintiff, and that the records of the corporation whose stock was involved disclosed that said plaintiff was never the owner of any shares of its stock. No affirmative relief was prayed in said answer.

Thereafter the cause was referred to the standing master in chancery of this court to take proofs. Afterwards, and before the taking of any testimony, defendant filed a petition for leave to file an amended answer and cross-bill, in which he alleged, among other things, that the defendant purchased the corporate stock in question from a person to whom it had been previously sold by the plaintiff, as administratrix of the estate of her deceased husband, to whom it had

belonged at his death; that plaintiff in her individual capacity was never the owner of any of such stock; and that her bill of complaint herein constituted a cloud upon defendant's title to said stock. In such proposed cross-bill defendant prayed that the court would decree that the plaintiff had no title or claim in any capacity to said stock and that defendant was the lawful owner thereof. The petition for leave to file this amended answer and cross-bill was filed September 5, 1919, and notice was served on plaintiff that it would be brought on for hearing on September 15, 1919. It does not, however, appear that any hearing or argument was ever had on said petition. On September 18th defendant, by one of her attorneys, not a resident of this district or admitted to practice in this court, obtained, ex parte and without any notice to opposing counsel, an order, made by a judge of another district sitting by designation in this district, dismissing the bill of complaint without prejudice, and with such costs as the defendant should be entitled to tax.

[1] On September 23, 1919, defendant filed his motion to set aside the order last mentioned, on various grounds. It is urged, in support of such motion, that the order complained of was entered on the motion of an attorney not admitted or authorized to practice in this court, and that said order was made without notice to any of the attorneys for defendant, and without notice to any of the resident attorneys for the plaintiff. On this motion to set aside the dismissal, however, plaintiff is represented by an attorney admitted to practice in this court, and as the defendant has now had ample opportunity to present objections to the dismissal of the bill, and in view of the provision of rule 19 of the federal equity rules (198 Fed. xxiii, 115 C. C. A. xxiii) that "the court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties," the present motion should be disposed of upon its merits, involving the question whether plaintiff is entitled to the dismissal which she seeks.

[2] It is well settled, at least in the federal courts, that a plaintiff who has filed a bill is entitled, at any time before a hearing thereon. to a dismissal thereof, conditioned upon payment of the costs incurred. unless such dismissal will deprive the defendant of the right to claim affirmative relief prayed by the latter in a cross-bill filed before the filing of the motion to dismiss, or unless such dismissal will result in substantial prejudice to the defendant, other than the prospect of further litigation thereby rendered possible, regarding the same subject-matter as that involved in the bill. Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; Connecticut & P. R. R. Co. v. Hendee (C. C.) 27 Fed. 678; American Zylonite Co. v. Celluloid Mfg. Co. (C. C.) 32 Fed. 809; Detroit v. Detroit City Ry. Co. (C. C.) 55 Fed. 569; Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co. (C. C.) 121 Fed. 1015; Penn Phonograph Co. v. Columbia Phonograph Co., 132 Fed. 808, 66 C. C. A. 127 (C. C. A. 3); Gilmore v. Bort (C. C.) 134 Fed. 658; Morton Trust Co. v. Keith (C. C.) 150 Fed. 606; Houghton v. Whitin Machine Works (C. C.) 160 Fed. 227; Thomson-Houston Electric Co. v. Holland (C. C.) 160 Fed. 768; Harding v. Corn Products Refining Co., 168 Fed. 658, 94 C. C. A. 144 (C. C. A. 7); E. G. Staude Co. v. Labombarde (D. C.) 229 Fed. 1004; Young v. J. Samuels & Bro., Inc. (D. C.) 232 Fed. 784; Orr v. Coca-Cola Co., 247 Fed. 452, 159 C. C. A. 506 (C. C. A. 9).

[3] I cannot avoid the conclusion that the dismissal of this bill would not result in such substantial prejudice to the defendant, within the meaning of the rule just stated, as can deprive the plaintiff of the right to such dismissal on the terms provided in the order complained of. While it is undoubtedly a hardship and an injustice which defendant will be compelled to suffer by the action of the plaintiff in first charging him with this fraud and then denying him, against his protests, the opportunity to defend himself against such a charge, yet I am satisfied that plaintiff is within her legal rights in demanding the dismissal of her bill. It will be noted that no cross-bill was ever actually filed. The filing thereof after the motion to dismiss would, of course, be too late. Tower v. Stimpson (C. C.) 175 Fed. 130.

It is therefore unnecessary to consider the contention of plaintiff that the paper sought to be filed by defendant as a cross-bill was in reality such a pleading, or whether its allegations and prayer for relief related so closely to matters of defense rather than affirmative relief that even the seasonable filing thereof would not have deprived plaintiff of the right to the dismissal of her bill. Gilmore v. Bort, supra; United States v. Reese (C. C.) 166 Fed. 347.

The motion to set aside the order dismissing the bill must be denied, and an order entered in conformity with the terms of this opinion.

GOULD COUPLER CO. v. U. S. SHIPPING BOARD EMERGENCY FLEET CORPORATION.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, v. U. S. SHIPPING BOARD EMERGENCY FLEET CORPORATION et al.

(District Court, S. D. New York. December 9, 1919.)

Shipping \$\infty 3\frac{1}{2}\$, New, vol. 8A Key-No. Series—Emergency fleet corporation subject to suit.

The United States Shipping Board Emergency Fleet Corporation, incorporated under the laws of the District of Columbia, *held* subject to suit in general like other corporations created under such laws.

At law. Suits by the Gould Coupler Company against the United States Shipping Board Emergency Fleet Corporation and by the Employers' Liability Assurance Corporation, Limited, of London, against the United States Shipping Board Emergency Fleet Corporation and another. On motion to set aside process. Denied.

Greene & Hurd, of New York City, for Gould Coupler Co. Koehler & Weymann, of New York City, for Employers' Liability Assur. Corporation, Limited, of London. Francis G. Caffey and John E. Walker, both of New York City, for the United States.

Wm. Y. C. Anderson, of Philadelphia, Pa., for Emergency Fleet Cor-

poration.

LEARNED HAND, District Judge. The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962, seems to me finally to control both cases. In that case the vessel had been requisitioned and completed by the Fleet Corporation and chartered by the Shipping Board, under the "emergency shipping fund" provision of the Urgent Deficiencies Act. That provision (40 Stat. 182 [Comp. St. 1918, § 31151/16d]) empowered the President to requisition any ship then being constructed and to exercise his powers through any designated agencies. The question was whether such a ship was within the liability to arrest of section 9 of the Shipping Act (Comp. St. § 8146e), or whether that act applied only to ships which had been built, chartered, or purchased by the Shipping Board under section 5 of the Shipping Act (section 8146c). It was held that, though the President was free to select other agencies, Congress showed that it contemplated the probability that he would in fact choose the Shipping Board and the Fleet Corporation, and that if he did choose them the general administrative provisions of the Shipping Act should apply, among them the liability of all vessels to be arrested on civil process. Therefore the court thought it an irrelevant consideration whether the Shipping Board had chartered the Lake Monroe under its powers derived from the Shipping Act or as a delegate of the President. In either case section 9 applies to such vessels.

Now, in these cases it appears to me too clear for dispute that the Fleet Corporation is in general capable of being sued. Section 11 of the Shipping Act (Comp. St. § 8146f) provides that the corporation shall be chartered under the laws of the District of Columbia, and no one disputes that this means under its general corporations laws. The corporation was so formed under Code of Law D. C. c. 18, subchapter 4, which authorized actions by and against any corporation so organized. The Fleet Corporation was therefore meant to be a legal person without immunity quite as much as any other corporation. In view of these provisions it is unnecessary to consider any of the cases touching the general liability to process of corporations in which the United States may be a stockholder or which it may organize for governmental pur-

poses.

If so, then this process would have been legal if these actions had concerned any activities authorized by the Shipping Act. But the objection raised is to process in suits which arose out of the execution of duties imposed upon the Fleet Corporation by the President under the Emergency Shipping Fund provision of the Urgent Deficiencies Act. That provision (a) authorized the President to place any order for ships or materials as he might think necessary, and it is to be assumed apparently on this motion that it was such an order that is the subject of the larger of the claims at bar. The other claim arises as a necessary incident to the construction of ships, and may properly be

thought to fall within the same power. When the President chose the Fleet Corporation as his agent to discharge the duties so imposed upon him, it may of course be argued, as the defendant does, that the agent retained the same immunity as the President would have had, had he deputed it to an individual immediately under his control. Nevertheless, by a precise parity of the reasoning which the Supreme Court adopted in The Lake Monroe, supra, it must follow that in choosing the Fleet Corporation he chose it with all its limitations upon its head. In other words, Congress contemplated that possibility, and expected that in so delegating his powers he must subject their exercise to the scrutiny and determination of the customary tribunals, precisely as the Fleet Corporation's other activities were subject.

To draw a distinction between ships and the contracts under which they were made would be a capricious rule. If all ships operated by the Board are subject to arrest, whether or not they are operated under the President's powers, it is hard to see why disputes should be justiciable arising under contracts made to build one class of ships and not under those made to build the other. No possible ground appears to me for distinguishing between the agents selected by the President when discharging one of his duties and when discharging any other.

Moreover, it is in general highly desirable that, in entering upon industrial and commercial ventures, the governmental agencies used should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed. The immunity of the sovereign may well become a serious injustice to the citizen, if it can be claimed in the multitude of cases arising from governmental activities which are increasing so fast. At least I have no disposition to strain the point in their favor, where they fall clearly within the principle of authoritative decisions.

I see nothing in U. S. v. Carlin (D. C.) 259 Fed. 904, and U. S. v. Union Timber Products Co. (D. C.) 259 Fed. 907, which in the least contradicts this conclusion. I have no doubt that the Fleet Corporation, certainly when acting as the President's delegate, is a governmental agency, and that a fraud upon it is a fraud upon the United States. That is nothing to the point, which is whether Congress has indicated that in this as in its other activities its disputes with citizens shall be justiciable in the courts, no doubt only United States courts.

The motions are denied.

In re BERNSTEIN.

(District Court, S. D. New York, December 10, 1919.)

BANKBUPTCY \$\infty\$ 140(2)—RECLAMATION OF PROPERTY ACQUIRED BY FRAUD.

Where bankrupt owned a business carried on under a trade-name and managed by her husband, false statements by the husband to one from whom he bought goods that he was the owner and doing a big business held not binding on bankrupt, nor material, and not to entitle the seller to reclaim the goods.

In Bankruptcy. In the matter of Tillie Bernstein, doing business as the Rialto Tire Company, alleged bankrupt. On motion to confirm report of referee, as special master, directing delivery of property to a claimant. Reversed.

Frederic R. Lillie, of New York City, for claimant. Max Sheinart, of New York City, for receiver.

MAYER, District Judge. This is a motion to confirm the report of the referee, as special master, directing the receiver to deliver certain goods to Economical Tire & Supply Company.

The facts, briefly stated, are that Tillie Bernstein, the alleged bankrupt, did business under the name of Rialto Tire Company. The special master has reported:

"The evidence shows that Jack Bernstein, with the knowledge and consent of Tillie Bernstein, carried on the business of the Rialto Tire Company; that Jack Bernstein transacted most of the business, bought all the merchandise, and drew all the checks in the name of the business, by virtue of a power of attorney given him by his wife."

The special master also held that Jack Bernstein made certain statements, upon which Rauchfuss, the president of the reclaiming creditor, relied, and that these statements were both false and material. An examination of the record fails to disclose any statement as to the actual financial condition of Tillie Bernstein. The testimony shows some general statements to the effect that Jack Bernstein said he was doing a big tire business, but there is nothing in the testimony showing that Jack Bernstein had made any representation as to the actual financial condition of the business which Tillie Bernstein was doing under the name of the Rialto Company. The sole representation upon which the reclaiming creditor relies is found in the following extract from the testimony of Rauchfuss, as to what Jack Bernstein said to him. Rauchfuss testified that Bernstein said:

"I am the owner of the Rialto Tire & Supply Company, both president and treasurer, and I can just as well give you the business as anybody else."

There is in the record some testimony corroborative of that given by Rauchfuss in this particular. Jack Bernstein, in substance and effect, denied that he made such a statement; but I shall assume, for the purpose of this decision, that the statement was made by Jack Bernstein. There is no testimony whatever that the statement thus made by Jack Bernstein was either authorized by or known to Tillie Bernstein. Assuming, for the purpose of the argument, that the agency as between Tillie Bernstein and Jack Bernstein existed in the manner and to the extent above quoted, there is nothing in such an agency which can be construed as an authorization by Tillie Bernstein to Jack Bernstein to make a statement of this kind.

It must be concluded in the first place, that the statement of Jack Bernstein was not in any manner binding upon Tillie Bernstein. In the second place, a reading of the record discloses that the statement was in no sense a material statement. There is nothing to show what, if any, Jack Bernstein's own resources were. All that the statement would amount to would be an assurance to Rauchfuss that Bernstein's business ability could be relied upon. There was nothing material in such a statement, because Bernstein, according to the special master, transacted most of the business and bought all the merchandise. The following extract from the testimony of Rauchfuss demonstrates how inconsequential the statement was:

"He said: 'I am doing a big tire business. I buy about two to three thousand dollars worth of Pennsylvania tires a month.' And he pulled out his bank book and showed it. I didn't notice it very closely, but I noticed a deposit of around \$700, the last item in it, and I had known the man for a long time, and I didn't doubt any of his ability, or * * * anything strange in the case, and I gave him anything he asked for."

Finally, it is very doubtful whether, in a business sense, Rauchfuss can be said to have relied upon the statement that Jack Bernstein was the owner, in order to extend the credit; but, assuming that he did, I am of opinion that the statement was not material, and, even if material, was made under circumstances for which in no manner Tillie Bernstein can be held responsible.

The cases of Smith v. Countryman, 30 N. Y. 655, and Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701, to which the special master and counsel for the claimant refer, are not in point. The principles laid down in those cases are now regarded as simple and well settled. In Smith v. Countryman, supra, the representations were made by the person sought to be held responsible therefor. In Fairchild v. McMahon, supra, the misrepresentation as to the cost of the property involved was made by a broker with the consent of his principal, and, in any event, was strictly relevant to the transaction. In the case at bar, if Tillie Bernstein authorized her husband to buy merchandise, and the husband had made false representations as to her financial condition, a different question might arise; but, in my opinion, it is a far stretch to hold that if, without any evidence of knowledge or authority, an agent represents himself as the owner of the business, then his principal can be held for such a representation.

The conclusion of the referee must be reversed, and an order in accordance herewith may be submitted on one day's notice.

LEE v. JACKSON LIGHT & TRACTION CO. (MERCHANTS' BANK & TRUST CO., Garnishee).

(Circuit Court of Appeals, Fifth Circuit. December 19, 1919.) No. 3437.

1. APPEAL AND ERROR \$\sim 461-Bond for \$500 on whit of error to review

\$10,000 JUDGMENT NOT SUPERSEDEAS.

Where the District Court granted writ of error to review judgment of \$10,000, and the order granting the writ required execution of a bond for \$500, held, that a bond in such amount, filed pursuant thereto, though reciting that it was a supersedeas bond, and though approved by the trial judge, cannot be deemed to have superseded the judgment.

2. APPEAL AND ERROR 5-487-SUPERSEDEAS DOES NOT DISCHARGE GARNISH-MENT, BUT SUSPENDS ACTION TILL DETERMINATION ON APPEAL.

Though writ of error and bond operated as a supersedeas, it will not discharge the writ of garnishment sued out by the judgment creditor, but will only suspend proceedings thereon till a mandate of the appellate court is received.

3. Garnishment \$\infty\$137—Garnishee's objection to sheriff's return waived BY FILING ANSWER.

Where a valid writ of garnishment was served, and the garnishee filed answer, it cannot thereafter urge the invalidity of the entire garnishment proceeding because the marshal wrote on the back of another writ his return, mistakenly stating that the paper served on the garnishee was a copy of the paper returned.

In Error to the District Court of the United States for the Southern

District of Mississippi; Edwin R. Holmes, Judge.

Action by Dr. C. A. Lee, administrator, against the Jackson Light & Traction Company. After judgment for plaintiff, the Merchants' Bank & Trust Company and others were summoned as garnishees. Thereafter judgment was affirmed on defendants' writ of error, and, the trial court having denied plaintiff's motion to enter judgment against the Merchants' Bank & Trust Company and dismissed the writ of garnishment, plaintiff brings error. Reversed and remanded for further proceedings.

Teat, Teat & Potter, of Jackson, Miss., for plaintiff in error. Wells, May & Sanders, of Jackson, Miss., for defendant in error.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

ERVIN. District Judge. The facts in this case are that appellant, Lee, having recovered a judgment against the Jackson Light & Traction Company, in the Southern district of Mississippi, filed a suggestion of garnishment on said judgment against various parties, including the Merchants' Bank & Trust Company; all of the parties being named in said suggestion.

There appears to have been issued by the clerk, under this suggestion, a writ of garnishment, which names on its face R. E. Kennington and 36 others, and Jackson Daily News, and Auto Supply Com-

Em For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 261 F.—46

"We therefore command you to summon R. E. Kennington and 36 others, and Jackson Daily News, and Auto Supply Company," etc.

There appears also to have been issued at the same time, and served by the marshal on the Merchants' Bank & Trust Company, a writ which was a copy of the first writ, except that in its recital of the persons against whom the garnishment is issued, it states:

"And the said Dr. C. A. Lee, administrator, having made the proper suggestion for a writ of garnishment against the Merchants' Bank & Trust Company, we therefore command you to summon Merchants' Bank & Trust Company to appear," etc.

On the back of the writ, after naming R. E. Kennington and 36 others, the marshal makes the following return:

"Executed by handing a true copy of this writ to G. L. Arnold, for Auto Supply Company, to Walter Johnson, for Jackson Daily News, to R. F. Young, for First National Bank, to R. F. Young, for Citizens' Savings Bank, and J. M. Hartfield, for Merchants' Bank & Trust Company.

"Done at Jackson, Mississippi, this 6th day of July, 1918.

"J. G. Cashman, U. S. M., By Freeney, Deputy."

It will be noticed that the writ actually served on the Merchants' Bank & Trust Company omits the names of all the garnishees except the Merchants' Bank & Trust Company, and omits all statement as to 36 others, and names only the Merchants' Bank & Trust Company as garnishee, while the writ which was returned by the marshal does not name the Merchants' Bank & Trust Company, nor any of the 36 others. With this exception, it is a literal copy of the writ on which the marshal made his return.

On the same day, namely, July 6, 1918, on which this suggestion of garnishment was filed and these writs were issued, the defendant in judgment, the Jackson Light & Traction Company, filed a petition for a writ of error and supersedeas to remove the cause to the United States Circuit Court of Appeals. The judge of the court to whom this petition was addressed made an order which reads as follows:

"It is ordered that the writ of error be and it is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit the judgment hereto entered berein, and that the amount of bond on said writ of error be and it is hereby fixed at \$500.00.

"This 21st day of May, 1918."

A bond in the sum of \$500 was executed, which recites:

"Whereas, the said defendant, the Jackson Light & Traction Company, has brought an appeal with supersedeas to the next term of the United States Circuit Court of Appeals at New Orleans, which said appeal was by this court granted, upon the execution of the supersedeas bond in the penalty of \$500.00," etc.

This bond was approved by the judge, who ordered the writ of error issued. It will be noticed, however, that the writ ordered by the judge to be issued was a writ of error only, and there was no mention made in his order of any supersedeas. It could hardly be assumed that any judge would supersede a \$10,000 judgment on a \$500 bond. The writ actually issued, as shown by the record, was also a writ of error, but no supersedeas.

The record was sent up to the Court of Appeals, and the judgment against the Jackson Light & Traction Company was duly affirmed by it. 256 Fed. 97, — C. C. A. —. The mandate was issued by the clerk of the Circuit Court of Appeals and sent down to the lower court.

The Merchants' Bank & Trust Company, on July 24, 1918, filed its answer in court to the writ which had been served on it, and its answer recites:

"Comes the Merchants' Bank & Trust Company and for its answer to the writ of garnishment served on it in this case shows and states to the court that, at the time of the service of the said process on it, it was indebted to the said Jackson Light & Traction Company in the sum of \$1,340.32, represented by deposit of said company. * * * The said Merchants' Bank further shows to the court that immediately after the service of the garnishment upon it that it stopped the payment of any sums out of the account of the said Jackson Light & Traction Company until July 6, 1918, when the supersedeas bond was filed by the said Jackson Light & Traction Company, in accordance with an order of court allowing writ of error to the United States Circuit Court of Appeals.

"It is understood by the said Merchants' Bank & Trust Company that under the filing of the said supersedens bond, and the allowing of the writ of error, that the said writ of garnishment becomes of no binding force against

the said Merchants' Bank & Trust Company."

Nothing seems to have been done further in this case until the 6th day of May, 1919, when the attorney for plaintiff asked for a judgment on the answer of the garnishee, the Merchants' Bank & Trust Company. The bill of exceptions recites:

"He assured the court that they were all right, and that if they were not they could be set aside. With this understanding, the court signed the judgment, but within a few minutes, and before the judgments were entered on the minutes, upon being informed by Hon. Ben H. Wells, of the firm of Wells, May & Sanders, that there was objection to these judgments being entered, the court immediately directed the clerk not to enter the same."

It then appears that the Merchants' Bank & Trust Company filed a motion asking for permission to withdraw its answer to the garnishment, and that the court quash the pretended writ of garnishment, purported to have been issued in said cause by the clerk on July 6, 1918, etc.

The grounds of motion seem to have been based on some idea that as the writ on which the marshal wrote his return did not name the Merchants' Bank & Trust Company, and as the marshal recited that a correct copy of this writ had been served on the Merchants' Bank & Trust Company, that the whole garnishment proceeding was void, as the writ served by the marshal was not a literal copy of the writ on which he wrote his return, and on the further ground that the court below had granted a supersedeas bond of \$500, and that the making of this bond had the effect to supersede and annul all of the garnishment proceedings which had been taken in the cause.

[1] In the first place, it will be noticed that all of the parties seem to have been under the impression that a supersedeas had in fact been issued, which was not the case, as all the judge ordered was that a writ of error be issued, which was done. The making of a supersedeas bond, and its approval by the judge, did not have the effect to super-

sede the proceedings in this case, and his approval of this bond must be read in the light of his order making it a cost bond, instead of a supersedeas bond.

- [2] It becomes, therefore, manifest that none of the garnishment proceedings taken were at all superseded, much less invalidated by the making of such bond; nor do we concede that the making of a supersedeas bond, if one had been ordered would have set aside and invalidated the garnishment proceedings. All that the making of such a bond would have done would have been to suspend further proceedings on such garnishments, until the mandate of the Court of Appeals was received in the court below.
- [3] It appears that a correct and valid writ was served by the marshal upon the Merchants' Bank & Trust Company, and that it filed its answer to said writ. We do not think that, having filed its answer to this writ, it can be heard to say that because the marshal wrote on the back of another writ his return, in which he mistakenly stated that the paper served on the bank was a copy of the paper he returned, that this would invalidate the proper writ, which had in fact been served on the bank.

The bank was served with a proper writ, and in obedience to this service it filed its answer, admitted indebtedness, and it then appeared in court and submitted itself to the further orders of the court. It therefore had no right thereafter to pay out any money of the Jackson Light & Traction Company until its answer had been ruled on by the court but it remained in court, subject to such orders as the court might thereafter make.

We think the court erred in quashing the service on the garnishee, and therefore also erred in denying the motion for a judgment against the garnishee. The cause will be remanded, for further proceedings in the lower court in accordance with this opinion.

RICHARDS, State Superintendent of Banks, v. CARPENTER et al. (Circuit Court of Appeals, Sixth Circuit. November 5, 1919.)

No. 3290.

1. Banks and banking \$\sim 313\top-Limitation of actions \$\sim 87(1)\top-Time within which stockholders' double liability must be enforced.

Under Code Civ. Proc. N. Y. § 394, found in the chapter devoted to limitations, which declares that the chapter does not affect an action against a director or stockholder of a banking association to enforce a liability created by the commonwealth or by statute, but such action must be brought within three years after the accrual, the double liability imposed on stockholders in trust companies by Banking Law N. Y. 1909, § 196, must be enforced by action brought within three years after accrual, the three-year period being a condition, not a limitation, and so section 401 of the Code, excepting from the running of limitations the period where defendant is out of the state, has no application.

2. BANKS AND BANKING \$\igchip313\text{—Time within which stockholder's double liability must be enforced.}

Though Code Civ. Proc. N. Y. § 394, requiring actions to enforce the statutory liability of stockholders in banking associations to be brought

within three years, is treated as a statute of limitation against a liability of this kind created by statute of another state, nevertheless it is a condition on the right to enforce such liability imposed on stockholders in a trust company by Banking Law N. Y. 1909. § 196.

While Banking Law N. Y. § 2, which is devoted to definitions, declares that the term "bank" means any moneyed corporation, and thus would include trust companies, yet in view of the specific provisions applicable to banks and other equally specific provisions applicable to trust companies, provisions as to banks cannot be extended to cover trust companies by reason of the inclusive definition in section 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bank.]

4. Limitation of actions ⇐⇒58(5)—Accrual to superintendent of banks of right to enforce double liability of stockholders of trust company.

Under Banking Law N. Y. 1909, § 19, relating to superintendent of banks, and sections 71 and 196, relating to the double liability of stockholders in banks and trust companies, a cause of action to recover the double liability imposed on stockholders in trust companies accrues in favor of the superintendent of banks, at least in equity, as soon as the necessity to resort to stockholders exists, notwithstanding there has been no assessment, for under section 196 a cause of action accrues against stockholders and to a creditor of a trust company upon default in payment of his claim, etc.

 Limitation of actions ⇐==6(9)—Amendment of statute after expiration of limitation.

Where the three-year period in which the superintendent of banks might enforce the double liability of stockholders in a trust company, imposed by Banking Law N. Y. 1909, § 196, expired prior to the amendment of April 16, 1914, to section 19, relating to the powers of the superintendent of banks, which thereafter became section 80, such amendment cannot affect the action already barred.

6. Limitation of actions 69—Extending of period after right of action is barred.

After right of action to enforce the double liability of stockholders in trust companies, imposed by Banking Law N. Y. 1909, § 196, had been lost by the expiration of the three-year period prescribed by Code Civ. Proc. N. Y. § 394, the extension of the period within which suit might be brought by subsequently enacted amendment of 1914, cannot be considered retroactive, and to revive the action.

Appeal from the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Bill by Eugene Lamb Richards, Superintendent of Banks of the State of New York, against John H. Carpenter and others. From a decree dismissing the bill, complainant appeals. Affirmed.

John B. Keeble, of Nashville, Tenn., for appellant. Jordan Stokes, of Nashville, Tenn., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. The plaintiff below, appellant here, is the superintendent of banks in the state of New York. In January, 1911, the Carnegie Trust Company, a New York City corporation, was closed by plaintiff's predecessor in office, and he proceeded to

administer its affairs in accordance with New York laws. In November, 1912, he made a written finding to the effect that, in order to pay the debts of the bank, it was necessary for the stockholders to pay their full statutory liability in that event, being the double liability of 100 per cent. of the amount of the stock held by each, and he made an assessment accordingly against the stockholders of record. To collect this assessment from the stockholders living in Tennessee, he filed a bill in the state chancery court. This was eventually dismissed by the Supreme Court of the state. Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234. Thereupon his successor, the plaintiff, filed in the court below the present bill, which was generally similar to that which had been dismissed by the Supreme Court of the state, and was against the same defendants. The defendants moved to dismiss, and, upon that and other motions, the court considered two different defenses which arose upon the undisputed facts. The court thereupon dismissed the bill upon the first of these defenses, holding that the action of the Supreme Court of Tennessee had been in effect to declare that the assessment was invalid, because it was in violation of the public policy of the state of Tennessee, and that, upon this question, the federal courts in Tennessee, whatever their own opinions, were bound to follow the decision of the state court.

The correctness of this conclusion is the question which has been chiefly argued in this court; but we find it unnecessary to reach any decision thereon, since we are of the opinion that, upon the face of the papers, the action was too late, and since this conclusion alone, if correct, is a sufficient ground for affirming the judgment below, without reference to the holding of the Tennessee Supreme Court in Van Tuyl v. Carpenter, supra.

[1] The stockholders' double liability, relied upon by plaintiff, is that created by section 196 of the Banking Law of New York of 1909 (Consolidated Laws of New York of 1909, c. 2). Section 394 of the New York Code of Civil Procedure reads as follows:

"This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute; but such an action must be brought within three years after the cause of action has accrued."

This section is a part of title 2 of chapter 4 of the New York Code. The chapter is entitled, "Limitation of the Time of Enforcing a Civil Remedy," and its three titles are: (1) Limitations of Real Actions; (2) Limitations of Other Actions; and (3) General Provisions. The decisive question is whether this three-year limitation should be considered as an ordinary statute of limitations, or as a condition affixed to the creation of the liability. If the former, the action would not be barred in New York, because the defendants have not been within the state (section 401, New York Code of Civil Procedure), if, indeed, any applicable provision of the general statute of limitations would have otherwise taken effect; and it would not be barred in Tennessee, because the generally applicable statute of Tennessee provides for six years (Shan. Code, § 4472); while, if the restriction is

of the latter character, we conclude that, for the reason to be stated, the time limit had expired before this suit was brought, in January, 1917, and hence an essential condition of the liability is absent.

What we have said to be the decisive question is controlled by the decision of the Supreme Court in Davis v. Mills, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067. There is, in our opinion, no substantial distinction between the facts of that case and of this. The corporation laws of Montana required certain annual reports to be filed, and provided that, in default of such filing, "all the trustees of the company shall be jointly and severally liable for all the debts of the company." Thus we have a liability independently created by a manufacturing corporation law, just as there is, in the present case, an independent liability created by the banking law. Neither in that case nor in this did the same statute which created the liability prescribe any time limitation. The Montana Code of Civil Procedure contained a separate title, which embodied four chapters governing limitations upon the time of commencing actions. The various sections of this title prescribed appropriate limitations in various cases according to the nature of the action, and section 541 contained the usual provision that the time when the defendant was outside of the state should be excluded from the computation. Section 554 says:

"This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years," etc.

The lower court certified to the Supreme Court the question whether this three-year limitation applied in a suit brought in the court of another state where the defendant resided and was found. The opinion of the court, by Mr. Justice Holmes, after stating that the defendant is entitled to the benefit of the conditions created by the foreign law under which his liability arises, continues:

"It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. The Harrisburg, 119 U. S. 199 [7 Sup. Ct. 140, 30 L. Ed. 358]. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

"If, then, the only question were one of construction and as to liabilities subsequently incurred, it would be a comparatively easy matter to say that section 554 of the Montana Code of Civil Procedure qualifies the liability imposed "pon directors by section 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought."

The court then proceeds to consider special circumstances, which were claimed to take the case out of the conclusion just stated, overrules this contention, and continues:

"A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else. We express no opinion as to the earlier act, but we think that this section 554 so definitely deals with the liability sought to be enforced that upon the principles heretofore established it must be taken to affect its substance so far as it can, although passed at a different time from the statute by which that liability first was created. * * *

"The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident. If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. We can see no constitutional obstacle in the way, and we are of opinion that they have purported to do it and have done it."

See, also, Boyd v. Clark (C. C.) 8 Fed. 849, 852; Theroux v. Northern Co. (C. C. A. 8) 64 Fed. 84, 85, 12 C. C. A. 52; Brunswick Co. v. National Bank (C. C. A. 4) 99 Fed. 635, 636, 40 C. C. A. 22, 48 L. R. A. 625; Stern v. La Compagnie (D. C.) 110 Fed. 996, 998; International Co. v. Lindstrom (C. C. A. 2) 123 Fed. 475, 60 C. C. A. 649; Atlantic R. R. v. Burnette, 239 U. S. 199, 201, 36 Sup. Ct. 75, 60 L. Ed. 226; Northern Co. v. Crowell (D. C.) 245 Fed. 668, 672.

Incidentally, this case also disposes of the contention that the section (541) providing that the time of absence from the state shall not be counted (section 401 of the New York Code) is operative to extend the three-year period of section 554 (section 394 of the New York Code). The court points out that this section is one of those in the title in which the section creating the three-year limitation is found, and that this latter section expressly declares, "This title does not affect" the specific action involved. The section regarding absence from the state is incidental to and qualifies the various periods of limitation prescribed by the title, and the provision that "this title does not affect" actions of this specific character, plainly means that neither the general periods named nor the exceptions to and modifications of those general periods have anything to do with the named action. Precisely the same situation exists under the New York Code.

Two reasons are insisted upon why Davis v. Mills should not be regarded as controlling. One reason is that the Montana statute there involved referred to actions against stockholders "to enforce a liability created by law," while the New York Code (section 394) refers to actions against stockholders "to enforce a liability created by the common law or by statute." It is said that this latter language is so general as to negative the inference that the legislative intent was to impose a condition upon statutory liabilities, and that, therefore, this section should be treated as merely one of remedial limitation. We cannot think this distinction well taken, or that the decision in Davis v. Mills can stand on such narrow ground. Liabilities created by the

common law as well as those created by statute are within the general words of the Montana act; and, however that may be, we have involved in the present case nothing excepting liability created wholly by the New York statute. Indeed, it must be doubtful whether the words "by the common law," in section 394, have any operative effect. Surely there is no "penalty or forfeiture imposed * * * by the common law," and it is not easy to think of any "liability created" by the common law against trustees or stockholders of a trust company which is not fully covered, as to stockholders, by sections 184 and 196, Banking Law, and as to directors by sections 195 and 196.

[2] The other reason is that this New York section 394 has been authoritatively interpreted to operate as a statute of limitations against liability of this kind created by the statute of another state (Platt v. Wilmot, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809), and hence that the statute cannot now be construed as one limiting the right, but must be treated as one affecting only the remedy. We see no reason why it may not have the double character (Platt v. Wilmot, supra, 193 U. S. 613, 24 Sup. Ct. 542, 48 L. Ed. 809), and limit rights created by New York statutes while correspondingly limiting remedies against New York citizens sued in the courts of that state upon liabilities created by the law of a foreign state; and to urge, as appellant does, that rights created by the laws of one state cannot be extinguished in practical effect by the limitation laws of another state as to the citizens of the second state, is to urge the same argument of which the Supreme Court said in Davis v. Mills, 194 U. S. 456, 24 Sup. Ct. 695. 48 L. Ed. 1067:

"It is quite incredible that such an unsubstantial distinction should find a place in constitutional law."

It would be unfortunate that the liability of different stockholders, scattered over the United States, should be regulated by as many periods of limitation as there were states of residence. The estate of the insolvent bank should be speedily administered, and all interested parties should have their status promptly settled. It would be an anomaly, after three years, that citizens of Tennessee should be liable while citizens of New York were free. We are satisfied that, both by the authoritative effect of Davis v. Mills and by an independent view of the natural and probable intent of the New York Legislature, it should be held that such a liability as this was extinguished, both in New York and in Tennessee, after the expiration of the prescribed time.

[3, 4] The remaining question is whether, within the proper meaning of section 394 of the New York Code, a cause of action accrued before January, 1914, so that the requisite three years had elapsed when this suit was commenced. The utter insolvency of the trust company, when the superintendent of banks took possession in January, 1911, and the then existing necessity that all the stockholders must pay 100 per cent. of their liability, and that even then the creditors must go largely unpaid, are either expressly alleged or fairly apparent on the face of the bill. In November, 1912, the superintendent had so far completed the liquidation and ascertaining the

amount of the debts and the actual as compared with the book value of the assets as to reach and declare the conclusion that the assessment against the stockholders was necessary, and to make a demand of payment from them. The effect of this conclusion and demand upon the existence or status of a cause of action against the stockholders rests upon section 19 of the New York Banking Law as it existed in the years 1911 and 1912 (Consolidated Laws New York 1909). This provided that, whenever it appears to the superintendent that any corporation within the act is in an unsafe or unsound condition. he may take possession of the property and business and retain such possession until they shall be returned to the corporation in the manner provided, or until the liquidation of its affairs by the superintendent shall be completed. The superintendent is to collect all debts due and claims belonging to the corporation, and may sell all such property on such terms as the Supreme Court may direct, "and may, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders." He is to give notice to all who seem to be creditors, and they shall thereupon file their claims with him. The assets which he collects shall be paid out in dividends to the creditors until the creditors have been paid in full. The administration during this period is under the supervision and control of the Supreme Court. There is no statutory transfer of title to the superintendent, and he seems to have, in all substantial respects, the status of a receiver in a court of equity to wind up a corporation, with the single exception that he was not appointed by the court. He had no express authority to begin a suit against the stockholders based upon their liability, and it would seem that his remedy against the stockholders if, indeed, any proceeding was to be taken in his name—was to file a bill in equity to procure a judicial ascertainment and enforcement of their liability, although the reported proceedings, to enforce liability under this or similar laws, seem to have been taken by some creditor in his own name for himself and others. The amendment of 1914 (Laws 1914, c. 369), hereinafter mentioned, has made clear the superintendent's right to proceed in his own name.

It is to be noted as an interesting and perhaps important fact that there are differences between the liability of a stockholder in a trust company and of one in a bank. It is true that, by the definitory provisions of section 2, it is declared that the word "bank," wherever used in the chapter, should have a meaning which would include trust companies; but then we find the chapter divided into eleven articles. Article 1 related to definitions, article 2 to general provisions, and the remaining articles, each, to a separate class of corporations within the chapter—one article to banks, one to trust companies, one to savings banks, one to building and loan associations, etc. The article relating to banks begins with a provision for forming "a corporation to be known as a bank," and the later sections of this article all refer back to the initial section by the phrase "in every such corporation," or its equivalent. The article on trust companies opens with a similar provision for forming "a corporation to be known as a trust company," and the later sections of this article refer back to "any such corporation." It seems a necessary conclusion that, where the article upon banks makes a specific provision concerning banks and the article upon trust companies makes another and inconsistent one relating to trust companies, the provision as to banks cannot be extended to cover trust companies by reason of the inclusive definition originally given to the word "bank."

The stockholders' liability as to banks is created by section 71,

which says:

"Except as prescribed in the Stock Corporation Law, the stockholders of every such corporation shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

In 1897 (Laws 1897, c. 441) this section was amended by adding a provision that, if a permanent receiver has been appointed, all actions to enforce liability under this section shall be taken by and in the name of the receiver. The corresponding liability in trust companies is declared in section 196, which reads:

"If default shall be made in the payment of any debt or liability contracted by any such corporation, the stockholders thereof shall be individually responsible, equally and ratably, for the then existing debts of the corporation, but no stockholder shall be liable for the debts of the corporation to an amount exceeding the par value of the respective shares of stock by him held in such corporation at the time of such default."

Under the language of section 196, it would seem that a cause of action accrued at once to any creditor of the trust company upon default by it in payment of that particular debt. Carrol v. Green, 92 U. S. 509, 511, 23 L. Ed. 738. Apparently such suit might be brought by any creditor, and he could recover the amount of his demand against the stockholder, to the extent of the par value of the latter's stock, unless appropriate proceedings were taken in equity to enjoin his suit and to preserve the fund for the benefit of all interested (Pfohl v. Simpson, 74 N. Y. 137), and such proceeding directly by the creditor was the recognized proceeding in generally analogous cases (Hirschfeld v. Fitz Gerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839). The latest holding, made shortly before the amendment of 1914, we find in Mosler Čo. v. Guaranty Co., 208 N. Y. 524, 101 N. E. 786. This involved still another similar liability (in a safe deposit company), but the powers of the superintendent under section 19 were the same in all similar cases. What is said about the superintendent's right to sue is perhaps a dictum, but his right to maintain such an action is clearly recognized (208 N. Y. 529, 101 N. E. 786). in spite of the fact that he had made no assessment valid for this purpose (208 N. Y. 534, 101 N. E. 786).

We cannot accept Richards v. Gill, 138 App. Div. 75, 122 N. Y. Supp. 620, as controlling. It is not by a court of last resort; it is not easily reconciled with the later decision of the Court of Appeals in the Mosler Case; it does not refer to, and seems entirely to overlook, section 394, an obviously pertinent and apparently controlling statute; and so far as it indicates that a cause of action does not accrue to a creditor until execution returned unsatisfied, it is based on sec-

tion 71, which expressly incorporates the Stock Corporation Law (Consol. Laws, c. 59) conditions (Hirshfeld v. Bopp, 145 N. Y. 84, 91, 92, 39 N. E. 817), while section 196 makes no such reference and, hence, imposes no such condition.¹

Considering the precise language of sections 196 and 19, and what we think their reasonable application to the facts of this case, and with such aid as may be had from the New York decisions, we do not doubt that a cause of action under section 196 accrued in favor of creditors, at least in equity, immediately upon the failure in 1911, and in favor of the superintendent, in equity, as soon as the necessity to resort to stockholders existed (Terry v. Tubman, 92 U. S. 156, 160, 23 L. Ed. 537), and, under the facts of this case, such necessity plainly existed at that same time. Surely no suit, by creditor or superintendent, could have been defeated because brought before ascertainment of the facts upon which the liability rested, when the statute provided for no such ascertainment. A cause of action accrues, so as to set in motion a period limitation, when there arises a right to bring a suit in which the liability may be determined; to say that it does not accrue until all the disputed facts have been litigated and decided is to abolish the limitation.

[5, 6] In deciding the question here involved, we give no force to the amendment of April 16, 1914 (Laws 1914, c. 369), by which this part of section 19 became section 80, and by which the superintendent was given power to make an assessment, and it was declared that he should have a cause of action therefor against the stockholder. Even if this operated to make him the sole proper plaintiff, and even if it fixed for the future the time when the right of action accrued, it could not so far have the latter effect as to control a limitation upon a cause of action accrued so long before that it was already barred. Nor could the extension of the limitation period from three years to six, made by this amendment and with no express retroactive effect, affect the present case. Under the view which we have adopted, the contract of the stockholders was to respond under section 196, if they were sued within three years after a default; and this obligation was gone before April, 1914. Neither Davis v. Mills nor Platt v. Wilmot is inconsistent with holding that such a liability is not so far merely contractual that the law of the forum will necessarily fix the limitation, and yet has that character (as pointed out in Whitman v. Oxford Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587), far enough so that it may be enforced in another state.

As against the two defendants who, in January, 1911, were executors of then deceased stockholders, the case is governed by the same considerations which prevail concerning the other defendants. Whether these executors be considered as defendants in their representative or in their individual capacities, the action accrued against them at the same time as against everybody else.

the same time as against everybody else. The decree of dismissal is affirmed.

¹ We observe that in the Mosler Case it was assumed, without noticing the distinctions, that a section like 196 in this respect implied the same condition found in section 71.

KEITH v. KILMER.*

In re NATIONAL PIANO CO.

(Circuit Court of Appeals, First Circuit. November 15, 1919. On Petition for Rehearing, January 6, 1920.)

No. 1406.

 BANKRUPTCY 318(1)—CLAIM UNDER EXECUTORY CONTRACT BY CORPORA-TION FOR PURCHASE OF ITS OWN STOCK.

An executory contract by a corporation for the purchase of its own stock cannot be made the basis of a claim against its estate in bankruptcy, thus permitting the selling stockholder to share with ordinary creditors in its assets.

On Petition for Rehearing.

2. MATTER NOT DECIDED.

The record raises no issue and this court intimates no opinion as to the power of the corporation organized under the laws of any state to contract to purchase its own stock, paying therefor only out of surplus or accumulated profits.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

In the matter of National Piano Company, bankrupt. Charles H. Keith, trustee, appeals from an order allowing claim of Frederick M. Kilmer. Reversed.

Lee M. Friedman, of Boston, Mass. (Percy A. Atherton and Friedman & Atherton, all of Boston, Mass., on the brief), for appellant. Samuel D. Elmore, of Boston, Mass., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an appeal by the trustee in bankruptcy of the National Piano Company, a Maine corporation, from an order of the District Court reversing the referee and allowing the claim of Kilmer in the sum of \$31,800. Kilmer's claim is based upon the breach of an alleged contract dated February 3, 1913, between him and the corporation, for the purchase from him at par of 318 shares of the bankrupt's capital stock in installments of 3 shares a month, beginning on July 1, 1916. The corporation was adjudicated a bankrupt in June, 1916.

For present purposes we assume, without deciding, that the court below was correct in finding the contract was sufficiently authorized or ratified, or both, by the directors and stockholders, although in passing it may be noted that a minority of the stockholders appear to have had no knowledge of the transaction, and therefore, if unanimous assent was requisite (Von Arnim v. Amer. Tube Works, 188 Mass. 515, 518, 74 N. E. 680), the corporation might not be bound; that question we pass. In like fashion, we assume that the court below was right in finding that at the time of the transaction the corporation was solvent, and the contract not tainted by fraud in fact—an intent to cheat creditors, existing or prospective.

But it is entirely clear that the transaction out of which the alleged contract grew was entered into, not for the benefit of the corporation itself, but for the benefit of certain stockholders. In brief, junior and minority stockholders desired to buy out the senior and majority stockholders; and, having no money with which to buy, the parties agreed, not for the benefit of the corporation, but for the benefit of the trading stockholders, to have the corporation, in form at any rate, agree to buy and pay for a large part of the stock intended thus to pass ultimately from the seniors to the juniors, thus giving them control of the corporation and its offices, with the emoluments thereof. The corporation was, so to speak, made an accommodation purchaser for the benefit of certain vending and purchasing stockholders. Over \$32,000 was thus paid by the bankrupt to, or for the benefit of, its trading stockholders, before bankruptcy—the natural result of such unbusinesslike and unlawful methods—overtook the concern. Kilmer now seeks to prove a similar claim for \$31,800 more. The question presented, then, is whether, by executory contract between a Maine corporation and one of its stockholders, such stockholder may be transmuted from a stockholder into a creditor, and as such be permitted to share in the assets, pari passu with merchandise and other ordinary creditors, proving claims in bankruptcy. No authority is cited which on analysis sustains this proposition.

[1] Under the laws of many states corporations may not purchase their own capital stock under any circumstances. See cases cited in 1 Machen, Corps, § 627, note 6; Thompson, Corps (White's Supp.) § 4076. This is not the rule in Massachusetts as to Massachusetts corporations. But there is no case in Massachusetts which sustains the proposition which underlies the present claim—that a stockholder, contracting with the corporation, not for its own benefit, but for the benefit of himself and other stockholders, with whom he is dealing, may, through an executory contract, cease to be a stockholder, and become a creditor, to share in competition with other creditors in the assets of the cor-

poration when bankrupt.

Dupee v. Boston Water Power Co., 114 Mass. 37, generally cited as the leading case in support of the proposition that a corporation may buy its own stock, was a bill in equity by minority stockholders to prevent the defendant company from selling land, taking one-half the pay in the stock of the corporation at \$75 a share, alleged to be much more than the market value of the stock. The case was heard on the bill and answer. The court, by Colt, J., said:

"There is nothing in the general laws of the commonwealth, or in the company's charter, which forbids the sale proposed. The power to purchase and hold implies the power to sell, and to sell upon such terms as to secure the highest price. The whole capital is now represented by these lands, from the sale, and not from the income or use, of which the shareholders must derive their return. In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers. Leland v. Hayden, 102 Mass. 542; American Railway-Frog Co. v. Haven, 101 Mass. 398 [3 Am. Rep. 377]; Nesmith v. Washington Bank, 6 Pick, 324, 329."

The doctrine that the power exists, because there is no "legislative provision to the contrary," does not accord with the usual rule as to

construing corporate charters. Thomas v. Railroad Co., 101 U. S. 71,

25 L. Ed. 950; Morawetz, Corps. (2d Ed.) § 316.

Leland v. Hayden, 102 Mass. 542, was a bill for instructions by trustees under a will as to the disposition of stock purchased out of accumulated profits and then distributed to its stockholders as a dividend. No question of the rights of creditors of the corporation arose. The court said, by Chapman, C. J., as to the course of the railroad company in investing surplus profits in the purchase of its own stock:

"This they might legally do, taking the transfer to a trustee, instead of investing the money in the stocks of some other company, or lending it, in order that it might be earning some income until they should be ready to divide or otherwise dispose of it.

This was said obiter, when the mind of the court was fixed upon the proper disposition of a trust estate. The relation of the stockholders to creditors of the corporation was not before the court.

In American, etc., Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377, the question was whether stock which had been transferred to a trustee for the benefit of the corporation continued to have voting rights. The court held that it did not. Here, again, there was no question of the

conflicting rights of creditors and stockholders.

New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271, was a bill brought by the plaintiff trust company to compel the executors of a deceased stockholder to turn in the decedent's stock for purchase by the company pursuant to provisions in the bylaws. No rights of creditors, existing or prospective, were considered by the court. The gist of the case was whether such provision, intended to keep the corporation a close corporation, could, as between the corporation and its stockholders, be made legally effective. The court held that it could.

Leonard v. Draper, 187 Mass. 536, 73 N. E. 644, was a suit upon a promissory note given by a street railway company in payment of the purchase price of shares of its capital stock. No rights of creditors of the corporation were involved; the court overruled the objection that a Massachusetts street railway company could not legally purchase its

own stock.

None of these cases presented the question of the effect of such contracts upon the rights of either existing or future creditors. Compare Lindsay v. Arlington Co-op. Assoc., 186 Mass. 371, 71 N. E. 797; Jones v. Brown, 171 Mass. 318, 50 N. E. 648; Whiton v. Batchelder & Lincoln Corp., 179 Mass. 169, 60 N. E. 483; Von Arnim v. Am. Tube Works, 188 Mass. 520, 74 N. E. 680; Haywood v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Old Dom. Cop. Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479.

Obviously, if a corporation may make an executory contract with its stockholders for the purchase of their stock at par, the statutory provisions as to the reduction of capital stock are, so far as the rights of future creditors are concerned, of no validity. If, as the decision of the District Court necessarily imports, contracts between a corporation and its stockholders for the purchase of their capital stock are to be held valid, pari passu, with contracts for merchandise and other dealings in the usual and ordinary course of its business, the theory that capital stock is a trust fund for creditors is rejected. Compare Morawetz, Corps. (2d Ed.) §§ 111, 112, 113; Machen, Corp. §§ 626-634; 1 Cook on Corps. (7th Ed.) §§ 309, 311, and cases cited and reviewed.

Such a doctrine also controverts, by necessary implication, the decisions in which unpaid assessments are held assets reachable by or in behalf of creditors. Compare Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, and cases cited. Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; 10 Cyc. 653.

The language of Lord Herschell in Trevor v. Whitworth, L. R. 12 App. Cases, 409, 414, is most pertinent:

"The result of the judgment in the court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the business so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith."

In this case the House of Lords considered carefully this question, disapproved of the reasoning, if not the decision, of certain earlier cases which looked in the same direction as the Massachusetts cases, and settled the law of England in favor of the proposition that stockholders cannot thus be transmuted into creditors, to share in bankruptcy or winding-up proceedings with outsiders, who have presumably trusted the corporation on the faith of its being what it appeared to be and what the law required it to be.

In Handley v. Stutz, 139 U. S. 417, 427, 11 Sup. Ct. 530, 534 (35 L. Ed. 227), the court, by Mr. Justice Brown, said:

"Ever since the case of Sawyer v. Hoag, 17 Wall. 610 [21 L. Ed. 731], it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and nonassessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. Upton v. Tribilcock, 91 U. S. 45 [23 L. Ed. 203]; Sanger v. Upton, 91 U. S. 56 [23 L. Ed. 220]; Webster v. Upton, 91 U. S. 65 [23 L. Ed. 384]; Chubb v. Upton, 95 U. S. 665 [24 L. Ed. 523]; Pullman v. Upton, 96 U. S. 328 [24 L. Ed. 818]; County of Morgan v. Allen, 103 U. S. 498 [26 L. Ed. 498]; Hawkins v. Glenn, 131 U. S. 319 [9 Sup. Ct. 739, 33 L. Ed. 184]; Graham v. Railroad Co., 102 U. S. 148, 161 [26 L. Ed. 106]; Richardson v. Green, 134 U. S. 30 [10 Sup. Ct. 280, 33 L. Ed. 516]."

In Sawyer v. Hoag, supra, the court, by Mr. Justice Miller, stated the principle as follows:

"Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And

when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

In Upton v. Tribilcock, 91 U. S. 45, 47 (23 L. Ed. 203), Mr. Justice Hunt said:

"The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received."

The question of allowing claims in bankruptcy grounded on such contracts came before the Court of Appeals for the Second Circuit in the case of In re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33. The court there, by Rogers, Circuit Judge, cited and discussed some of the chief authorities, and reached the conclusion that the note of a New York corporation, given in payment of its own stock, though given in good faith and at a time when the company was solvent, was unenforceable as against creditors if the corporation was insolvent at the time of maturity; holding that, in effect, such note is but a promise to pay out of surplus profits if such payment can be made without prejudice to reeditors. Judge Rogers says:

"If, at the time the stockholder receives payment for his stock, the payment prejudices the creditors, payment cannot be enforced. If a stockholder sells his stock to a corporation which issued it, he sells at his peril, and assumes the risk of the consummation of the transaction without encroachment upon the funds which belong to the corporation in trust for the payment of its creditors.

"The right of the creditors of the corporation cannot be defeated by the fact that at the time the transaction was entered into the seller of the stock and the officers of the company who purchased it were acting in good faith and supposed that the company was solvent.

"The Supreme Court of Illinois in Commercial National Bank v. Burch,

141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331, said:

"'Purchase of its own stock by a corporation by the exchange of its property of equal value, though made in good faith and without any element of fraud,' or 'anything in the apparent condition of the' corporation 'to interfere with the making of the exchange, will not be allowed where it injuriously affects a creditor of the' corporation, 'even though the fact of the indebtedness was not at the time established or known to the stockholders. * * * The capital stock of' a corporation 'is a fund set apart for the payment of its debts, and the directors * * * hold it in trust for that purpose. * * * The shareholders of the corporation are conclusively charged with notice of the trust character which attaches to its capital stock. As to it they cannot occupy the status of innocent purchasers,' and, when 'they have in their hands

any of the trust fund, they hold it cum onere, subject to all equities which attach to it.'

"In Clapp v. Peterson, 104 III. 26 (1882), the same court, after stating that the shareholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock and that when they have any of this trust fund in their hands they hold it cum onere, subject to all the equities which attach to it, went on to say:

"'It is objected, against the principles above stated, that the cases in which they were declared were where there was actual or constructive fraud or unfairness, where the corporations were insolvent, or in process of being wound up. The question naturally would arise mostly in such circumstances, but the principles enunciated are general in scope, following from the nature of the capital stock of corporations, and the relation of a stockholder to the corporation, and we know of no limitation of their application as above suggested.'

"In this statement we fully concur. There can be no such limitation of the principle.

"The Supreme Court of Connecticut, in Crandall v. Lincoln, 52 Conn. 73, 52

Am. Rep. 560 (1884), said:

"'If the view we have taken of the character and nature of this stock is sound,' that it is a trust fund for the security of creditors, 'and we have no doubt that it is, the conclusion inevitably follows that under no circumstances can a stockholder sell his stock to the company and take therefor his portion of the capital stock to the prejudice of creditors. The illegality of the transaction does not at all depend upon the actual knowledge or mala fides of the seller; if he in fact sells to the company and receives in return a part of the capital, the policy of the law requires him to know it, and conclusively charges him with knowledge. Thus selling, he sells at his peril. In no other way can the rights of creditors be protected. The seller can protect himself by selling to other parties, or he may hold his stock, taking, as he is bound to the stockholder's risk, and he has no way of protecting himself. The law is his only protection.'

"The above cases were not based on any local statute, but upon general

principles.

"In saying that the assets of a corporation constitute a trust fund, we are to be understood as referring to the assets of an insolvent corporation. A solvent corporation, of course, holds its property as any individual holds his. But when a corporation becomes insolvent, a trust arises in respect to the administration of its assets for the benefit of its creditors. Hollins v. Brierfield, etc., Co., 150 U. S. 371, 381, 383, 14 Sup. Ct. 127, 37 L. Ed. 1113 (1893); McDonald v. Williams, 174 U. S. 397, 401, 19 Sup. Ct. 743, 43 L. Ed. 1022 (1899). Hence, when a corporation buys its own stock, payment cannot be made with funds which upon insolvency belong to its creditors, instead of to its stockholders. Cook on Corporations (7th Ed.) vol. 1, § 9, pp. 42, 43."

See, also, In re Tichenor-Grand Co. (D. C.) 203 Fed. 720, where Hand, D. J., dealt with a similar question arising as to a New York corporation.

In Grasselli Chemical Co. v. Ætna Explosives Co. (D. C.) 258 Fed. 66, Mayer, D. J., reached the same result, to wit, that a note of a New York corporation given in payment of stock is enforceable only as against a surplus; that it cannot be let into competition with creditors.

In re Brueck & Wilson Co. (D. C.) 258 Fed. 69, is another recent de-

cision by Judge Mayer to the same effect.

Olmstead v. Vance, etc., Co., 196 Ill. 236, 63 N. E. 634, is another well-considered case, in which the same result is reached. It was there held that an agreement by a corporation to buy its own stock cannot be enforced to the injury of creditors—such an agreement being the

equivalent of a contract to diminish its capital; that the stockholders of a corporation are charged with notice that the capital stock is a trust fund for the payment of debts, and hold their stock subject to all the equities which attach. The court said:

"This court has repeatedly held that, as against the claims of creditors, it is immaterial what private arrangements subscribers may make with the corporation, and that any device by which members of the corporation seek to avoid the liability imposed upon them by law is void as to creditors, whether binding or not as between themselves and the corporation. Clapp v. Peterson, 104 Ill. 26; Alling v. Wenzel, 133 Ill. 264 [24 N. E. 551]; Coleman v. Howe, 154 Ill. 458 [39 N. E. 725, 45 Am. St Rep. 133]. If such an arrangement as that made between the Smith & Jones Company and Bentley & Olmstead could be enforced, a corporation might then, at the time of its organization, make such a contract with each of its stockholders as to totally destroy the capital stock of the concern and deprive the creditors of all security from this trust fund. The capital stock is a trust fund furnished for the benefit of the creditors of the corporation, and equity will not permit it to be destroyed or impaired to their injury for the benefit of stockholders. The creditors of this corporation had a right to rely upon the application of the capital stock toward the payment of their claims, and to permit this plaintiff in error to cancel his stock upon this inequitable agreement, and to receive a premium of ten per cent. in addition, would be in violent disregard of a long line of decisions of this court."

Other authorities sustaining the same general doctrine are: Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560, citing and reviewing many of the earlier cases; Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706. 17 Am. St. Rep. 910; White Mountains R. R. v. Eastman, 34 N. H. 124, 140; Thompson's Corporations, White's Supplement (2d Ed.) §§ 4075 and 4076.

Mr. Morawetz, in his book on Corporations, says (volume 1, § 112):

"No verbiage can disguise the fact that a purchase by a corporation of shares in itself really amounts to a reduction of the company's assets, and that the shares purchased do in fact remain extinguished, at least until the reissue has taken place. The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. It is contrary to the fundamental agreement of the shareholders, and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a frightful source of unfairness, mismanagement, and corruption. It is for these reasons that a shareholder cannot be allowed to withdraw from a corporation, with his proportionate amount of capital, either by a release and cancellation before the shares have been paid up, or by a purchase of the shares with the company's funds."

Machen (volume 1, § 628) states the rule as follows:

"In America, many courts uphold the same sound and wholesome doctrine as the English cases. But it must be conceded that a somewhat larger number of the American courts have taken the view that a corporation may without express statutory authority purchase its own shares, provided the purchase is entered into bona fide and does not endanger the claims of creditors. It should be observed that the American cases which agree with the English doctrine are often well considered and fully reasoned, whereas those which uphold the contrary view generally lack any extended examination of the subject."

The court below apparently assumed that the bankrupt was a Massachusetts corporation. In fact it is a Maine corporation. While there is no decision by the Maine Supreme Court dealing flatly with the pow-

er of a Maine corporation to purchase under any circumstances shares of its own capital stock, the decision in the case of In re Brockway Mfg. Co., 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401, accords with the doctrine of the Supreme Court of the United States and with the decisions above cited in the Circuit Court of Appeals and the District Courts, to the effect that such a claim cannot be sustained as against the rights of creditors, existing or subsequent.

In this case the treasurer of the corporation had used its funds to pay for the stock of the corporation purchased by him and other stockholders. It was held that the treasurer was responsible for the whole amount of the money so used, so far as necessary to satisfy the claims of creditors, even though all the stockholders had assented to the purchase. The court, by Peters, C. J., said (89 Me. 125, 35 Atl. 1013, 56 Am. St. Rep. 401):

"Whatever rule might obtain, if this were a proceeding to enforce the liabilities of a stockholder under our statutes, we think that the case discloses in its facts a diversion of its property and assets to the detriment of creditors. The case is very like that of a trustee secretly applying the trust property to his own use. To hold otherwise would be a contradiction of the plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and that its creditors have a lien thereon and the right to priority of payment over any stockholder. The payment of the amount claimed by Haskell for the benefit of the corporation amounted in law to an application of that sum in reduction of his indebtedness to the company, and therefore a reduction of its assets to that extent. It is well settled by numerous authorities that the stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefit of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. Wood v. Dummer, 3 Mason, 311 [Fed. Cas. No. 17,944]; Sanger v. Upton, 91 U. S. 60 [23 L. Ed. 220]. Creditors may hold the company's agents liable for wasting assets which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds."

The Maine corporation statutes expressly authorize their corporations to deal in the shares of "any other corporation." This express inclusion of power to deal in the shares of other corporations certainly implies a lack of power to deal in its own shares. Compare Morawetz, Corps. (2d Ed.) § 316. At any rate, there is nothing in the Maine decisions holding that a Maine corporation can, by process of contract with its stockholders, reduce a fund to which its creditors, existing or prospective, are entitled to look for the payment of their debts. If such contracts can be sustained, the statutory provisions as to the reduction of capital stock are waste paper.

Even in Wisconsin, where the trust fund doctrine as to capital stock is not entertained, a transaction such as this at bar is regarded as constructively fraudulent. Atlanta, etc., Association v. Smith, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 13 Am. St. Rep. 42.

A fortiori, under the decisions of the Supreme Court of the United States, holding the capital stock to be a trust fund for the benefit of creditors, it cannot be allowed to be dissipated by executory contracts between the corporation and its stockholders, not disclosed in the public records of the corporation, or even in its own books of account.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter an order disallowing the claim, and the appellant recovers his costs of appeal.

On Petition for Rehearing.

PER CURIAM. The appellee has filed a petition for rehearing, accompanied by a long brief, arguing many questions not arising on this record, and therefore not touched upon by the court in the opinion. This petition points out no error of fact or of law; it must be denied. But, to avoid possible confusion, it may be desirable to add a few words as to what is not decided by this court in this case.

[2] This record raises no issue, and this court intimates no opinion, as to the power of a corporation organized under the laws of the state of Maine, or of any other state, to contract to purchase its own stock, paying therefor only out of surplus or accumulated profits. Compare In re O'Gara & Maguire, Inc., 259 Fed. 935; Jesson v. Noyes, 245 Fed. 46, 50. The only question presented in this case, and decided by this court, is as to whether a stockholder may prove damages for a breach of such contract, accruing after bankruptcy, against general assets, and in competition with ordinary creditors. That question we answer in the negative. As to any other questions concerning contracts by corporations for the purchase of their own stock, arising under different conditions, no opinion is intimated.

Petition denied.

VICKSBURG, S. & P. RY. CO. et al. v. ANDERSON-TULLY CO.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1919. Rehearing Denied January 19, 1920.)

No. 3388. *

1. COMMERCE \$\infty\$=92\to ENFORCE AWARD OF INTERSTATE COMMERCE COMMISSION; JURISDICTION.

Where the tracks of a railroad company stopped across the Mississippi river from Vicksburg, but its trains and their crews, except the engines and engine crews, were transferred by boat across the river, and by arrangement with another company were hauled by the latter over its tracks to the Vicksburg terminal, used jointly by the two companies, the District Court of the Southern District of Mississippi held to have jurisdiction of a suit against it to enforce an award of damages to a shipper by the Interstate Commerce Commission, under Interstate Commerce Act, § 16, as amended by Act June 18, 1910, c. 309, § 13 (Comp. St. § 8584[2]), giving jurisdiction to the District Court of any district "through which the road of the carrier runs."

2. COMMERCE \$\infty 92\$—Suit to enforce award of Interstate Commerce Commission; Jurisdiction.

The provision of Act Oct. 22, 1913, c. 32 (Comp. St. § 994), that "the venue of any suit to enforce, suspend or set aside * * * any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party * * * upon whose petition the order was made," applies only to the class of cases jurisdiction of which was transferred from the Commerce Court, thereby abolished, and does not by implication repeal Interstate Commerce Act, § 16, as amended by

Act June 18, 1910, c. 309, § 13 (Comp. St. § 8584[2]), conferring jurisdiction on District Courts of suits to enforce awards of money reparation to shippers, of which the Commerce Court was never vested with jurisdiction.

3. RAILROADS &=24(1)—Service on agent of railroad under government control sufficient.

That the person on whom service of summons was made in a suit against a railroad company was at the time an employé of the government railroad administration, then in control of defendant's road, did not prevent him from being at the same time an agent of defendant on whom service might properly be made.

4. Pleading \$\iff 34(6)\$—Sufficiency of complaint; waiver of defects.

If a complaint, not demurred to, sets out a cause of action, however imperfectly, it will withstand objection first made after judgment.

5. COMMERCE 5 94 - SUIT TO ENFORCE AWARD OF INTERSTATE COMMERCE COMMISSION; PLEADING.

In a suit against a railroad company, under Interstate Commerce Act, § 16, as amended by Act June 18, 1910, c. 309, § 13 (Comp. St. § 8584[2]), to enforce an award of damages made to a shipper by the Interstate Commerce Commission, a complaint is sufficient which sets out the findings of the commission and its order, which are by the statute made prima facie evidence of the facts therein stated.

6. COMMERCE 53-Suit to enforce award of Interstate Commerce Commission; Evidence.

In a suit to enforce an award of damages made to a shipper by the Interstate Commerce Commission, the introduction in evidence of the findings and order of the commission is sufficient to entitle plaintiff to judgment, in the absence of any evidence on behalf of defendant.

In Error to the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Suit by the Anderson-Tully Company against the Vicksburg, Shreveport & Pacific Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

S. W. Moore, of Kansas City, Mo., and J. M. Souby and John C. Theus, both of Monroe, La., for plaintiffs in error.

R. G. Brown, of Memphis, Tenn., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. This is a writ of error to a judgment of the District Court for the Southern District of Mississippi in favor of the defendant in error (plaintiff below) and against the plaintiffs in error (defendants below) rendered in a suit brought by the plaintiff as a shipper against the defendants as common carriers upon an award of reparation of the Interstate Commerce Commission, in favor of the plaintiff and against the defendants.

Three objections to the correctness of the judgment are presented by the appeal: (1) As to the jurisdiction of the District Court for the Southern District of Mississippi. (2) As to whether the complaint sets out a cause of action. (3) As to whether the proof supported the judgment.

[1] 1. The jurisdiction of the District Court was timely challenged upon two grounds: (a) That there was no venue in the district where

the suit was brought; and (b) that there was no service upon the defendant the Vicksburg, Shreveport & Pacific Railway Company.

- (a) The sixteenth section of the Act to Regulate Commerce, approved February 4, 1887 (24 Stat. 384, c. 104 [Comp. St. § 8584]), together with its various subsequent amendments, provided that, if a carrier should not comply with an order of the Interstate Commerce Commission for the payment of money within the time set in the order, the plaintiff might sue for the enforcement of the order in any Circuit (District) Court of the United States in which he resided, or in which was located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties. Jurisdiction was invoked by the plaintiff upon the theory that the road of the defendant the Vicksburg. Shreveport & Pacific Railway Company ran through the Southern district of Mississippi. This was disputed by the defendants. The facts relating to it stipulated in the record are as follows: The Vicksburg, Shreveport & Pacific Railway Company operated a line from Shreveport to Vicksburg, as a common carrier of passengers and freight. Its own rails stopped at Delta, La., across the Mississippi river from Vicksburg. Its trains were transferred by ferryboat across the river. Its engines and engine crews went no further east than Delta. Its passenger coaches and train crews crossed the river to the terminal at Vicksburg. Its trains, after they had reached the east side of the river, were handled by the engines of the Alabama & Vicksburg Railroad Company between the transfer boat and the Vicksburg terminal, and vice versa. It had an arrangement with the Alabama & Vicksburg Railroad Company for the handling of its trains by the engines and engine crews of the latter, and for a joint use with it of the Vicksburg terminal. It also had a contract with the corporation which handled the ferryboat for the handling of its cars over the river. In view of these facts, we think the instrumentality through which the business of the Vicksburg, Shreveport & Pacific Railroad Company, as a carrier. was conducted, viz. the transfer boat and the tracks and terminal of the Alabama & Vicksburg Railroad Company, were well held to be a part of the road of the Vicksburg, Shreveport & Pacific Railway Company. Ownership of them was not essential, and the word "road" includes other instruments than tracks. If the defendant, in order to conduct its business as a carrier of passengers, made use of instrumentalities other than railroad track, and owned by others than defendant, but which it had the contractual right to use in its business, and which were located in the Southern district of Mississippi, this was enough to show venue in the District Court of that district. The stipulation shows that such was the case.
- [2] The plaintiff in error contends that section 16 has been repealed by implication by Act Oct. 22, 1913, c. 32, 38 Stat. 219, which abolished the Commerce Court, and which provided that—

"The venue of any suit * * * to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission, shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." Comp. St. § 994.

The purpose of the act of October 22, 1913, was to abolish the Commerce Court and to redistribute its jurisdiction. The act of October 22, 1913, provides that—

"The jurisdiction vested in said Commerce Court by said act is transferred to and vested in the several District Courts of the United States, and all acts or parts of acts, in so far as they relate to the establishment of the Commerce Court, are repealed." Comp. St. § 992.

The Commerce Court was never vested with jurisdiction to enforce awards of money reparation made by the Interstate Commerce Commission in favor of shippers. Legislation, the design of which was only to abolish the Commerce Court, should not be held to change by implication a procedure that related exclusively to courts other than the Commerce Court. The venue fixed by the act of October 22, 1913, of suits brought to enforce, suspend, or set aside orders of the Interstate Commerce Commission, is limited to suits to enforce, suspend, or set aside orders of the commission which the Commerce Court had been vested with jurisdiction of, and which did not include reparation order suits. The limitation as to venue should be held to apply only to the class of cases jurisdiction of which was transferred from the Commerce Court to the District Courts by the terms of the act of October 22, 1913.

[3] (b) It is contended that the defendant the Vicksburg, Shreveport & Pacific Railway Company was not properly served. The return of the marshal is that the summons was:

"Executed by handing a true copy of this summons and petition for judgment to Austin King, freight agent for the V., S. & P. R. R. Co., Vicksburg, Miss., Dec. 4, 1919."

Plaintiff in error contends that the defendant railroad was then in government operation and control, of which the courts take judicial notice, and hence that the person served was an employé of the government, and not an agent of the carrier. The return is to the effect that, at the time of service, the person to whom the copy was handed was an agent of the defendant railroad company. The return, so long as its recital is unamended, is conclusive of the character of the person served. The fact that King was an employé of the government would not necessarily prevent his being also and at the same time an agent of the carrier, for the transaction of its business, such as the settlement of claims antedating government operation. Section 10 of the act which provides for government control (Act March 21, 1918, c. 25, 40 Stat. 456 [Comp. St. 1918, § 3115¾i]) prescribes that—

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

This would seem to authorize suits on causes of actions against the carriers themselves to be brought on service upon former agents of the carrier who continued to be agents of the government under its operation.

[4, 5] 2. The complaint is criticized because it does not charge that the rate was unreasonable in fact. No demurrer was interposed to it, and objection was first made to it after judgment. If the complaint

sets out a cause of action, no matter how imperfectly, it will withstand objection first made after judgment. The action sued on is a specific one, created by the Act to Regulate Commerce. Section 16 of that act provides that, if the carrier does not comply with an order for the payment of money within the time limit set in the order, the complainant may file in the Circuit (District) Court of the United States a petition setting forth briefly "the causes for which he claims damages and the order of the commission in the premises." It also gives to the award and order of the commission the force of prima facie evidence of the facts contained in it. The purpose of the action is the enforcement of the award. In view of the peculiar nature of the action we think that a complaint which sets out the findings of the commission and its order, and claims damages due the plaintiff under it, was sufficient to withstand objection made for the first time after judgment that it showed no cause of action. The finding of the commission that the rate was unreasonable was made prima facie evidence of that fact. The plaintiff, to sustain his complaint, was required to offer no evidence, except the award and order of the commission. His averment was as broad as his proof was required to be. The action was a statutory one, to enforce the award of the commission, and by the statute proof of the award of the Commission was prima facie sufficient to sustain the plaintiff's case. The statute requires the petition merely to set out the causes for which the plaintiff claims damages and the order of the commission in the premises. The defendants had full information from the complaint as to the cause of action they were required to meet. Technical rules of common-law pleading are inapplicable to the statutory form of action created by the Act to Regulate Commerce for the enforcement of order of the commission.

[6] 3. The plaintiff in error contends, also, that the evidence does not support the judgment. The case was tried by the District Judge, a jury having been waived. The District Judge was not requested to make special findings, and did not make any. The general finding of the District Court has the effect of the verdict of a jury, and the judgment upon it is subject to review only because of errors of law, based on rulings of the court, which were excepted to during the progress of the trial. No rulings of law were invoked by the plaintiff in error during the trial, or excepted to, nor were there any exceptions to the rendition of judgment. The ruling of the court below on the motion for a new trial, to the denial of which the defendants did except, is not reviewable in the federal court.

We may say, however, that the court properly rendered judgment for the plaintiff in view of the state of the record. The judgment recites that the plaintiff offered the award and order of the commission, and rested, and that the defendants introduced no evidence. The act of Congress gives to the award and order of the commission prima facie effect, and it does this, regardless of the correctness or incorrectness of the findings of the commission. The defendants are not permitted to destroy this prima facie effect by internal criticisms of the commission's findings. The defendants have the right to overcome the prima facie effect of the findings of the commission in a suit

to enforce the award in the District Court only by offering evidence in that court tending to impeach their correctness. If the defendants offer no evidence to rebut the prima facie case made by the plaintiff's introduction of the award and order of the commission, then the District Court has nothing to do but apply the statute and render judgment for the plaintiff on the unrebutted prima facie case made by him. The act of Congress provides that—

"On the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated." Comp. St. § 8584(2).

The unreasonableness of the rate and the amount of plaintiff's damage caused thereby were found by the commission. The introduction of the award and order of the commission showed prima facie that the rate was unreasonable and that the plaintiff was injured thereby to the extent of the award. If the defendants declined to introduce evidence to rebut the plaintiff's case so made, the District Judge had no alternative than to render judgment. He did not rule that defendants could not rebut the prima facie case made by plaintiff, but that they had not done so, and, not having done so, that he was required to treat the plaintiff's prima facie case, which was unrebutted, as entitling the plaintiff to a judgment.

The judgment of the District Court is affirmed.

THALER v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1919.)

No. 3325.

1. WAR \$\infty 4-Aiding prostitution in vicinity of cantonment.

Evidence held to sustain a conviction for aiding and abetting prostitution within distance from army cantonment prescribed by Selective Draft Act, § 13, as amended by Act July 9, 1918 (Comp. St. 1918, § 2019b), and regulations made thereunder, by transporting persons and aiding them to find bawdyhouse.

- 2. DISORDERLY HOUSE \$\igcup 4-\text{What constitutes bawdyhouse.}
 - To constitute a house a "bawdyhouse" it is not necessary that it supply the prostitutes, or cater only to the lecherously disposed, but is sufficient if persons are knowingly permitted to frequent it for the purpose of unlawful intercourse, although such character is not generally known, except to those lasciviously inclined and to panderers.
- 3. CRIMINAL LAW \$\ightarrow\$369(2)\$—EVIDENCE OF OTHER OFFENSE.

Where the substance of the offense charged was the taking of persons by defendant to a hotel for purposes of prostitution, evidence that such persons were there served with liquor in their rooms held relevant.

4. DISORDERLY HOUSE &==2-"BAWDYHOUSE"; "BROTHEL"; "HOUSE OF ILL FAME."

In the general popular acceptation of the terms, "bawdyhouse," "brothel," and "house of ill fame" are synonymous (citing Words and Phrases, Bawdyhouse; House of Ill Fame).

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Criminal prosecution by the United States against Meyer Thaler. Judgment of conviction, and defendant brings error. Affirmed.

Hiram C. Bolsinger, of Cincinnati, Ohio, for plaintiff in error. Allen C. Roudebush, of Cincinnati, Ohio, for the United States.

Before KNAPPEN and DENISON, Circuit Judges, and KILLITS, District Judge.

KNAPPEN, Circuit Judge. Plaintiff in error was indicted under section 13 of the Selective Service Act of May 18, 1917 (40 Stat. 76, c. 15)—the section was amended by subchapter 14 of chapter 143 (Act July 9, 1918, 40 Stat. 885 [Comp. St. 1918, § 2019b])—for the suppression and punishment of prostitution, etc., near cantonments, as affected by the order of the Secretary of War (evidenced by bulletin of the War Department of January 17, 1918), which, so far as here important, designated five miles as the reasonable distance from military places within which the condemnation should apply. The indictment charged that defendant, within five miles of the military camp known as Ft. Thomas (situated at Ft. Thomas, Ky.), did—

"direct, take, and transport certain persons, to wit [two men and two women named] for immoral purposes, to wit, for the purposes of lewdness, assignation and prostitution, and to assist said persons for such purpose to find a house of illfame, brothel and bawdyhouse, to wit, the rooms and house known as [giving the name and location of a hotel in Cincinnati], and the said Meyer Thaler then and there well knowing and having reasonable cause to know the character of said house to be that of a house of ill fame, brothel and bawdyhouse."

Neither the sufficiency of the indictment nor the effectiveness of the statute and regulation upon which it is based is challenged. There was trial by jury, resulting in conviction, and judgment thereon.

1. Plaintiff in error contends that there was no testimony tending to show that he took the parties named to the hotel for the purposes charged in the indictment, or that he had reasonable cause to know that the character of the house was as charged, or that it was in fact used for such immoral purposes. These questions are raised under a denial of a motion, at the close of the testimony, for directed verdict.

There was substantial testimony to the effect that the two men (who were soldiers in uniform) met the two women (who were before that unknown to them) on a railroad train going to Cincinnati; that on arriving at the depot in that place one of the men asked the defendant (who was a taxicab driver) if he knew of some hotel in the outskirts of the city where it was quiet, and where they would not be bothered or interrupted, and that defendant replied that he did; that the four parties then entered the taxicab, and that during the ride to the hotel the soldier referred to told defendant that he and the other soldier had "picked these two women up on the train in West Virginia and were out for a good time"; that on arriving at the hotel defendant said he would go in and see if it was all right; that after three or

¹ See Coopersville Co. v. Lemon (C. C. A. 6) 163 Fed. 145, 89 C. C. A. 595, and cases cited.

four minutes defendant came out of the hotel and said, "All right, come on in" (one of the girls testified that the soldier first named went in with defendant, and that "they both came out of the hotel and said everything was all right and safe"), and that all four of the parties thereupon entered the hotel; that the soldier first referred to paid the room rent for all four parties in advance; that they "did not make it known to the hotel people their purpose in coming," but that "no questions were asked" the girls or any other of the parties; that the two couples registered, respectively, as husband and wife, and were assigned to adjoining rooms, wherein the respective couples had sexual relations; that after the four had gone to their rooms they were furnished whisky and at other times beer, brought in by the bell boy, once at least on an open tray, and once at least the bottled beer being wrapped in paper—the bell boy being each time called for, and each time receiving the pay direct.

There was also testimony that, after the arrest, defendant, in answer to a question by a government officer whether he knew that these people were unmarried, replied that he "knew they wasn't married, but it wasn't up to me to question them." Defendant also admitted that he was in the habit of receiving 25 cents for each passenger taken to the hotel in question (having the same arrangement with another hotel), and that he received the agreed payment in connection with the de-

livery at the hotel of the four persons named.

A detective in the employ of the city of Cincinnati testified that on going to the hotel on the night in question with the juvenile officer he found one of the two couples in question "in bed and the other in their room"; that he "could not say that the hotel had a reputation for renting rooms for immoral purposes," but that he had "instructions to go through the cabaret of that hotel for the purpose of picking out prostitutes and other undesirables; that there also congregated there pimps, who are men that live with women, or off of the shame of women; and that these people would visit the cabaret or lobby whenever we went in there, and we tried to get them out of the lobby." This practice applied, not only to the hotel in question, but to all other hotels having cabarets.

Another detective, who was a member of the Cincinnati police vice squad at the time in question, testified that at that time the reputation of the hotel for renting rooms to people for immoral purposes was bad, and that "there were prostitutes and pimps hanging around the place," stating, however, on cross-examination, that he did not know that it had "a reputation for women to go for immoral purposes," and that on the date in question the hotel "was not known as a house of ill fame or bawdyhouse," and that he knew of no other arrest being

made therein for renting rooms for immoral purposes.

Another policeman testified, in substance, that it "was generally conceded, among the boys of the police department, that things were a little loose around" the hotel; that if "anything immoral went on in the house that it did not have that appearance among the public, and that the boys in the department were under the impression that it was not hard to put over, and that it needed a little attention." There was

also testimony that the house detective of the hotel, whose duties were "to look after the house and see that there were no suspicious persons or undesirables known to him to visit the place," had a bad reputation, was known to be living off the earnings of a woman known as a prostitute, and was known as a "pimp," and that before he became the house detective "he lived off of a woman on the line, meaning the red light district." As affecting the motion to direct verdict, we have, of course, stated the testimony in the aspect most favorable to the government.

- [1] We think the motion to direct verdict was properly denied. There was testimony directly tending to show that plaintiff in error knowingly and intentionally took the four persons to the hotel to assist the purpose for which they desired the accommodations. There was also substantial testimony which would reasonably sustain an inference (although not conclusive) that the character of the hotel at the time was as charged; that is to say, that persons of opposite sexes were permitted to obtain rooms with knowledge of the intended purpose of lewdness, assignation, or prostitution, or with reasonable cause to believe that such was the purpose, and that it was resorted to for such purpose. This inference of the character of the hotel received support from the testimony of the policeman and detectives referred to. Support was added by the history of the instant transaction, which also tends to justify an inference that plaintiff in error was acquainted with such character.
- [2] To constitute a place a bawdyhouse, it is not necessary that such house supply the prostitutes, nor that it cater only to the lecherously disposed. A house is bawdy, if persons are knowingly permitted to frequent it for the purpose of unlawful sexual intercourse (see People v. Gastro, 75 Mich. 127, 133, 42 N. W. 937), although such character is not generally known, save to the lasciviously inclined and to panders. If prostitution, in the sense of involving pecuniary reward, is thought essential (there are authorities both ways), it is enough to say that the testimony in the instant case would support an inference of prostitution, although the record is silent as to money payment, as such, to the women.
- [4] Although in one or more jurisdictions proof of reputation seems to be necessary to constitute a "house of ill fame," and while in some jurisdictions proof of general reputation is permitted in support of a charge of keeping a house of that character (although in others it is not), yet in general popular acceptation the terms "bawdyhouse," "brothel," and "house of ill fame" are synonymous (see Century Dictionary); and in many jurisdictions they are held to be such (4 Words and Phrases, title "House of Ill Fame"; 1 Words and Phrases, title "Bawdyhouse," and cases cited; State v. Boardman, 64 Me. 523, 529; State v. Keithley, 142 Mo. App. 417, 423, 127 S. W. 406). In the statute here involved, the words are, "house of ill fame, brothel or bawdyhouse." An allegation that the hotel was a "bawdyhouse" would thus have been sufficient, and the indictment as drawn was satisfied, so far as the description of the house is concerned, by proof that it was a

"bawdyhouse"; a finding to that effect being necessarily covered by the verdict.

The statute makes it an offense "to aid or abet prostitution," even though there is no resort to a bawdyhouse, brothel, or house of ill fame. The gist of the offense charged is the assisting of the four persons in question to find (and be received in) a house of such character that their lustful purposes could therein be carried out. The three characterizations used in the indictment were merely descriptive of one and the same offense, and defendant could not have been prejudiced by the inclusion of the words "house of ill fame," even were the proof thought to be lacking as to such character, if to be distinguished from the other character assigned. Bennett v. United States (C. C. A. 6) 194 Fed. 630, 633, 114 C. C. A. 402; Daniels v. United States (C. C. A. 6) 196 Fed. 459, 464, 116 C. C. A. 233.

- [3] 2. There was no error in refusing to strike out the testimony that liquor was furnished the party, notwithstanding defendant was not present at that time. While neither he nor the hotel men were on trial for selling liquor (it was an offense to sell liquor to a soldier in uniform), the testimony that liquor was furnished was a natural part of the narrative of the entire occurrence; it bore upon the credibility of the story of the transaction in the vital respects involved; that the proof was strong enough without it did not render it irrelevant, and we cannot say that the furnishing of several orders of liquor to a party so composed, in a private room, had no tendency to support a conclusion that rooms were being let for purposes of illicit sexual relation. The fact that the liquor was ordered from and paid for to the bell boy did not necessarily destroy the relevancy of the testimony.
- 3. Defendant complains of the admission of the testimony before referred to respecting the bad reputation of the house detective as related to prostitution. The testimony came about in this way: To sustain the character of the hotel, defendant's counsel had shown, on cross-examination of one of the vice squad officers, that several months after the transaction in question the hotel manager, on complaint being made that the house detective was not doing his duty in keeping out undesirable characters, had discharged the detective. The criticized testimony was thereupon introduced against a general objection whose ground was not stated, and which thus disentitles defendant to a review of the ruling as matter of right. Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 625, 116 C. C. A. 294. And we do not think the error, if any, in admitting the criticized testimony was so plain, or the case such as to justify a reversal on that account.

There seems much force in the consideration that in view of the cross-examination referred to it became competent to show that at the very time in question the detective had the reputation of, and was living a life such as to indicate that he was pandering. It is difficult to conceive of a hotel officer or employé, whose character in the respect mentioned would presumably be more significant than that of the house detective, in giving to the hotel a character in the respect involved here. It is true that the evidence does not in terms state that the house detective's reputation was general, or that it existed at the

very date of the transaction in question; but the natural implication would be that it was intended to relate to that time, and if the objection was that it was not general (as is not suggested here) it should have been so stated.

The judgment of the District Court must be affirmed.

UNITED STATES v. MURPHY et al.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1919.) No. 5369.

1. BAIL \$\infty\$ 76—Liability of sureties on supersedeas bond cannot be extended beyond its terms.

The obligation of a surety on a supersedeas bond given on proceedings in error is measured by the plain terms of his contract, and cannot be extended beyond them.

 Bail \$\infty\$=75—Sureties not liable on bond on appeal on nonappearance for retrial on reversal.

A bond given on proceedings is error in a criminal case, conditioned that defendant should abide by and obey all orders made by the appellate court, and "surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of said District Court against him shall be affirmed," held not to render his sureties liable for his failure to appear in the District Court for retrial after reversal of the judgment.

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by the United States against Robert D. Murphy and another. Judgment for defendants, and the United States brings error. Affirmed.

J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M. (Charles L. Rigdon, U. S. Atty., and David J. Howell, Asst. U. S. Atty., both of Cheyenne, Wyo., on the brief), for the United States.

M. E. Wilson, of Salt Lake City, Utah (T. S. Taliaferro, of Rock

Springs, Wyo., on the brief), for defendants in error.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. Lew Moy and Sam Hee, Chinese citizens, were indicted in the district of New Mexico under section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]) for conspiracy to violate the Chinese Exclusion Act. They were tried, convicted, and sentenced to imprisonment. Both defendants sued out writs of error to the United States Circuit Court of Appeals for the Eighth Circuit; each giving a supersedeas bond in the sum of \$2,000, signed by themselves, with defendants in error in this case, Murphy and Anderson, as sureties. The condition of each of these bonds is as follows:

"That if the said Lew Moy (Sam Hee) shall appear in the United States Circuit Court of Appeals for the Eighth Circuit, on the first day of the next term thereof, to be held on the first Monday of September, 1915, from day to day thereafter during said term and from term to term and from time to time until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said court may direct, if the judgment and sentence of said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Eighth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect."

This court thereafter reversed the lower court, and its mandate provided that—

"On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said District Court, in this cause, be and the same is hereby reversed, without costs to each party in this court, as to each of the defendants below, Lew Moy and Sam Hee. It is further ordered that this cause be, and the same is hereby, remanded to the said District Court, with directions to grant a new trial as to each of the defendants, Lew Moy and Sam Hee."

It was thereby further-

"commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding."

The case was remanded to the District Court for said district, set down for trial, and, neither of said defendants appearing at the next regular term, both of the bonds were forfeited. Suit was then commenced against the bondsmen upon the two bonds. Defendants answered, setting up the proceedings, above briefly stated, pleading a copy of the bonds sued on and a copy of the mandate of the Court of Appeals, to which answers the government demurred.

The sole question involved here is whether the condition of the bonds quoted above called for the appearance of the defendants on retrial of the case in the District Court. A determination of this question necessarily calls for a construction of the plain terms of the condition of the bonds as above set forth. The defendants Murphy and Anderson covenanted that each of the principals, Lew Moy and Sam Hee, shall—

- (1) Appear in the United States Circuit Court of Appeals for the Eighth Circuit on the first day of the next term, to be held on the first Monday of September, 1915, from day to day thereafter during said term, and from term to term and from time to time, until finally discharged therefrom;
- (2) Abide by and obey all orders made by the said United States Circuit Court of Appeals for the Eighth Circuit in said cause;
- (3) Surrender himself in execution of the judgment and sentence appealed from, as said court may direct, if the judgment and sentence of said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Eighth Circuit.
- [1] The liability of these defendants is measured by the precise terms of their contract. Reese v. United States, 76 U. S. (9 Wall.) 13, 19 L. Ed. 541. Not only that, but their obligations cannot be extended beyond such terms. Their duty and their obligations are con-

tractual, and must be found within the limits of the provisions of the bonds. No obligation is imposed by these bonds on the sureties therein named, except those obligations which they assumed by the plain terms of their contracts. Nolan v. Glynn, 183 Iowa, 21, 166 N. W. 717; Lang v. Pike, 27 Ohio St. 498; State v. Candland, 25 Utah, 172, 70 Pac. 403; 1 Brandt on Suretyship, § 106.

[2] Does a reasonable interpretation of any of the three covenants upon the part of the defendants, above set forth, impose a liability on the part of said defendants when Lew Moy and Sam Hee failed to appear in the trial court at the next regular term thereof for a new trial? Clearly such a liability cannot be found within the plain terms of the covenants.

By rule 45 (188 Fed. xxiv, 109 C. C. A. xxiv), adopted March 30, 1911, this court prescribed the form of supersedeas bond for use in

this circuit as follows:

"* * Now, the condition of the above obligation is such that if the said shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed or the writ of error or appeal is dismissed; and if he shall appear for trial in the Court of the United States for the District of on such day or days as may be appointed for a retrial by said court and abide by and obey all orders made by said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit, then the above obligation to be void; otherwise, to remain in full force, virtue, and effect."

It is significant that this court adopted this procedure, and it is evident that the plain terms of this form of bond fix the liability upon the part of the sureties, not only that the defendant shall appear in this court and prosecute his appeal, and shall surrender himself in execution of the judgment appealed from, if it shall be affirmed, and obey the orders of this court, but it specifically provides, in addition to the form of bond in question here, if the writ of error or appeal is dismissed, that he shall appear for trial in the court below on such day or days as may be appointed by such court for retrial; that he shall abide by and obey all the orders made by the trial court, providing the judgment and sentence against him shall be reversed by this court.

The adoption of rule 45 in this circuit has done away with the necessity of taking the bond of the defendant at different stages of the proceedings after conviction, providing for the various contingencies named in the form of bond prescribed. It is evident that the bonds in question followed a form prescribed by a rule which was superseded by the new rule of 1911. Clearly, the giving of these bonds by these defendants was not a compliance with this rule, and the fact that they were approved by the trial judge can add nothing to the liability imposed by the plain terms of the instruments. These bonds entirely

ignore the provisions of the revised or amended rules of 1911.

The obligation of these defendants, as measured by the plain terms of the bonds, does not extend to an undertaking on their part that Lew Moy and Sam Hee shall appear and obey the orders of the trial court and appear at the next regular term of the trial court, after the mandate of this court was sent down, for retrial therein. This is not one of the conditions set forth in the bonds in question, and there is no undertaking upon the part of these defendants that the principals shall appear at the trial court to which this case was remanded to await its action.

It is suggested that the covenant on the part of the defendants that their principals would "abide by and obey all orders made by the said Circuit Court of Appeals for the Eighth Circuit in said cause" by implication required the principals to appear for retrial in the United States District Court for the district of New Mexico at the next general term thereof, or pursuant to an order of the trial court. It is admitted that the bonds do not comply with rule 45. It is admitted that there is no covenant that the principals shall obey the orders of the trial court in the event of reversal, or that they shall appear for retrial. An interpretation of these bonds to imply such a liability on the part of these sureties would be to impose a liability upon them which cannot be found in their obligation, and their duty and obligation would thereby be extended beyond the plain terms of the instruments themselves.

"A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances. * * * It will not be implied that the surety has undertaken to do more or other than that which is expressed in such obligation. * * Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no further." Brandt on Suretyship, § 106.

The Circuit Court of Appeals for the Eighth Circuit made no order that has not been obeyed by both Lew Moy and Sam Hee, and when this court reversed the judgment and sentence against them, and ordered a new trial, the obligation of the sureties as given by them was fully performed, and the judgment of the trial court is affirmed.

MISSOURI PAC. R. CO. et al. v. METTE. (Circuit Court of Appeals, Eighth Circuit. November 15, 1919.) No. 5379.

1. ABATEMENT AND BEVIVAL \$== 15-ACTION MAINTAINABLE IN FEDERAL COURT UNDER EMPLOYERS' LIABILITY ACT AFTER DISMISSAL IN STATE COURT.

The provision of Employers' Liability Act, § 6, as amended by Act April 5, 1910, c. 143, § 1 (Comp. St. § 8662), that no case arising under the act and brought in a state court shall be removable, does not deprive a plaintiff of the right to dismiss an action brought in a state court, and bring a second action in a federal court.

2. Courts &==284-Jurisdiction of action under Employers' Liability Act NOT DEPENDENT ON CITIZENSHIP.

Jurisdiction of a federal court of an action brought under Employers' Liability Act is given by section 6 of the act, as amended by Act April 5, 1910, c. 143, § 1 (Comp. St. § 8662), and is not dependent on diversity of citizenship, and where the action is against a receiver, a succeeding company, which in purchasing the property assumed payment of all claims against the receiver, may be joined as a defendant, regardless of its citizenship.

3. Master and servant \$\iff 279(4)\$\—Evidence of negligence of engineer in STARTING ENGINE STRIKING SWITCHMAN.

In an action for injury to a switchman, struck at night by an engine passing a switch he had just thrown, evidence held insufficient to show negligence of the engineer in starting his engine, which was then standing still, when the target light showed that the switch was thrown for his passage; there being no evidence of rule or custom requiring him to await other signal before moving.

4. Master and servant \$\iff 276(1)\$\to Proof of employment in interstate com-MERCE INSUFFICIENT.

Evidence that a switchman, injured in railroad yards, was engaged in throwing a switch for the passing of an engine for a purpose not shown, and in directing another engine to move a caboose to another part of the yards, held not to sustain an allegation that he was employed in interstate commerce, within Employers' Liability Act, § 1 (Comp. St. § 8657).

In Error to the District Court of the United States for the Eastern District of Missouri; Jacob Trieber, Judge.

Action at law by Frank A. Mette, a minor, by his next friend, Katherine Ludington, against the Missouri Pacific Railroad Company and B. F. Bush, receiver of the Missouri Pacific Railway Company. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

H. H. Larimore and James F. Green, both of St. Louis, Mo. (Edward J. White, of St. Louis, Mo., on the brief), for plaintiffs in error. Sidney Thorne Able, of St. Louis, Mo. (Charles P. Noell, of St. Louis, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and MUNGER and YOU-MANS, District Judges.

YOUMANS, District Judge. Defendant in error, hereafter called plaintiff, brought a suit on the cause of action declared upon in his petition herein in the circuit court of St. Louis, Mo. On his motion that suit was dismissed without prejudice. He then brought this

6mFor other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

As the jurisdictional ground he alleged that B. F. Bush, as receiver, was operating the railroad of the Missouri Pacific Railway Company as a carrier in interstate commerce; that plaintiff was employed by said receiver, and while so employed was injured through the negligence of the receiver's employés. The plaintiff alleges, also, that since his injury all of the property of the Missouri Pacific Railway Company has been sold under decree of court to the Missouri Pacific Railroad Company, which "assumed and agreed to pay, as a part of the purchase price of the said properties, all unpaid indebtedness and liabilities of the said receiver incurred by him in the management or operation by him of the said properties between August 19, 1915, the date of his appointment, and the date of the delivery by the said receiver of possession of such properties to the defendant Missouri Pacific Railroad Company," and that plaintiff "received the injuries herein complained of during such period, and that the liability of the receiver to plaintiff is unpaid, and is one of those liabilities assumed by the defendant Missouri Pacific Railroad Company."

The receiver filed a plea in abatement to plaintiff's petition. plea states that the court "should not assume jurisdiction of the subject of this action, or of the parties hereto, for the reason that heretofore, to wit, on or about the 9th day of June, 1917, and before the institution of this cause in this court, suit for damages was duly instituted against this defendant by the above-named plaintiff on the same cause of action and for the same injuries as set forth in plaintiff's amended petition in this cause, in a state court of competent jurisdiction, to wit, in the circuit court of the city of St. Louis, Mo., said last-named court being one of general and common-law jurisdiction, with full power and authority to duly and lawfully try said cause and render final judgment therein," and "that while said cause was pending in said circuit court of the city of St. Louis plaintiff herein duly filed in said court a motion asking for certain relief and orders on the part of said court, which said motion was duly considered and passed upon by said circuit court at the request and prayer of this plaintiff." The plea in abatement was overruled, and this is assigned as error.

In his amended petition, on which the case went to trial, plaintiff alleges that on or about the 26th day of January, 1917, he was in the employ of the defendant as a switch tender, "and on said date, and while so employed, and while working in the scope of his employment, and while plaintiff was in the yards of the defendants in the city of St. Louis and state of Missouri, for the purpose of, and while in the act of, delivering orders in connection with, and for the purpose of, and while in the act of, assisting in the movement of interstate shipments, cars, and trains, the plaintiff was struck, run over, and injured, by a switch engine operated and controlled by the employés of the receiver." The allegations of negligence are that the employés in charge of the switch engine violated a stop signal; that they failed and neglected to ring a bell; that they carelessly and negligently backed the switch engine through a screen of steam escaping from a de-

fective engine; that they failed to keep a lookout, and that they failed to give any warning of the movement of the engine.

During the trial, the plaintiff introduced in evidence, over the objection of plaintiffs in error, the deed of Special Commissioner Joseph S. Dobyns to the Missouri Pacific Railroad Company. The objection of counsel for plaintiffs in error was:

"That the obligations and liabilities to be assumed or paid by the Missouri Pacific Railroad Company are to be fixed by the court having jurisdiction of the receivership, when such claim or claims as the one now being litigated have been presented to that court pursuant to its orders made in such receivership."

In ruling upon that objection the court said:

"I desire to state that that is a question that the court feels has been determined by another judge in this case, and for that reason the court will not review his rulings, regardless of what the individual opinion of this court may be."

The record shows that there was a difference of opinion between counsel as to what had been decided by the court upon the point in question, but the record does not show what the facts were, so as to enable this court to determine what was decided, nor how the decision was arrived at. From the silence of the record it must be presumed that the decision of the court was correct on that point.

Excerpts were read from the order approving the sale and from the deed conveying the property to the Missouri Pacific Railroad Company, to the effect that the purchaser assumed all liabilities of the receiver incurred by him in the management and operation of the property purchased. Objection was made by counsel for plaintiffs in error to the reading of those excerpts in evidence. The refusal of the court to sustain the objection was assigned as error.

At the conclusion of the testimony a request was made on behalf of the receiver that the jury be instructed to return a verdict for him. This request was refused, and the receiver excepted. A similar request was made on behalf of the railroad company, which was likewise refused, and an exception taken. These refusals are assigned as error.

The case went to the jury on one charge of negligence only. It was stated by the court to the jury as follows:

"In this case the plaintiff has set out several acts which he alleges were acts of negligence, and which caused the injury to the plaintiff. The plaintiff relies on only one issue now, and that is this: Do you find that it has been established, by a preponderance of the evidence, that after the plaintiff, who was a switch tender, had given the signal to the engineer in charge of engine No. 9458 to stop, in order to enable him to throw the switch, that the engineer disregarded the stop signal, started his engine toward him, and while he was engaged in throwing the switch he was run over by the engine and suffered the injuries complained of? * * *

"The plaintiff testified that he had given the stop signal in order that he might throw the switch; that in spite of that the engineer came forward, and he (the plaintiff) not realizing that the engineer was going to come forward, did not get out of the way, but attempted to throw the switch, and was run over by the engine and suffered these injuries. It also appears from his testimony that at the time that he says he gave the stop signal the engine was at a standstill; that the switch was closed, and the charge showed that it was closed, which of itself is a signal to the engineer not to come on. * *

"If you believe that it has been established by a preponderance of the evidence that the plaintiff had given the stop signal to the engineer of the engine, and that the engineer in spite of that fact disregarded that signal, or failed to see it, and came forward with his engine and moved it without giving plaintiff an opportunity to move away, or failed to signal to him that he would come, so as to give him the opportunity to get out of there, and by reason of that the plaintiff was run over and suffered these injuries, then, gentlemen of the jury, he is entitled to a verdict at your hands."

Counsel for defendants in error excepted to the instruction of the court, as shown by the record, as follows:

"The defendant excepts to that portion of the court's charge wherein the court charges the jury that if they believe that plaintiff had given the stop signal to the enginer, and the engineer disregarded that signal, or failed to see it, and therefore ran the engine over the plaintiff, that the plaintiff is entitled to recover, for the reason—

"The Court: You need not state the reason.

"Mr. Larimore: I want to put in the record. For the reason that there is no testimony in the case that the engineer in charge of engine 9458 saw this stop signal, was in a position to see it, or that the plaintiff, Mette, gave the stop signal in sufficient time so it could be seen by the engineer; neither is there any testimony showing that there is any rule or custom of the defendant which required those in charge of engine 9458, situated as that engine was situated, to be on the lookout to receive such signals from switch tenders, when such engine was already at a standstill, and with the target against it."

The giving of the instruction as excepted to is assigned as error.

[1] The plea in abatement is based on the theory that, since section 6 of the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 66 [Comp. St. § 8662]) provides that "no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States," plaintiff could not dismiss his case in the state court and afterwards bring it in a United States court. Plaintiff had the right to dismiss his case in the state court. Alsop v. McCombs, 253 Fed. 949, 165 C. C. A. 391; Barrett v. Virginian Railway Co., 250 U. S. 473, 39 Sup. Ct. 540, 63 L. Ed. 1092, decided by the Supreme Court of the United States June 9, 1919. When plaintiff afterwards brought the same suit in a United States court, such proceeding was not a removal, within the meaning of the Removal Act, nor within the meaning of section 6 of the Employers' Liability Act. It was not error to deny the plea in abatement.

It was not the purpose of plaintiff's petition to charge a joint liability against the receiver and the railroad company. The effect of the allegations of the petition was to charge the receiver with the primary liability, and that the railroad company assumed the payment of such liability. Excerpts from the deed and order of court introduced in evidence were competent to prove the assumption. Their admission for that purpose was not error.

[2] Counsel for plaintiffs in error also contend that the court was without jurisdiction, because there was no diversity of citizenship between defendant in error and the Missouri Pacific Railroad Company. This suit was brought under the federal Employers' Liability Act. Under the provisions of that act jurisdiction did not depend

on diversity of citizenship, so far as the receiver was concerned. The liability of the railroad company was dependent upon the establishment of the liability of the receiver. The jurisdiction of the court below was determined by the primary and original liability of the receiver, and not by the secondary and dependent liability of the railroad company. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Railroad Company v. Railway Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; Dewey v. Fairmont Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179; Carey v. Houston and Texas Ry., 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638; Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 73 C. C. A. 260; Pell v. McCabe, 256 Fed. 512. — C. C. A. —.

- [3] We think that the instruction given by the court, in the light of the evidence, was wrong. The only testimony with regard to the occurrence was given by the plaintiff himself. On direct examination he said:
- "Q. What was the engine doing at that time? A. The engine was standing
- "Q. How did you happen to give a stop signal? What was the purpose of the stop signal? A. The switch was against me.
- "Q. Is it customary to give a stop signal when an engine is already standing, and a switch is against them? A. Yes, sir.

'Q. For what purpose? A. For the protection.

"Q. What did you do after giving the stop signal? A. After giving the stop signal there was not a sufficient amount of room for me to throw the switch between track 13 and track 23. I stepped just north of this track and threw it there, threw the switch, and Halley came to the door and asked me what the caboose number was, and I got as far as the switch lever in the locks, and just as I pushed it down I repeated the order. I got as far as 'caboose,' and just as I started to raise up to give him the number I was struck.

"Q. What happened when you were struck, if you know? A. The only

thing that I remember is that everything went black.

"Q. Had you given any come ahead signal after throwing that switch, before you were hit? A. No, sir."

On cross-examination plaintiff said:

- "Q. At the time you gave this stop signal, the engine was standing still? A. Yes, sir.
 - "Q. And the switch was against you? A. The switch was against him; yes.

"Q. It was nighttime? A. It was 3:20 in the morning.

"Q. That switch being against him, the light on that switch indicated to the engineer in charge of the engine that the switch was against him also, did it not? A. Yes, sir.

"Q. He did not need your signal to know that that switch was against him,

did he? A. By rights I did the right thing by giving that-

- "Q. We won't go into that now. But he did not need your signal to know that switch was against him; it was there in plain view, turned against him, and the lights indicated to the engineer that that switch was against him? A. Yes, sir.
- "Q. Always when you passed through the yards, has it been your custom, when an engine is standing still, with a switch against it, which condition is apparent to the engineer in charge of the engine, to follow that up with a stop signal to the engineer? A. I do.

"Q. What kind of a signal is a stop signal? A. In nighttime with a lamp.

It is swung such as this (illustrating).

"Q. What is the reason for giving a stop signal to an engineer on an engine standing still, with the switch against him? A. Well, there is no reason at all; he cannot get out.

"Q. He cannot get out, can he? A. No, sir.

"Q. He could not have gotten out there to save his life, until that switch was thrown, could he? A. No.

"Q. Without derailing his engine and turning it over? A. That is the

only way

"Q. That is the only way he could have gotten out. He was tied up there in a pocket, you might say, with the switch against him, and with the target turned to indicate that situation to him, and until some one opened that switch that engine couldn't have gotten out of there, could it? A. No, sir.

"Q. And he was standing still at the time? A. Yes, sir.

"Q. And you followed up that situation with a stop signal? A. Yes, sir."

Further in his cross-examination plaintiff said:

"Q. What was the purpose of your throwing that switch? A. He could not have gotten out there.

"Q. Who could not have gotten out? A. 9458.

"Q. Then you threw that switch for the purpose of letting 9458 out, did you? A. Yes, sir.

"Q. After throwing that switch, you never gave any more signals to engine

9458, did you? A. No, sir.

"Q. When you threw that switch, that target turned around, and indicated to the engineer of engine 9458 that the switch was open and he could leave the track? A. He had no business leaving the track—

"Q. Answer the question. That is what it did, did it not? A. Yes; it

indicated that he could leave.

"Q. And you gave him no further signal? A. I gave him no further signal."

There was no proof that it was the custom to give a come ahead signal. The question was asked the plaintiff by his counsel, but on objection the question was withdrawn, and no answer was given. The plaintiff testified that when he threw the switch it indicated to the engineer that the switch was open and that he could leave the track. He also testified that until the switch was thrown the engineer could not leave the track without derailing his engine. With the engine standing still, there would appear to be no reason why the engineer should be looking for a stop signal, or why one should be given. The testimony was not sufficient to establish negligence on the point that was permitted to go to the jury. The instruction was erroneous, in that the jury was told that if the engineer failed to see the stop signal, and moved his engine without signaling the plaintiff, or giving him an opportunity to move away, he was neg-The effect of that instruction was that the engineer was negligent if he moved his engine toward the switch without giving a signal to plaintiff. When the plaintiff threw the switch for the purpose of letting the engine out, and in throwing the switch caused the target to indicate to the engineer that he could run his engine out, there does not appear to be any reason why the engineer should wait for any other signal, nor why he should give a signal that he intended to do what he had been notified by the change in the target that he could do, and what it was the apparent purpose of Mette that he should do.

[4] According to the testimony of the plaintiff, at or about the time of his injury, he was engaged in the performance of two duties. He carried a message to a switch foreman in charge of another engine, directing him to take a certain caboose to a point in the railroad yards

in St. Louis. His testimony indicates that the foreman put to him a question with reference to this message at the same time the plaintiff was performing the other duty; that is, throwing the switch. There is no testimony stating for what purpose the engine which inflicted the injury was leaving the switch. There is direct testimony that the caboose was to be moved from one part of the yard to another. There is, therefore, no proof in the record to sustain the allegation of the petition that the plaintiff was engaged in moving engines or cars in interstate commerce. The facts in this case fall within the rule laid down by the Supreme Court of the United States in the case of Illinois Central Railroad Co. v. Behrens, Adm'r, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. In that case the Supreme Court said:

"Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908 [Comp. St. § 8657], reads as follows: 'Section 1. That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce."

The proof fails to show that the service in which plaintiff was engaged was a part of interstate commerce. On account of such failure the court should have given the instructions requested to find for the defendants respectively.

For the errors indicated, the case is reversed and remanded for a new trial.

SANBORN, Circuit Judge. I concur in the result in this case, and in the foregoing opinion, on the grounds that there was no substantial evidence of the negligence of the engineer, or of the alleged fact that the plaintiff was engaged in interstate commerce at the time of his injury.

MUNGER, District Judge. I concur in the result in this case because there was no evidence of the engineer's negligence in the issue of negligence submitted to the jury by the court's instruction. I also concur that the court had jurisdiction, but upon the ground that the suit was one arising under the laws of the United States, and therefore that jurisdiction did not depend upon diversity of citizenship. The plaintiff, in good faith, sought to establish the liability of the railway company under the act of Congress imposing a liability upon receivers of common carriers by railroad while engaging in interstate commerce in favor of employés employed by the carrier in such commerce (35 Stat. 65; 36 Stat. 291) against the railway company which had assumed any

such obligations of the receiver. His action clearly arose under such statute, so far as it ran against the receiver, and it also arose under that statute as against the one who assumed the liability, as that statute was one of the essential ingredients of his suit, and the decision of his case depended on the construction given that statute. Railroad Company v. Mississippi, 102 U. S. 135, 141, 26 L. Ed. 96; In re Lennon, 166 U. S. 548, 553, 17 Sup. Ct. 658, 41 L. Ed. 1110; Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501, 507, 30 Sup. Ct. 184, 54 L. Ed. 300.

WARTELL v. MOORE.*

(Circuit Court of Appeals, Sixth Circuit. November 5, 1919.)
No. 3300.

1. BANKRUPTCY \$\infty 458-QUESTIONS PRESENTED BELOW.

In an action to recover as preferential, payment made to defendant, an individual creditor, by bankrupt a few days after buying out his partner and shortly before filing of the petition, where defendant moved for directed verdict on the ground there were no other creditors in his class, contending that those who extended credit to the bankrupt after dissolution of the firm, but in ignorance of that fact, were not individual creditors, held that, on error by defendant to review an adverse judgment, where there was no exception to the charge, which left to the jury the question whether defendant had reasonable cause to believe that payment would result in his obtaining a larger percentage of his debt than would be received by other creditors of the same class, the only question which can be reviewed, defendant's motion for directed verdict having been denied, is whether there was evidence tending to show that debts proven in bankruptcy were based upon credit extended to the bankrupt after dissolution of the firm, so that such creditors became individual, mstead of firm, creditors.

2. BANKRUPTCY €==167—PRESUMPTION AS TO WHETHER ONE EXTENDING CREDIT WAS INDIVIDUAL OR FIRM CREDITOR.

Where the bankrupt obtained credit after he became a second time a sole trader, by buying out his partner, those extending credit, though they acted in ignorance of the dissolution, will not be presumed to have extended credit solely to the firm, and to be merely firm creditors, because of their option to hold the withdrawing partner, where such presumption would preclude the trustee in bankruptcy from recovering as preferential a payment made by the bankrupt to an old individual creditor after dissolution of the firm, on the ground that there were no creditors of the same class as the one to whom payment was made.

3. BANKRUPTCY €==178(2)—TRANSFERS VOIDABLE, THOUGH NOT AMOUNTING TO PREFERENCES.

Where the bankrupt, who had begun business as an individual trader, then associated himself with a partner, and finally bought out his partner, paid an old individual creditor (who had notice that a preference would result) a large sum of money out of the assets of the firm, shortly after dissolution of the firm and within about a month of bankruptcy, the transaction is voidable, under Bankruptcy Act, § 67e (Comp. St. § 9651), if not a preference under section 60b (Comp. St. § 9644), as an attempt to defeat the intended operation of the bankruptcy law.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Ralph S. Moore, trustee in bankruptcy of Burt P. White, against Herman M. Wartell. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Shurley Kennary, of Detroit, Mich., for plaintiff in error.

F. C. Miller, of Ionia, Mich., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. This case involves the right of a bankruptcy trustee to recover a preference under section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. § 9644]). The bankrupt, White, carried on a commission business in poultry, eggs, etc. For the sake of buying into that business, he had borrowed \$1,500 from Wartell, with the expectation that the loan would be carried for some time. Later White took Kaufman into partnership, and they continued the same business. On November 20, 1915, White bought out Kaufman, took over the business and all its assets for himself, and promised Kaufman to pay all the partnership debts. These amounted to about \$6,000. On November 26th he repaid Wartell the \$1,500 loan, making payment out of the assets thus recently taken over. On December 29th, he filed a voluntary petition in bankruptcy. If the partnership debts assumed by him be included in his liabilities, he was insolvent on November 20th, and continuously thereafter.

The trustee's action to recover this Wartell payment as a preference was brought at law, and tried in the court below before a jury. The only question rightly preserved for review in this court is whether a verdict should have been instructed for Wartell, and the case, upon its facts, is not such that we are inclined to consider any error now alleged, and as to which there is any deficiency for lack of exception. More specifically, the only question is whether the evidence tended to show that there were other creditors of the same class as Wartell, who were prejudiced by the payment to him. His argument is that on November 26th he was a creditor of White as an individual; that all the other creditors had no claim against White, excepting as a member of the partnership of White & Kaufman; that all the business assets were then in the individual estate of White; that Wartell was entitled to priority in these assets as against the partnership creditors: and that he did not receive a larger percentage than other creditors of the same class, because there were no others of the same class.

Certain aspects of this question argued by counsel present difficulties which we think it not necessary to meet. When counsel for Wartell presented his motion to direct a verdict, and insisted that the proofs did not show the existence of any other creditors of the same class as Wartell, the court said that it seemed as though there must be, among the body of creditors who had proved their claims, some who had become creditors after he had resumed business in his individual capacity, and who therefore would be individual rather than partner ship creditors, even if it should be thought that the partnership creditors, existing on November 26th, could have in this proceeding no other status. Wartell's counsel said that this was a matter to be

proved by the trustee, and that there had been no proof. The trustee's counsel replied that the books were in evidence, and that the books showed the facts as assumed. Wartell's counsel, not questioning that the books were in evidence, nor that they showed, as among the debts existing at bankruptcy, items which had accrued after November 20th, insisted that the inference of individual indebtedness was not authorized, because, he said, no notice of the dissolution of the partnership and continuance of the business by White alone had been sent to those dealing with the firm or had been publicly given, and hence it would be presumed that those who later furnished goods to the concern became partnership rather than individual creditors. The court overruled this contention, denied the motion to instruct, told the jury that upon the conceded facts the payment to Wartell gave him a larger percentage than would be received by other creditors of the same class, and left to the jury only one question of fact, viz. whether Wartell had reasonable cause to believe that this result would follow. No exception was taken to the charge. The jury found for the plaintiff trustee.

[1, 2] Under this state of the record, it is clear that the ultimate position on which counsel finally stood in support of his motion for directed verdict, and the only matter which the trial court understood was presented to him for decision (and thus the only specific question for this court), was the claim that there was no evidence tending to show that debts which had been proved in bankruptcy were based upon credits extended to White personally, rather than to the former partnership. It was not contended, in this connection, that November 26th, the date of the payment to Wartell, was the critical date, but only that there should be no inference that any individual credit was given after November 20th. The question of law, whether individual creditors who became such after November 26th could be considered as "of the same class" for the purposes of section 60b, was not presented to the trial court, and cannot be considered by us. Upon the question which we have said is thus the only specific one for us, we find: (1) The natural presumption which would arise out of common knowledge of the methods of conducting such a business, in which it would be normal for new debts to arise from day to day as the old were paid off; (2) the express testimony found in the record that debts existing on November 20th had been paid before bankruptcy to the extent of the major part thereof; and (3) the practical concession by counsel in the colloquy with the court that the books which were in evidence did show this state of facts.

We think the position on which counsel relied to escape the force of these facts is untenable. Creditors who have been dealing with a partnership, and who continue to furnish credit to the concern after it has become the personal business of one of the partners, and who have no notice of the change, have a right to enforce their new debt against the old partnership; but this is an option. The truth is that the debt accrued against the new concern, but the old partners are estopped to make this defense, because, by failing to give notice, they had misled the creditors. Surely, in the absence of any exercise

by the creditors of this optional right to hold the old concern, there can be no legal presumption that their debt is not against the new business, but is against the old; yet to this presumption the posi-

tion of counsel must come.

[3] We think it clear that the motion to direct was rightly denied. We are the better content to dispose of the case upon a somewhat strict construction of the right to review, because the transaction shown by the peculiar facts of this case, even if it might be thought to lack some element necessary to a voidable preference under section 60b, was nevertheless voidable under section 67e (Comp. St. § 9651), as an attempt to defeat the intended operation of the Bankruptcy Law. Watson v. Adams (C. C. A. 6) 242 Fed. 444, 445, 155 C. C. A. 217.

The judgment is affirmed.

MISSISSIPPI VALLEY TRUST CO. v. SOUTHERN TRUST CO. (Circuit Court of Appeals, Eighth Circuit. November 15, 1919.)

No. 5250.

1. Mortgages \$\iff 280(4)\$—Lien not extended by assumption of debt.

A mere contract of assumption of a mortgage debt does not extend the mortgage lien to other property of the new debtor.

2. RAILROADS ⇐==167—CONSTRUCTION OF MORTGAGE ON AFTER-ACQUIRED PROP-EBTY OF "SUCCESSOR."

"Successor," within a mortgage by a railroad company of all its existing property and all thereafter acquired by it or its successor, means a corporate successor, and not an independent corporation, which takes title to its property by ordinary purchase.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Successor.]

3. RAILROADS &== 167-MORTGAGE LIEN NOT EXTENDED BY DOCTRINE OF ACCESSION TO CONNECTING LINES.

The doctrine of accession cannot aid to extend the lien of a mortgage given by the O. Company on its railroad and assumed by the M. Company, purchaser of the O. Company's road, to connecting lines, one built by another company and purchased by the M. Company, and the other built by the M. Company; the one being purchased and the other built with funds obtained by the M. Company by mortgaging the two roads to another.

- 4. RAILROADS \$\iiint \text{167}\$—Mortgage lien not displaced by renewal of rails. That the purchaser of a railroad subject to mortgage relaid part of it with rails bought with proceeds of bonds secured by mortgage to another does not work a displacement of the first mortgage as a first lien on the improved property.
- RAILROADS \$\ightharpoonup 167\to Mortgage lien not displaced by repairs of equipments.

All engines, cars, and other equipments covered by a railroad mortgage remain subject to the mortgage as a first lien, however renewed by repairs made by the purchaser of the road subject to the mortgage.

Appeal from the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Controversy in mortgage foreclosure between the Mississippi Valley Trust Company and the Southern Trust Company as to priority of railroad mortgages. Decree for the Southern Company, and the Mississippi Valley Company appeals. Reversed and remanded.

James B. McDonough, of Ft. Smith, Ark., and William S. Gordon, (J. V. Walker, of Fayetteville, Ark., on the brief), for appellant.

D. H. Cantrell and W. E. Hemingway, both of Little Rock, Ark. (Joseph De F. Junkin, of Philadelphia, Pa., and G. B. Rose and J. F. Loughborough, both of Little Rock, Ark., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. This is a controversy in a railroad foreclosure suit between the appellant, Mississippi Valley Trust Company, and the Southern Trust Company, appellee, both of them mortgage trustees, over the priority of their mortgages on certain railroad property in Arkansas. The trial court extended the mortgage of the appellee to property acquired and constructed after appellant's mort-

gage was given. Hence this appeal.

The mortgage of the appellee was executed in 1907 by the Arkansas, Oklahoma & Western Railroad Company, hereafter called the Oklahoma Company, to secure bonds of which \$300,000 were issued and outstanding. The mortgage recited the mortgagor's ownership of 22 miles of railroad from Rogers to Springtown in Benton county, Ark.; also a line then being constructed from the latter place southwesterly to Siloam Springs in the same county; also an intention to build a line from Rogers "in a northeasterly direction to a point at or near Eureka Springs, in Carroll county." It purported to cover all existing railroad property and all thereafter acquired by the Oklahoma Company "or its successors," including "continuations, branches and extensions."

In 1911 the Kansas City & Memphis Railway Company, hereafter called the Memphis Company, was organized. It purchased and took a deed of all the property of the Oklahoma Company, and as part of the consideration it assumed the payment of the \$300,000 of outstanding bonds of the latter. About the same time it purchased from the Monte Ne Railway Company 8 miles of road from Freeman, a short distance below Rogers, to Monte Ne, on the White river. It also built about 30 miles of road from Cave Springs to Fayetteville. The line to Monte Ne and that to Fayetteville connect with the road bought from the Oklahoma Company. The new Memphis Company executed the mortgage to the appellant upon all of the properties purchased and constructed by it as above mentioned. The money represented by the bonds secured by this mortgage to the appellant was furnished for the specific purpose, in part, of enabling the Memphis Company to acquire and build the Monte Ne and Fayetteville lines, and with the expressed provision that the mortgage should be a first and prior lien upon the entire property of that company, except only

the \$300,000 already upon the part thereof bought of the Oklahoma

Company.

[1] The principal question in the case is of the effect of the "afteracquired property" clause in the first mortgage; that is to say, whether by virtue of the clause the lien of that mortgage takes precedence over the lien of the subsequent mortgage by the Memphis Company to the appellant upon the Monte Ne and Fayetteville lines of railroad. We are of the opinion that it does not. Preliminarily it should be said that the assumption by the Memphis Company of the \$300,-000 of bonds of the Oklahoma Company did not operate to extend the lien of the mortgage securing them to the property afterwards acquired and built by the assuming company. The obligation contracted by the latter was purely personal, and left it free to deal with its other property as it pleased. A mere contract of assumption of a lien debt leaves the lien as it finds it. It does not by itself enlarge or spread the lien to other property of the new debtor. The appellee gained nothing by the contract of sale and assumption, except the addition of a general corporate liability of the Memphis Company for

the old mortgage debt.

[2] The after-acquired property clause in appellee's mortgage is somewhat exceptional in the use of the term "successors." Without that term there would be little question, because it could not be said that the Monte Ne and Fayetteville lines were in any real sense subsequent acquisitions of the Oklahoma Company. In considering the meaning of "successors" as used in the mortgage, it must be borne in mind that when the Oklahoma Company sold its property it went out of business; it was no longer a going concern. It was practically dead, except as regards its obligations to its own creditors. Memphis Company, the purchaser, did not take over its corporate franchise as a successor, but had one of its own from the state in no wise dependent on it. As an independent corporation it bought the property of the Oklahoma Company, and thereafter owned and controlled it in its own right. Doubtless the property remained subject to public duties and conditions inhering in its origin and peculiar character, but that does not make the Memphis Company a successor of the Oklahoma Company, within the meaning of the term employed in appellee's mortgage. The term means a corporate successor, not a vendee, who takes title by ordinary purchase. As bearing upon this subject, see Metropolitan Trust Co. v. Chicago & Eastern Illinois R. Co., 165 C. C. A. 348, 253 Fed. 868, certiorari denied 248 U. S. 586, 39 Sup. Ct. 184, 63 L. Ed. —. In that case, however, the afteracquired clause was phrased somewhat differently, and there was a consolidation of railroad companies, instead of a purchase by one from the other.

[3] The doctrine of accession is also invoked by the appellee. But the Monte Ne and Fayetteville lines were not added to the railroad belonging to the Oklahoma Company in the usual course of growth or extension. They were not acquired or built by that company, or for it, or with funds for which it obligated itself, or in which it was in any wise interested. They were the result of a new and enlarged enterprise by another railroad company directly dependent upon different financial engagements an inseparable part of which was the lien to the appellant. Aside from any close consideration, the equities are clearly with those who furnished the moneys for the Monte Ne and Fayetteville roads upon the express condition that they should have on them a first lien.

[4, 5] The Memphis Company relaid about 8 miles of the railroad acquired from the Oklahoma Company with rails bought with proceeds of bonds secured by appellant's mortgage, but that does not work a displacement of appellee's mortgage as a first lien on the property so improved. Finally, all engines, cars, and other equipment which can be identified as having been property of the Oklahoma Company which passed by the sale to the Memphis Company remain subject to appellee's mortgage as a first lien, however renewed by repairs.

The decree of the District Court is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

UNION STEAMBOAT CO. v. FITZGIBBONS.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919. Rehearing Denied December 5, 1919.)

No. 2667.

- 1. Admiralty &=34—Action for seaman's death not barred by laches.

 Claim for death of a seaman killed by an explosion on the vessel, where action was brought, but was stayed in proceedings for limitation of liability shortly after death of the administrator plaintiff, held not barred by laches because of delay of several years before it was filed in the admiralty court, where a new administrator was appointed and the claim filed at once, after decision sustaining other similar claims.
- 2. Admiralty \$\iff 52\)—Jurisdiction to distribute fund in court.

 Where a fund has been paid into a court of admiralty for payment of claims proved against it, the court has jurisdiction to entertain additional claims, so long as sufficient of the fund remains undistributed.
- 3. Death € 22—Interest on claim for death not allowable in admiralty before liquidation of claim.

Interest is not allowable in admiralty on a tort claim for death of a seaman prior to liquidation of the claim, although a number of other claims, similar, except for amount of damages, were liquidated at a prior date.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in admiralty by Edward B. Fitzgibbons, administrator, against the Union Steamboat Company, owner of the steamboat Tioga. Decree for libelant, and respondent appeals. Reversed.

It appears that in July, 1890, an explosion occurred on appellant's steamboat Tioga while it was lying at the dock in Chicago. Twenty-five of the boat's crew were killed, including Edward Fitzgibbons, appellee's intestate. Suit in New York under the Illinois "Wrongful Death" statute was begun within two years by John Fitzgibbons, as administrator of deceased. In May, 1893, appellant filed in the federal court in Illinois a petition for limitation of li-

ability. Value of the boat was fixed at \$111,560, for which security was given and accepted by the court. January 23, 1894, monition was ordered published, restraining certain named claimants, including John Fitzgibbons, the then administrator, from further prosecuting their suits. Before publication of the monition, the administrator, who was father of deceased, died, and administrator, who was father of deceased, died, and administrator.

trator de bonis non was appointed in 1913.

Claims based on certain of the other deaths were filed in the District Court. They were referred to a commissioner, who on December 1, 1906, completed his report as to those claims, allowing damages thereon totaling, with certain other claims, about \$60,000. On July 31, 1911, the District Court confirmed the commissioner's report in most particulars, and allowed interest on the damages from December 1, 1906, to the date of the decree. Upon appeal to this court that decree was affirmed. Union Steamboat Co. v. Chaffin's Adm'r, 204 Fed. 412, 122 C. C. A. 598. The total of these and of all claims subsequently allowed (including appellee's) and of all charges on the fund in court is well within the amount of the bond.

The claim in question was presented to the District Court shortly after the appointment of the administrator de boffs non, and was referred to a commissioner, who reported May 11, 1917, finding appellant liable and fixing appellee's damages at \$2,500, but refusing interest thereon. The District Court approved the finding as to liability and damages, but awarded interest from December 1, 1906, the date on which the commissioner had completed his re-

port with respect to the first group of claims submitted.

George N. B. Lowes and Mitchell D. Follansbee, both of Chicago, Ill., for appellant.

Samuel B. King, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] 1. Appellant insists that appellee's claim is barred by laches through failure to present it for so many years. It appears that suit was duly commenced within two years, as required by the Illinois "Wrongful Death" statute. Prosecution of that suit was prevented by the monition of 1894 issued by the District Court. The administrator died shortly thereafter, and whether or not the appointment of an administrator de bonis non would be advisable, for the purpose of further prosecuting the claim, might in large measure depend on the outcome of the other claims of the same general nature, arising out of the same accident, which were then in process of adjudication, but which, of course, were not necessarily conclusive upon this claimant. Final adjudication of those other claims was not had until 1913, when this court decided the appeal. The claim in the suit at bar was filed shortly thereafter. True, a long time had passed since the occurrence; but from the record it would appear that appellant is by far more blamable than appellee for prolonging the litigation. The proceedings to limit liability were not even begun till nearly three years after the accident, and for the inordinately long pendency of the proceedings thereunder, appellant, in the entire absence of any exculpating circumstances appearing of record, must bear its full share of responsibility, while for this delay no part of the blame attaches to appellee. Appellee's suit was begun in proper time, and for aught that appears to the contrary is still pending. The record does not show that the usual notice to claimants to present their claims was given at any time before appellee's claim was filed in the District Court. In this state of facts the claim is not barred by laches.

- [2] 2. It is urged that the decree of 1911 terminated the limitation proceedings, and that consequently the court had no jurisdiction in the instant case. The answer is that at least sufficient of the fund to meet this claim is still undisposed of and within the jurisdiction of the court. So long at least as any of that fund remains within its jurisdiction, it seems plain that the court may entertain claims, which, if allowed, would be payable out of that fund.
- 3. The contention is made that the damages awarded are manifestly grossly excessive. Deceased was 19 or 20 years old at the time he was killed and was earning about \$30 per month, part of which he sent to his parents. He left surviving him his mother, who died about a year after he did, and his father, who died about three years after. There was also a brother, last known of about three years before the explosion on the Tioga. Under all these circumstances, the damages awarded are not excessive.
- [3] 4. Error is assigned on the allowance of interest from date of the commissioner's report on the other claims (December 1, 1906), and in support appellant invokes the general rule that no interest is allowable on claims in tort for personal injury until they have been liquidated. Appellee maintains that allowance of interest in admiralty is discretionary with the court. Cases were cited where, if the fund deposited in the court was insufficient to pay the claims, the court, in its discretion, might require the owner who thus took the vessel, to add to the fund interest thereon, upon the theory that, having had the use of the vessel, it would be equitable to require him to pay interest on the fund. Interest on claims has been awarded, where they arose under contract or were for the value of property destroyed; but the case at bar does not fall within any of such classes, and no cases are cited, and we find none, where on claims such as this interest prior to liquidation was allowed. No reason is apparent for applying to this claim any different rule than that ordinarily prevailing in tort claims for personal injury, viz., that interest is not allowable until damages are liquidated. The Argo, 210 Fed. 872, 127 C. C. A. 456 (9 C. C. A.); Union Steamboat Co. v. Chaffin's Adm'r, 204 Fed. 412, 122 C. C. A. 598 (7 C. C. A.); Burrows v. Lownsdale, 133 Fed. 250, 66 C. C. A. 650 (9 C. C. A.).

Did the commissioner's report of December 1, 1906, upon the other claims liquidate the claim here in issue? It is readily conceivable that, notwithstanding the general similarity of all these death claims, and the likelihood that the legal rule of liability governing one would govern them all, yet even as to the question of liability, the facts concerning one or some of the decedents might be such that an entirely different rule of liability would prevail, and that as to some of the cases there might be liability and as to others not. But if it were conceded that the finding of liability in respect to the other claims determined the question of liability in this one, yet there remained unadjudicated and unliquidated the amount of damages to which the claimant is entitled. This in every case depends upon the facts of the particular case—the age and earning power of the deceased, whether he leaves next of kin, the extent to which he contributed or was liable to

(261 F.)

contribute to their support—all matters of fact entering into the liquidating and fixing of the damages, and it cannot be said that the commissioner's finding on the other cases liquidated the damages as to this one. Surely the long delay in the presentation of this claim, while not constituting laches that will bar it, does not raise in its favor any legal or equitable right to interest because of the delay.

We conclude that the District Court did not err in fixing the damages at \$2,500, but that there was error in allowing interest from December 1, 1906, and that interest at the lawful rate (5 per cent.) is allowable on the damages from the date of the commissioner's report

on this claim, May 11, 1917.

The decree is reversed, with costs, with direction to the District Court to enter a decree in favor of appellee for \$2,500 damages, with interest at 5 per cent. from May 11, 1917.

SOUTHWESTERN GAS & ELECTRIC CO. v. CITY OF SHREVEPORT.*

(Circuit Court of Appeals, Fifth Circuit. December 10, 1919.)

No. 3406.

1, ESTOPPEL ← 62(8)—CITY NOT ESTOPPED BY FAILURE TO TAKE ACTION ON NOTICE OF INCREASE OF GAS RATES.

A city *held* not estopped from maintaining a suit to enjoin the charging of increased rates by a gas company by the fact that it took no action on notice of the intended increase, but waited until the increased rates had been put in force.

2. Gas ६==14(2)—RATES; COMPANY OPERATING UNDER TWO FRANCHISES CAN CHARGE ONLY LOWEST MAXIMUM RATES.

A gas company, operating under two franchises from a city, one of which it acquired by assignment, *held* bound to charge no more than the lowest maximum rates provided in either franchise.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit in equity by the City of Shreveport against the Southwestern Gas & Electric Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 258 Fed. 59.

J. D. Wilkinson and Wilkinson, Lewis & Wilkinson, all of Shreveport, La., for appellant.

Benjamin F. Roberts, J. M. Foster, Frank J. Looney, and W. A. Wilkinson, all of Shreveport, La., for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. This is an appeal from a decree in favor of the appellee, the effect of which is to enjoin the appellant from putting into effect rates for natural gas in excess of a schedule set out in the decree.

The appellant claims the right to increase its rates beyond those set out in the decree, by reason of the claimed happening of a contingency, which was provided for in the amended franchise of the Citizens' Oil & Pipe Line Company, of June 18, 1907, under which the appellant was operating. The effect of this contingency was that the rates therein provided—

"should remain in force and effect as long as what is now known as the Cadda gas field shall furnish gas in sufficient quantities with natural pressure to force such gas from the gas wells through the pipe line of the company to the city of Shreveport, but, should the supply of gas or the natural pressure diminish, so as to make it necessary to use artificial force or power either to pump the gas from the well or to force it through the pipe line of the company to the city of Shreveport, this amendment shall cease, and the rates herein fixed shall become inoperative and void, and the rates now authorized to be charged by said company, as fixed in said franchise, shall revive and become executory as if this amendment had never been passed, and in such event the said company shall be empowered and authorized to charge such rates as now fixed by its said franchise."

Whether the contingency upon which the revivor of the old rates dependent had happened was the disputed question in the case. Its solution depends upon the construction of the words of the amended franchise, "what is now known as the Caddo gas field." If the Pine Island field was included in the Caddo gas field, as known on June 18, 1907, then the contingency had not arisen, for the District Court found, and properly found, from the evidence, that the Pine Island field was capable of furnishing gas in sufficient volume and under natural pressure to supply the city of Shreveport. The District Judge also found that the Pine Island field was included in what was known as the Caddo gas field on June 18, 1907, and we are satisfied with the conclusion reached by him and the reasons expressed in his opinion for reaching that conclusion.

It seems clear to us that both the Pine Island field and the Annanias field were considered, at the time the amended franchise was granted by the city of Shreveport, as parts of the Caddo field. They were both known as gas-producing fields at that time, and are mentioned as such in defining the term Caddo gas field, as used in the Atkins franchise, granted by the city of Shreveport on the same day. The record convinces us, not only that they were known as gas-producing fields, but as mere subdivisions of the Caddo gas field, in June, 1907, and that they were intended by all parties to be included in that term

as used in the amended franchise.

[1] The District Judge correctly held that the city of Shreveport was not estopped by its failure to take affirmative action against the appellant, when first notified by it that it would cease to operate under the amended franchise, and would revert to the original franchise. The notice was accompanied by a statement that the appellant would not then raise rates. The city was not called upon to take, and could not well have taken, affirmative legal action, until injury to it or its inhabitants resulted from the declaration. As soon as the appellant put the increased rates in force, the city moved. It was not called upon to act earlier, and no estoppel arises from its not having done so.

[2] The District Judge enjoined the appellant from putting into

effect rates for domestic consumption higher than those named in the Atkins franchise, and for manufacturing and public buildings service higher than those provided for in the amended franchise of the Citizens' Company of June 18, 1907. This was upon the theory that the appellant was operating under both franchises, and that the Atkins franchise provided that, in the event of its transfer to another gas franchise corporation, no higher rates should be charged by the transferee than the lower of those prescribed in the two franchises. The lease agreement between the predecessor of the appellant and the Louisiana Gas Company, the then owner of the Atkins franchise, also prohibited the appellant from charging for gas a rate in excess of the rate authorized by the Atkins franchise. We think the District Judge was correct in his finding of fact that the appellant was operating under both the franchises, and in his conclusion of law therefrom that the appellant was bound thereby to adopt the lower maximum rate, contained in either of the two franchises, and that the lower rate for domestic service (that provided for by the Atkins franchise) and the lower rates for service to public buildings and manufacturing plants (that provided by the amended franchise of June 18, 1907, of the Citizens' Company) were proper maximum rates, which the appellant had no right to exceed, and which it was properly enjoined from increasing. We have stated only ultimate conclusions, and adopt the convincing opinion of the District Judge, for the reasons and authorities supporting them.

Affirmed.

HICKS CO., Limited, v. MOORE.

In re W. D. WHITE & SON.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1919.)
No. 3392.

Under Judicial Code, § 274a (Comp. St. § 1251a), a complainant in equity may amend his pleadings, although the effect is to make the suit one at law.

- 2. Appeal and error \$\iff 236(1)\$—Motion to have cause transferred to law side after amendment necessary to review.
 - A defendant cannot complain that the court proceeded with a cause in equity after an amendment by complainant which made it an action at law, where no motion was made to transfer to the law side, although defendant objected to the amendment.
- BANKRUPTCY \$\sim 303(3)\$ EVIDENCE OF INSOLVENCY AT TIME OF ALLEGED PREFERENCE INSUFFICIENT.

Evidence *held* insufficient to show that at the time of an alleged preferential transfer of property by bankrupts they were insolvent, as defined in section 1 of the Bankruptcy Act (Comp. St. § 9585).

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit by Russell P. Moore, trustee in bankruptcy of W. D. White & Son, against the Hicks Company, Limited. Decree for complainant, and defendant appeals. Reversed.

J. D. Wilkinson, of Shreveport, La. (Wilkinson & Lewis, of Shreveport, La., on the brief), for appellant.

J. S. Atkinson, of Shreveport, La., for appellee.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. The appellee, the trustee in bankruptcy of W. D. White & Son, brought suit on the equity side of the court to set aside a sale made, within four months prior to the filing of the petition in bankruptcy, by the bankrupts to the appellant, a creditor of the bankrupts, of six bales of cotton, on the ground that such sale was made with the intention to hinder, delay, and defraud creditors of the bankrupts. An amendment of the petition was allowed, which contained averments to the effect that at the time of the alleged sale the bankrupts were insolvent, that appellant then knew of such insolvency, that the transfer or sale alleged operated as a preference, and that appellant at that time had reasonable cause to believe that such transfer or the enforcement of it would operate to effect a preference in its favor, and the amendment contained a prayer that the cotton sold be ordered surrendered to the appellee. The appellant objected to the allowance of the amendment.

[1, 2] The amendment was allowable under section 274a of the Judicial Code (Act March 3, 1915, c. 90, 38 Stat. 956 [Comp. St. § 1251a]). The record does not show that the appellant sought to have the suit transferred to the law side of the court, pursuant to equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv). So far as appears, after the allowance of the amendment, the appellant raised no objection to the suit being proceeded with before the court without a jury. Though the effect of the amendment was to make the suit one at law, the appellant cannot successfully complain here of action of the court in

which apparently it acquiesced.

[3] The allegations of insolvency of the bankrupts when the sale or transfer in question was made were put in issue. We do not think that any evidence adduced supported those allegations. The most that the evidence showed as to the financial condition of the bankrupts at and prior to the time the transfer was made was that they were embarrassed, and were unable to meet their obligations when they matured. It did not show that the aggregate of their property, exclusive of any conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay their creditors, was not then, at a fair valuation, sufficient in amount to pay their debts. Bankruptcy Act July 1, 1898, c. 541, § 1 (Comp. St. § 9585). There was evidence tending to prove that within four months prior to the filing of the petition in bankruptcy the financial condition of the bankrupts, who bought considerable amounts of cotton within that period, was prejudicially affected by the fall in the market price of that commodity. It did not show that, at the time of the

transfer in question, the impairment of the financial condition of the bankrupts had gone so far as to make them insolvent within the definition of that term contained in the Bankruptcy Act. The attacked transfer did not operate as a preference, unless the debtors were insolvent at the time it was made. Bankruptcy Act, § 60b (Comp. St. § 9644); In re Leech, 171 Fed. 622, 96 C. C. A. 424; Collier on Bankruptcy (11th Ed.) 869. The evidence adduced was not such as to support a finding that the financial condition of the bankrupts did not change for the worse between the time of the transfer in question and that of the filing of the petition in bankruptcy. The record does not show that the court found that the bankrupts were insolvent when the transfer was made. In the absence of evidence to support such a finding, the decree appealed from is not sustainable.

That decree is reversed.

CHAPA v. UNITED STATES. *

(Circuit Court of Appeals, Fifth Circuit. December 10, 1919.)
No. 3428.

CRIMINAL LAW 5-676—LIMITING NUMBER OF WITNESSES TO ONE POINT IN DISCRETION OF COURT.

The limiting of the number of witnesses testifying to facts tending to show the good faith of defendants, charged with using the mails to defraud, to 13, although many more were offered, *held* within the discretion of the court; their testimony being cumulative.

In Error to the District Court of the United States for the Western

District of Texas; Duval West, Judge.

Criminal prosecution by the United States against Antonio Cisneros Chapa. Judgment of conviction, and defendant brings error. Affirmed.

G. Woodson Morris and C. M. Chambers, both of San Antonio, Tex. (Chambers, Watson & Wilson, of San Antonio, Tex., on the brief), for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge. Defendants, husband and wife, were indicted in three counts for using the mails in furtherance of a scheme to defraud, and were convicted.

The indictment charges substantially that the defendants had devised a scheme and artifice to defraud certain Mexicans, and for obtaining money by means of false representations and promises; that they would inaugurate and maintain a propaganda to be carried on by means of personal solicitation and advertisement, and representations and promises contained in letters and circular letters and circulars and books and leaflets and other literature written in the Spanish language, and by opening correspondence with the said Mexicans in the name

of Eloisita Cisneros, their young daughter, and in other names, for the purpose of exploiting the gullibility and superstition of the said ignorant Mexicans, and would represent in said letters and literature and other channels of advertising that their said daughter was a young Mexican girl who from birth had been favored with supernatural gifts and attributes, who at the age of two or three years had died and been brought back to life, and who thereafter was inspired by the Deity, and was possessed of many occult arts and powers, among these the ability to heal affliction and disease, and remorse and suffering, either by some magic or some divine strength, with the aid of charms and nostrums and advice.

Nine errors are assigned. The first, third, fifth, and ninth assignments are not pressed in brief or argument. We have examined them, however, and find them without merit.

The second error assigned is to a portion of the charge of the court. The court charged the jury fully on the law of the case, and left it to the jury to say whether defendants believed in the truth of their representations, or made them with intent to defraud, charging specifically that, if the defendants were actuated by an honesty of purpose and a good intention, they should be acquitted. We find no error in the charge.

The fourth assignment runs to the refusal of the court to give a special charge requested. The special charge was lengthy and objectionable, because it assumed many facts to be proved, and requested the court to so charge, but in any event the material part was fully

covered by the general charge of the court.

The sixth assignment is to certain remarks of the assistant district attorney to the effect that the defendant would use a verdict of acquittal as an advertisement. The district attorney is entitled to as much latitude as the defense in drawing deductions from the evidence and the general aspect of the case, provided he does not try to nullify the privileges and immunities of the defendant, and confines himself to facts in the record. The remarks of the assistant district attorney were unnecessary and perhaps undignified, considering his high office; but we cannot say that they were prejudicial to the defendant.

The seventh assignment of error is to the refusal of the court to permit more than 13 witnesses for the defense to testify that they had been cured by defendants' daughter. This was material on the question of defendants' good faith, as showing their own belief in the possession by their daughter of the occult power claimed for her. About 150 witnesses were tendered on this point. The evidence offered was purely cumulative. The witnesses for the prosecution had testified to the same effect, and there was no question but that many persons believed they had been cured by the supernatural or unusual powers of defendants' daughter. The entire evidence is not in the record, and we must assume that there was other evidence tending to show bad faith and fraudulent intention on the part of the defendants. It is discretionary with a trial court to limit the amount of cumulative evidence, and in this case it does not appear that this discretion was abused.

The eighth assignment is to the refusal of the court to grant a new trial. It is elemental that in the courts of the United States the granting or refusing of a new trial is a matter of discretion with the trial court, and error cannot be assigned to its action thereon. We find no prejudicial error in the record.

Judgment is affirmed.

SNARE & TRIEST CO. v. FIREMAN'S FUND INS. CO. OF SAN FRANCISCO.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 41.

INSURANCE \$\ightharpoonup 478\$—INSURER NOT LIABLE IN PARTICULAR AVERAGE UNDER MARINE POLICY.

The loss of a concrete mixer, which broke from the deck of a barge, to which it was bolted, when the barge capsized at sea, in which position it was towed 30 miles to port, held not to render the insurer liable in particular average under a clause exempting it from such liability unless caused by "stranding, sinking, burning, or collision,"

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Snare & Triest Company against the Fireman's Fund Insurance Company of San Francisco. Decree for respondent, and libelant appeals. Affirmed.

Snare Company procured from Fireman's Company marine insurance on a barge while in tow from Havana, Cuba, to Charleston, S. C.; but the policy was to be "free of particular average unless caused by stranding, sinking, burning, or collision." On the voyage contemplated, upon the high seas, and in moderate weather, the barge filled, and sank "decks to," but being of wood, and having no cargo other than some machinery and fittings bolted or otherwise fastened to the deck, could sink no farther. The tug continued to the northward, until about 30 miles off Mayport, Fla., when the barge turned upside down, whereupon the tugmaster made for Mayport as the nearest place having enough water to admit the barge bottom up and with the machinery bolted to her deck projecting downward. On arrival at Mayport, assistance was procured and the barge righted, when it was found that a "concrete mixer," the largest, heaviest, and tallest piece of machinery bolted to the deck, was gone; the deck giving evidence of a violent separation. Search in Mayport harbor failed to discover the mixer, and we find it fairly proven that, when the barge was fastened to the Mayport wharf, it was already gone. The probability is that the mixer went when the barge capsized; there is certainly no proof that it was lost in any other way.

The barge itself never grounded; there is some evidence that at low water in Mayport a small engine, also belted to the deck, touched sandy bottom; but it is shown that neither said engine nor the barge was injured by such contact. A plank was off the barge's bottom, and the deck was badly torn up, apparently by the violent detaching of the "mixer," etc. For the cost of repairs and loss of mixer, libelant brought suit on the policy, and, after dismissal of libel, appealed to this court.

Hector M. Hitchings, of New York City, for appellant. Lawrence Kneeland, of New York City, for appellee. Before WARD, HOUGH, and MANTON, Circuit Judges. HOUGH, Circuit Judge. The insured barge was always waterborne, and after becoming what the witnesses call "water-logged" was navigated over 80 miles, and then fastened to a wharf. Whether such a vessel can ever be said to have sunk, even within the meaning of a policy of insurance drawn and tendered by an insurer, is a question not requiring decision herein, because liability under this policy does not depend on the mere fact of a sinking (London Assurance v. Companhia de Moagens, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113), but arises only if the particular average loss in suit was "caused by stranding (or) sinking." On the facts recited, and assuming that a vessel of such buoyancy that she cannot go lower than "decks to," is "sunk" when in that condition, the loss here claimed was not caused by such sinking but by a capsizing, which (so far as this record shows) was not the result of, nor caused by, the water-logging.

There never was a "stranding," for, even if the small engine that remained fast to the capsized barge did at one time touch sand, it was "touch and go" only, and therefore no stranding, under the London As-

surance Case, supra.

The decree is affirmed, with costs.

McDONALD et al. v. MANDEVILLE et al.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 6.

Brokers \Leftrightarrow 49(1)—Brokers not entitled to commissions when not procuring cause.

While a buyer may promise anything, an unusual contract cannot be spelled out of words normally importing only the conventional agreement with the broker; so brokers cannot, on proof of an ordinary contract of brokerage, recover commissions because defendants made the purchase, without any showing that the brokers were the procuring cause of sale, on the ground defendants were to pay commissions if they made the purchase.

In Error to the District Court of the United States for the Southern District of New York.

Action by Benjamin McDonald and another against Edward E. Mandeville and others. There was a judgment dismissing the complaint, entered at the close of defendants' case, and plaintiffs bring error. Affirmed.

See, also 250 Fed. 607, 162 C. C. A. 623.

Bacon & Rorty, of Goshen, N. Y. (Philip A. Rorty, of Goshen, N. Y., and Albert Ritchie, of New York City, of counsel), for plaintiffs in error.

Graham & L'Amoreaux, of New York City (George S. Graham, Ralph Polk Buell, and John B. Knox, all of New York City, of counsel), for defendants in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The judgment complained of is the result of a retrial of this action, as directed in Mandeville v. MacDonald, 250 Fed. 607, 162 C. C. A. 623. The evidence in the present record is substantially what was here before, and the statement of facts prefixed to our opinion is sufficient. There has been no amendment of complaint, and it is still true that plaintiffs do not sue to recover the usual broker's commission for bringing together the minds of a willing seller and a willing and able buyer, but states as the ground of recovery (we quote from their brief) that—

"The agreement to pay the plaintiffs was dependent on the defendants buying, and not upon the plaintiffs being the procuring cause of the sale."

To repeat what we said before on this point, a buyer may promise anything; he may agree to pay for failure as well as success, but when the unusual contract is asserted, it can never be spelled out of words normally importing only the conventional—i. e., the familiar brokerage employment, which is always of the "no cure, no pay," kind.

This cause was retried after we had indicated the foregoing as the crux of the matter, and it is still clear (1) that plaintiffs themselves on November 12, 1913, proposed in writing the usual brokerage contract; (2) that they wholly failed to earn a commission thereunder; (3) that never did defendants promise to pay them for their failure what they had stipulated for in the event of success; and unless this last had been shown "pretty plainly" the dismissal of complaint was right.

Judgment affirmed, with costs.

In re JARMULOWSKY et al.

Petition of DUKAS.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 3.

BANKBUPTCY ©=140(3)—TRUST FUNDS APPLIED ON BANKBUPT'S INDEBTEDNESS NOT SO IDENTIFIED AS TO BE RECOVERABLE.

To entitle a depositor to recover the amount of checks deposited in an insolvent bank and uncollected on the date of its bankruptcy as a trust fund, he must identify and trace the proceeds into some fund or property which came into the hands of the trustee, and cannot so recover, where the checks had been deposited to the credit of bankrupt in other banks, which applied their proceeds on indebtedness of bankrupt to them.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Harry Jarmulowsky and Louis Jarmulowsky, bankrupts. On petition of Julius H. Dukas, trustee, to revise an order made on petition of one Attie. Reversed.

See, also, 249 Fed. 319, 161 C. C. A. 327, L. R. A. 1918E, 634; 258 Fed. 231, — C. C. A. —.

Samuel F. Hyman, of New York City (Jacob J. Lesser, of New York City, of counsel), for petitioner.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The bankrupts were private bankers against whom a petition in bankruptcy was filed May 11, 1917. On May 10th certain checks were deposited in bankrupts' bank by and to the credit of one Attie. On the same day these checks were by the bankrupts deposited in certain national banks and at the date of petition filed were not collected. Thus far the situation is identical with that presented in Re Jarmulowsky, 249 Fed. 319, 161 C. C. A. 327, L. R. A. 1918E, 634.

But the national banks having these checks for collection to the credit of the bankrupts were creditors of the bankrupts, and retained in discharge of the bankrupts' indebtedness to them all that the bankrupts had on deposit with them on May 11th. Therefore none of the proceeds of the checks in question ever came into the hands of the receiver or trustee. Attie filed petition to recover as a trust fund the amount of the checks deposited.

It was incumbent upon such petitioner to identify what he claimed and trace it into some specific fund or property in the hands of the representative of the estate in bankruptcy. This has not been done, and is just as necessary to recovery as is the establishment of the fact that the checks were the subject of a trust in Jarmulowsky's hands. In re Matthews' Sons, 238 Fed. 785, 151 C. C. A. 635, and cases cited.

The court below entered an order in favor of the petitioner; it was error so to do, and the order in question is reversed, with costs.

NESTLE PATENT HOLDING CO. v. E. FREDERICS, Inc. (Circuit Court of Appeals, Second Circuit, June 10, 1919.)

No. 189.

TATENTS 57, 119—INVENTIONS FOR PROCESS AND APPARATUS MAY BE EMBRACED IN ONE PATENT.

A process and an apparatus by which it is to be performed are distinct matters, and, while they may be embraced in a single patent, may be the subject of different patents.

2. PATENTS \$\infty 328\$—Process and apparatus for waving hair valid and infringed.

The Nessler patents, No. 1,052,166 and No. 1,052,167, for apparatus and process for waving hair, conceding their validity, held not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Nestle Patent Holding Company against E. Frederics, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 258 Fed. 627.

This cause comes here on appeal from a decree entered in the United States District Court for the Southern District of New York on July 15, 1918. A bill of complaint was filed by Charles Nessler against the defendant, a corporation organized and existing under the laws of the state of New York. The plaintiff therein alleged that he was the first, original, and sole inventor of certain improvements in apparatus for waving natural hair on the head, and that the government of the United States had issued him letters patent No. 1,052,166, on February 4, 1913, for his invention of an apparatus for waving natural hair on the head. While the patent did not issue until 1913, the application was filed on August 6, 1909. The plaintiff therein also alleged that the government of the United States issued to him on February 4, 1913, letters patent No. 1,052.167, for a process of waving natural hair on the head. The plaintiff further alleged that George Aldworth, on March 18, 1915, duly filed in the United States Patent Office an application for letters patent for certain improvements in permanent hair-waving appliances, and that the said Aldworth had assigned his rights therein to plaintiff, which assignment had been recorded in the United States Patent Office, and that letters patent No. 1,186,533 had been issued on said application to the plaintiff. The plaintiff, Nessler, claimed in the bill that defendant had infringed these several patents and prayed for an injunction restraining defendant from infringing, and for costs, profits, and damages. The defendant moved to dismiss, on the ground that plaintiff at the time of the motion was an alien enemy, being a subject of the emperor of Germany. This motion was denied on June 25, 1917, and a motion to mark the cause reserved generally was granted.

On July 13, 1917, Charles Nessler assigned to the Nestle Patent Holding Company, Incorporated, all his right, title, and interest in the three letters patent involved in the cause, together with all rights to sue and recover all damages for past infringements of the patents. On July 20, 1917, the Nestle Patent Holding Company, Incorporated, presented a petition to the court, in which it stated that it had acquired all the right, title, and interest of the original complainant, Charles Nessler, and asked permission to file a bill in the nature of a supplemental bill. On November 16, 1917, an order was obtained allowing plaintiff to file a bill in the nature of a supplemental bill, substituting the Nestle Patent Holding Company, Incorporated, for Charles Nessler as plaintiff herein. The Nestle Patent Holding Company, Incorporated, is a corporation organized under the laws of the state of New York, and Maving its principal office in the city of Hornell, county of Steuben, state of New York. The supplemental bill asked for all measures of relief as prayed in the original bill, and that the present plaintiff might have the full benefit of all the proceedings previously had and the orders which had been entered in the cause.

On November 23, 1917, the cause was restored to the general calendar. The Trading with the Enemy Act approved October 6, 1917 (40 Stat. 411, c. 106 [Comp. St. 1918, §§ 3115½ a-3115½ j), by paragraph (G) under section 10, authorizes any enemy or ally of an enemy to prosecute suits in equity against any person other than a licensee to enjoin infringement of letters patent in the same manner and to the extent that he would be entitled to do if the United States was not at war, subject, however, to a proviso which it is not necessary now to consider.

Charles Neave and Willis Fowler, both of New York City, for appellant.

Charles H. Wilson, of New York City (Thomas Ewing, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). patents in suit relate to alleged improvements either in the apparatus or in the processes for producing a so-called "permanent" wave in the hair while on the human head. Prior to the patents in suit hair had been waved, both when on the human head and after it had been removed from the head and made up into "switches" and sold as "commercial" hair. A large business has been developed under the patents in suit.

The president of the plaintiff company, Charles Nessler, was born in Germany and began the business of a hair dresser in Zurich and Geneva in Switzerland. Then he removed first to Paris, and afterwards to London, where he maintained an establishment for several years, and was employing some 23 persons just prior to the breaking out of the war. In 1915 he removed to New York City, where he has since carried on his business. The president of defendant company, Ernest O. Frederics, was also born in Germany, where he learned his trade. He, too, removed to London, where he pursued his occupation as a maker of wigs and hair dresser. He also removed to New York City in 1914, where he established himself, and he describes his occupation as that of "permanent" hair waving, and states that he first started to wave hair upon the head in 1916.

The patents in suit are three. Patent 1,052,166, being the apparatus patent granted Nessler, contains six claims and the complaint alleged that the defendant infringed particularly claims 3, 4, 5, and 6. The court below held claim 5 void. That claim we do not need to consider, as on the argument in this court it was withdrawn by the appellant from consideration on this appeal.

Claim 3 reads as follows:

"3. In apparatus for waving hair, the combination of a curler, a tubular heater, a tube closed at one end for receiving said curler with the hair thereon, and adapted to be inserted in said heater with the closed end outermost; the said heater being provided at its outer end with a vent for the gases issuing from the inner end of said curler receiving tube, substantially as described."

Claim 4 reads as follows:

"4. In apparatus for waving hair, the combination of a curler, an absorbent material for enveloping the curler with the hair thereon, a tube closed at one end and adapted to receive the curler with the hair and absorbent material and cover the same, and a heater within which said tube with its contents may be inserted."

Claim 6 reads as follows:

"6. In apparatus for waving hair, the combination of a curler, a tubular heater, a tube closed at one end for receiving said curler with the hair thereon and adapted to be inserted in said heater with the closed end outermost, means for loosely binding the open end of said tube about the hair; the said heater being provided at its outer end with a vent for the gases issuing from the inner end of said curler receiving tube, substantially as described."

The court held none of the above claims infringed.

Patent No. 1,052,167, being the process patent, contains three claims, all of which the court held not infringed. Claim 1 reads as follows:

"1. The herein described process of waving hair, which consists in coiling the hair, then covering it with absorbent material suitably moistened, then applying a suitable liquid or lotion and heat, and causing the gages or vapors liberated by the heat from said liquid or lotion to act on the hair through the absorbent material, substantially as and for the purpose set forth."

Claim 2 reads as follows:

"2. The herein described process of waving hair, which consists in coiling the hair, then covering it with absorbent material, then applying a suitable liquid or lotion and heat, and causing the gases or vapors liberated by the heat from the said liquid or lotion to act on the hair through the absorbent material, substantially as and for the purpose set forth."

Claim 3 reads as follows:

"3. The herein described process of waving hair which consists in coiling the hair, then covering it with absorbent material suitably moistened and inclosing the same in a closed vessel or tube containing a lotion, and applying heat to the vessel and vaporizing the lotion, and causing the vapors or gases to act on the hair through the absorbent material while said vapors or gases are confined, substantially as and for the purpose described."

The court also held that the above claims were not infringed.

Patent No. 1,186,533, being the Aldworth patent, contains eight claims. The complaint put in issue claims 1, 2, 3, 4, 5, 6, and 7 thereof, and the court held this to be a good and valid patent as to claims 1 to 7, inclusive, and that defendant had infringed each of claims 1 to 7, inclusive. As the defendant has not appealed, it is not necessary to consider these claims, and no reference to them is hereinafter made.

The plaintiff in its appeal insists that the court erred in dismissing the bill as to patent No. 1,052,166, the apparatus patent, and as to patent No. 1,052,167, the process patent, on the ground of no infringement

- [1] A process and an apparatus by which it is performed are distinct matters. They may be found in one patent, or they may be the subject of different patents. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034; Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805. In Steinmetz v. Allen, 192 U. S. 543, 24 Sup. Ct. 416, 48 L. Ed. 555 (1904), the court held that rule 41 of practice in the Patent Office, in so far as it required a division between claims for a process and claims for an apparatus, if they are related and dependent inventions, was invalid.
- [2] In his original application for a patent Nessler did not separate his apparatus invention and his process invention, and on October 19, 1909, the examiner in the Patent Office wrote him, calling attention to the fact that the inventions were separate and independent, and that "division is required between the two sets of claims above mentioned before action on the merits of the case can be given." This was after the decision in the Steinmetz Case. The reason for this action in the Patent Office in asking for the separation of the claims was that the claims for the process and those for the apparatus were not regarded as "related and dependent inventions." It is evident that the process patent might be infringed without using the specific apparatus disclosed in the apparatus patent.

In Cochrane v. Deener, 94 U. S. 780, 788 (24 L. Ed. 139), the court, speaking through Mr. Justice Bradley, said:

"A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing. If new and useful,

it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

The patents in suit relate only to the waving of hair while on the head, which is a special problem quite distinct and apart from the problem of waving hair which has been severed from the head and which is known as "commercial" hair. The testimony shows that at the time these patents were taken out it was known that commercial hair could be so treated as to produce a wave having a considerable degree of permanence. The process used in the case of commercial hair consisted in moistening the hair, winding it tightly around a curling stick, winding strips of paper around the hair and strips of cotton cloth over the paper. Then the hair on the stick thus covered was put in a vessel containing water and borax in solution and boiled from 2 to 8 hours. It was then placed in a drying oven to steam for 3 to 6 hours (according to one patent for 12 to 48 hours). The hair then was unwound from the curling stick and combed. The wave thus produced in the hair is said by some, but not by all, to be a "permanent" wave.

But, whether permanent or not, it seems to be conceded that hair so treated retained its wave for years in spite of repeated washings. This result was due, not merely to the use of liquids, or heat, or pressure, but to the subjection of the hair, while tightly wound, to the action of steam. Chemicals were not always used in this steaming operation.

The above process is inapplicable to hair on the head. Hair, of course, cannot be boiled when on the head; neither can it be kept in a drying and steaming room for a long period of hours while on the head. The most common process used some 25 years ago for curling hair on the head was to take a strand of the hair, moisten it, and wind it around a metal tube some three or four inches in length, and then insert a heated rod in the metal tube, so that the heat could be transmitted through the metal tube to the moistened hair outside of it. There is some testimony in the record that sometimes a piece of wet cloth was wound around the curler before the strand of hair was wound on; but there is evidence at least that this was not done with what was known as the "Cleveland" or "Columbia" curler.

It appears that permanence of wave depends upon the use of steam, and that heat alone does not accomplish it; and the prior art left unsolved the problem of steaming the hair while on the head, so as to obtain a permanent wave, and the Nessler patents, including the Aldworth patent, all relate to waving natural hair on the head. In his specifications of letters patent No. 1,052,166, the apparatus patent, Nessler says nothing about a permanent wave; in his specification of letters patent No. 1,052,167, the process patent, in describing his improved process in a passage hereinafter quoted in this opinion, Nessler says that waves produced according to his process "are practically permanent"; and in the specification of letters patent No. 1,186,533 Aldworth asserts that he has invented "a new or improved permanent

hair-waving appliance," but in no one of the claims in this patent does Aldworth use the word "permanent." That word is absent from the "claims" of all three of the patents in suit. The use of the word "permanent," whether in connection with the waving of hair on the head or off the head, is more or less misleading. The extent of permanency in a wave depends upon the amount of steaming and heating the hair has been subjected to, and also upon the quality or texture of the hair itself—in fine hair the "permanency" of the wave does not last as long as where the hair is of a coarser texture.

When Nessler applied in 1909 for his process patent, he described in his specification the then known process as follows:

"A known process for waving hair consists in tying a curler of the ordinary kind (for example, a thin metal tube, which may be about 3½ inches long) to a portion of the hair about as thick as the curler, coiling the hair around the curler, applying suitable lotion, then covering with a tube (of compressed paper, asbestos, or other suitable material) closed at one end, and applying a heating iron outside the tube."

Nessler, when on the stand, was asked how long he had known that process, and his reply was, "since October, 1905," when he stated it in an address before a body of hair dressers and medical men in London. Then the following colloquy took place:

"Q. What was the result of the use of this thing which you have described here as the known process; how satisfactory was it? A. The known process produced practically the same results as the present one, but it was extremely slow and unsafe.

"Q. When you say 'extremely slow,' how long did that old process take? A. Seven or eight hours for a head of hair.

"Q. And how much quicker is your present process? A. Considerable, because the present process heats a whole head of hair in eleven minutes altogether, and with the old process the heaters had to be held by hand, one after the other, and the heating consequently would take from three to four hours."

In the specification for his process patent, No. 1,052,167, Nessler states his improved process as follows:

"In my improved process I coil the hair around the curler as in the practice above referred to, but I do not apply the lotion directly to the hair. I wrap a strip of flannel or other similar absorbing material moistened with water helically over the hair on the curler, so as to completely cover the said hair. I then pour a suitable lotion into the tube and allow it to collect in the closed end thereof, and I then place the tube over the hair on the curler, so as to cover the same, and apply the heating iron. I find that by thus keeping the lotion from direct contact with the hair, and only allowing the gases or vapors liberated by the heat to act on the hair through the moistened flannel, great advantages are obtained. The waves so produced are practically permanent and appear quite natural; whereas hair waved by ordinary processes is rendered straight again by moisture in the atmosphere or by washing. Hair waved by my process, though it may possibly become straight, if allowed to get dirty or greasy, will resume its waved condition on being washed. After the tube has been placed over the hair, the open end may, if desired, be closed down on the hair by tying with string or otherwise, so as to prevent too ready escape of the vapors. It will be understood that I may use any convenient known form of heater, electric or other; but I prefer to employ an electric heater as specified in the specification accompanying my application filed on 6th August, 1909, serial number 511,562.

Nessler claims that prior to his process the effect obtained as to hair on the head was a temporary waving, and that the result of his process was the permanent wave. He says that hair heated according to the prior process came back into straight form immediately it was allowed to come in contact with humidity; that it would reasonably keep its shape, it might be for one day, two days, a week, perhaps, but no longer, and the moment any drop of water came on any particular piece the hair became straight. Nessler under his process guarantees a permanent wave, which he says lasts forever, less the new hair which grows. No one can shampoo the wave out of the hair treated by the Nessler process. This is contrary to the testimony of numerous witnesses, as already stated, that there is no such thing as a permanent wave. But if Nessler produces a permanent wave, Frederics does not produce a wave that is permanent; so that the result attained by Frederics is not the result attained by Nessler. says his result lasts forever; but Nessler's own witnesses prove that Frederics' "permanent" wave lasts only three months, and Nessler bases his claim on the allegation that his combination of the old elements produces a new result, which is a permanent wave, as distinguished from a temporary one, which was old. There is nothing in this record which shows that Frederics has ever produced a permanent wave. A wave that is "everlasting" and one that lasts for three months are hardly one and the same.

One of the most experienced witnesses defined a permanent wave as "a wave that can be wetted and which will retain its wavy effect." The witness was a member of a firm which had been in existence for 47 years, and he had been with it for 26 years. His firm is credited with being the largest wholesale hair dealers in the world, and it had 3,000 accounts in the United States. This witness testified in very positive terms that permanent waves were produced in hair on the head prior to Nessler, and by the use of the old Cleveland hair waver device. This is an excerpt from his testimony:

"Q. You have seen the use of the Cleveland waver on the hair to make a permanent wave? A. Positively.

"Q. Was it then called the everlasting wave? A. Yes; they referred to it as the everlasting wave."

And he testified that hair so waved retained its wave after it had been shampooed. In this he was substantiated by other witnesses. A manufacturer of toilet preparations, including a hair-curling fluid, was asked as to the Cleveland device, which was used 25 or 30 years ago:

"Q. Would the hair stand wetting after the use of this device, and still retain it? A. Yes; if the rod is heated sufficient, so as to help bake the wave in shape.

"Q. It will stand wetting? A. Yes."

The gist of the Nessler invention, as stated by his counsel at the argument, but not by Nessler in his specifications, is the provision made for obtaining more steam. It consists in having a reservoir of liquid, thus providing for more moisture than would be obtained by merely wetting the hair, and then heating this reservoir of liquid so as to produce steam, and then so confine the steam that it will be held in contact

with the hair. What Nessler hoped to get was more steam than he thought he could secure if he merely moistened the hair, and instead of applying the heat directly to the hair, as had previously been done, he applied the heat to a reservoir of liquid or lotion and produced vapor which he forced into the hair to heat and moisten it. Plaintiff's counsel say in their brief:

"The point is that considerable steam must be generated and be applied to the hair to effect the desired result, and this requires a reservoir of liquid to be converted into steam, and this reservoir is between the heater and the hair, so that there shall always be a wet heat applied to the hair, and not a dry heat, as is the case when the heater is next to the hair, as it was in the use of the Cleveland heater, in which, as soon as the moisture is driven out of the hairs next to the metal tube, those hairs are subjected to heat alone. The use of the Cleveland heater results in drying the hair; the use of the Nessler invention results in moistening the hair by driving steam into it."

As it appeared to the court below, and as it appears to this court, the crux of this litigation is to be found in this moisture and in the manner of applying it to the hair. If we concede that Nessler was, as is asserted, the first to treat coiled hair with vaporized lotion only, and that the lotion might mean solution of borax or just water, anything that steams, then the question is whether the borax pad used by Frederics is an infringement. The court below has found that it is not; that the vaporizing of a lotion, which is an essential part of Nessler's process, has never at any time been used by Frederics in his process of treatment. When Frederics first began to wave hair in this country, which was in 1916, he used a tube. He testified about this as follows:

"Q. Describe the tube which you used. A. There was blotting paper on the inside of the tube, and this holding borax paper, and an outer tube is ordinary papier-maché, and this was put in water and of course it absorbed right away the water, and then I placed this over a curler and tightened it close to the scalp, and after it was tight I placed another shield here, and then placed a heater over it to steam it, and a certain amount of steam was kept in the tube, and a certain amount escaped.

"Q. Did you at that time use a tube closed at the outer end? A. No.
"Q. Have you ever used a tube which is absolutely closed at either end, A.

No.

"Q. The one next to the hair is simply field around the hair as tightly as you can get it? A. Yes.

"Q. Sometimes you tuck a little cotton in the end of one. A. Yes."

In this use of the tube he was notified by the plaintiff that he was infringing the Aldworth patent. He then consulted counsel, who advised him to discard it, which advice he followed, and ceased to use the tube in February, 1917. In the use of the tube, as the court below found, and as is now conceded, the defendant infringed the Aldworth patent. After discarding the tube, he adopted a steam pad, and his use of that was explained as follows:

"A. After the hair is wound on a curler, I place the solid cake of borax right up against the hair. I wet it, of course.

"Q. Describe how that is made. A. A solid piece of borax powder has been

wet, and then in a cake form placed on a paper.

"Q. A cake of borax? A. And this is placed around in order that the powder should not fall out, just to carry this borax powder.

- "Q. Why do you have the stitches there? A. So that the powder should not sift-fall out.
- "Q. You have got the borax stitched into a rectangular pad? A. Yes. "Q. What do you do with your rectangular pad when you are going to beautify the hair? A. I wet it first.
 - "Q. What do you do next? A. Then I put this tight around the hair.
- "Q. Make a tube of it, and then wrap it in a tubular form around hair?
- A. I put it as tight as I possibly can around the hair.
 "Q. And then what do you do? A. Then I place a paper tube over this and close it on the inside against the scalp, and the other side I leave open for the steam to escape.
- "Q. And then what do you do next? A. And then I place a heater over, and put on the heat for about 14 to 17 minutes, and then the heat produces steam, and after this head has been heated for about 17 minutes I switch off the heat, and take the tube off, and shampoo the hair, and then there is a permanent wave."

He continued his testimony as follows:

- "Q. Have you ever wrapped a flannel around the hair on the curler? A. In the beginning, before I had this steam pad, I used a flannel against the hair. I placed borax powder on each side of this flannel, and placed this around the curler.
- "Q. So that borax came into intimate contact with the hair? A. Yes; that is my chief point, that I want to bring the borax right on the hair.
- "Q. You want to get it as close to the hair as you can? A. As close as possible.
- "Q. You said you never used a closed tube. Did you ever use any lotion which you poured into the tube? A. No; I do not use any lotions.
- "Q. And you have never used any tube which you could pour a liquid into? A. No.
 - "Q. What did you use to wet the pad? A. Water.
- "Q. You never used anything else except water? A. That is what I used; I dipped it in ordinary water.
- "Q. In the use of your tubes, what becomes of the steam that is produced by the heating of the moistened tube-moistened pad? A. It escapes on the other side of the tube.
- "Q. You do not want to keep the steam in there? A. I want to keep a certain amount, so that the pressure should escape, so that there is not too much suction on the head.
- "Q. You keep it there until the hair is dry? A. Not exactly; sometimes it is, and sometimes it is not.
- "Q. Does the element of personal skill have anything to do with the way you carry on your process? A. That is the principal thing really; the skill and the knowing of this operation is the principal thing. The apparatus cuts very little."

Nessler describes his process as consisting:

"In coiling the hair, then covering it with absorbent material suitably moistened and inclosing the same in a closed vessel or tube containing a lotion, and applying heat to the vessel and vaporizing the lotion and causing the vapors or gases to act on the hair through the absorbent material while said vapors or gases are confined, substantially as and for the purpose described."

But, while Nessler thus incloses the hair and absorbent material in a vessel or tube containing the lotion, the process of Frederics does not contemplate vaporizing a lotion in a closed vessel and causing the vapors to act on the hair through absorbent material while the vapors or gases are confined.

The process of Frederics in large degree comes within the terms of Nessler's disclaimer, heretofore quoted as the known process. The "suitable lotion" referred to in that disclaimer is in Frederics' a borax paste, and the end of the tube, which in the disclaimer is closed at the end, is in Frederics' process left open, and so is not capable of holding a liquid. In leaving the end of the tube open Frederics differs from Nessler's claim in the process patent, in which he claims "a closed vessel or tube." Nessler uses a lotion, which he seeks to keep separate from the hair by covering the latter with an absorbent material. Frederics uses a paste, which he strives to get as close to the hair as possible, by eliminating the absorbent material and by using a pad sewed with a big needle to permit more ready escape of the borax paste. In the Nessler process the hair wrapped in some absorbent material is placed in a closed vessel or tube, into which a lotion is poured, and the gases liberated by the heat are caused to pass through the absorbent material. The difference between the Frederics and Nessler processes is plainly manifest.

The use of borax on the hair and the moistening of the hair with water and a cloth were old in the art, and Frederics unites them in a moistened pad, putting the borax inside the pad, and by this means he obtains perhaps five or six times the amount of water that could be applied directly to the hair. By using four plies of material in the pad, the water-holding capacity of the pad is increased; each ply increasing the water-holding capacity within itself, as well as by its juxtaposition to its neighbor by capillarity. The suggestion that this flat pad is converted into a tube, because it is wrapped as tightly as possible around

the hair, is an argument we are unable to follow.

Frederics testified as follows:

"Q. Is there anything in your process you care about which is a matter of secrecy? A. No.

"Q. Will you let every one know just how you do it? A. Yes."

Nessler testified as follows:

"Q. I have given you an opportunity to state what you have done to that hair which makes it permanently wavy, if it is any different from what you were taught to do with commercial hair in Switzerland. Have you anything that your wish to say? A. About ten minutes ago I explained that this is done on a scientific basis, and the other by mere physical force and time.

"Q. The scientific basis is that you use the electric heater? A. No.
"Q. What else is there? A. I beg your pardon; I would rather not explain that in open court. It is a matter of commercial secrets, and here

are people who know nothing about that, and whom I do not want to know. "Q. Very well; I do not wish to inquire into your commercial secrets."

In Nessler's specification of his process patent, No. 1,052,167, already quoted, he states that he pours "a suitable lotion into the tube." The court below understood that Nessler meant by "a suitable lotion" something which by its ingredients assisted in curling. And the court in its opinion said:

"If this were not so, he would never have differentiated between the water which moistened his flannel and the lotion to be vaporized in his tube. Indeed, in his testimony he seems to me substantially to admit the use of a preparation regarded by him as sufficiently valuable in 'permanent curling' to be kept secret."

It is difficult for us to resist the conclusion that Nessler's process involves the use of some undisclosed lotion, which constitutes the "suitable" lotion, the use of which enables Nessler to obtain a wave which he says is "everlasting" and the want of which makes Frederics' wave one of "about three months."

We are also satisfied that the Nessler apparatus patent, No. 1,052,-166, is not infringed. The specification of this patent states that:

"My invention consists in part in providing an orifice 12 in the handle end of the heater for the purpose of allowing the steam and gases to escape when the heater is in use as illustrated in Fig. 1. The steam and gases pass out of the open end of the compressed paper or like tube which incloses the hair on the curler, and then pass between the outer surface of the tube and the inner surface of the heater until they reach the orifice 12. In some cases the steam and gases may pass through the material of the tube, or through the tied-up end 20. Such an orifice as 12 has not been provided in heaters of this kind hitherto, and the steam and gases having their only exit from the orifice next to the subject's head have been apt to cause burns on the scalp. Another feature of my heater is the tapered shape of the end 21. Heaters have hitherto been made with flat ends, and unless such heaters are held with the end quite flush with the head the hair will not be completely embraced by the heater."

In the prior art hair had been waved by winding it about a curler, applying a lotion, covering it with a closed tube of paper, asbestos, or the like, and applying that heater outside the tube. Heaters heretofore used in this process lacked vent 12 and did not have the tapered ends shown in the patent; but, as none of the claims of the apparatus patent sued on specifies the tapered end, we do not need to consider it. The vent 12 is, however, mentioned in claims 3 and 6. This vent appears to us to be useless. The vapors generated within the heater are supposed to escape through this vent 12 thereby saving the scalp from scalding. A glance at figure 5 of the patent, however, shows inside the heater a paper tube closed at the end 20. As the patent states at line 49, steam is generated within this paper tube and passes through the open end thereof 22. As this open end is tied to the hair close to the scalp, here is where the scalding would occur, but for the fact that the steam is supposed to turn back on its course and pass through the narrow space between the paper tube and the inner wall of the heater and escape at vent 12. Counsel for the defendant, in commenting on the fact that it is not disclosed why the steam should take this accommodating course, says that the apparatus claims 3 and 6 of the patent are rendered hopelessly silly by this theory as to vent 12.

However that may be, the defendant does not infringe these claims. Nessler's heater has a vent. Frederics' heater has no vent. Instead of his paper tube being inclosed by the heater, the paper tube extends through the outer end of the heater and there is no use for a vent. The claims of the patent specify that the tube is closed at one end, and the context shows that this means closed in a sense different from tying it down on the hair, because it is the end 20 that is indicated as the closed end, although the other end, 22, is tied down on the hair. Frederics ties one end of the tube to the hair and into the other end slips a little wad of cotton, and neither end is closed, within the mean-

ing of the patent as the court below has found.

At the argument it was said that the court below misunderstood this vent, and our attention was called to the fact that the vent is in the heater which surrounds the tube, and not in the tube, as it is alleged the court thought. We do not see that the court labored under such misapprehension. The language quoted in the brief of counsel indicates to us the reverse of what it indicates to him. The language is as follows:

Claims 3 and 6 "are not infringed because, assuming that good combinations are stated, Frederics' heater has no vent, nor can I think that the end of his projecting tube, pinched and lightly stuffed with cotton, is the equivalent of a vent in the heater furnishing exit for gases issuing from the inner or head end of the tube."

This court is under no misapprehension on that point. We understand that in Nessler's apparatus the vent is in the heater of the patent and at its outer end, and that it is for the gases issuing from the inner end of the curler receiving tube. But it makes no difference whether the vent is in the heater or whether it is in the tube, provided Frederics does not make any use of a vent, and the court below has found that he does not.

If before Nessler it was not known how to produce a permanent wave in hair on the human head, and Nessler through his patent or patents discloses how a permanent wave in such hair can be produced, he would seem entitled to claim patentable invention for what he discovered; but if there is no such thing as a permanent wave in hair, either on or off the head, and if the principle which underlies the subject, as one of the witnesses testifies, "is the same way back from the beginning of the world," and the process of the prior art and Nessler's process produces, as he admits, "practically the same results," Nessler has simply, by substituting an electric heater for a hand iron, been able to steam hair on the head more effectively than was possible by the use of hand irons, or has by the use of an electric heater and a "suitable" lotion, not disclosed, produced a wave which lasts somewhat longer than one produced by the hand iron, we are not prepared to say that he has "discovered" something which he is entitled to patent. If he has in fact made a real discovery in the art, we are inclined to believe that it lies in the "commercial secrets," which he did not wish to disclose, and which cannot be patented until disclosed.

In the hair-dressing art a curler, a tube, a heater, and the use of borax were all old in the art. So it was old in the art to moisten the hair, either with water or with a curling fluid. It was old to use a piece of cloth on the hair, and to saturate the cloth with either water or some kind of curling fluid. It was old to steam the hair and to bake it. One of the witnesses, who testified that he had no interest in the case, said:

"My theory of hair waving is simply that the waving hair principle is the same as we have done years ago. They applied it on the head, the same as off the head. The principle is the same thing, winding the hair around, dampening it with a cloth, or any other way. The only difference is on the head that they are giving a little protection to the ladies, so that they should not burn their heads."

And as one of the witnesses testified:

"The cloth was put around the outside to keep the steam in."

A witness who had been in the hair-dressing business all his life, and whose father had been in the business before him, was asked whether there is a difference between permanent waving as done to-day and as done 25 years ago and he replied that the wave is more permanent now. An excerpt from his testimony follows:

- "Q. Is there any difference in the problem of waving hair then and now?
- A. No; it is the same process. "Q. And you get a more lasting wave? A. With the modern process.

"Q. Because of what? A. Because of the steam.

"Q. Because of the greater amount of steam? A. Steam and heat produced. "Q. What is that due to? A. That is due to the electric iron.

"Q. What they have called the electric heater? A. Yes."

The Supreme Court has recently had occasion to once more call attention to a well-established principle in the law of patents. In Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196, the court has again declared that a combination of old elements, evolving no new co-operative function, and producing no new result, other than convenience and economy, is not patentable; and the statement made in Richards v. Chase Elevator Co., 158 U.S. 299, 302, 15 Sup. Ct. 831, 833 (39 L. Ed. 991), was repeated as fol-

"Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements."

Decree affirmed.

CHEATHAM ELECTRIC SWITCHING DEVICE CO. v. TRANSIT DEVELOPMENT CO. et al.

(Circuit Court of Appeals, Second Circuit. November 19, 1919.)

No. 38.

1. PATENTS \$\infty 277-DAMAGES AWARDED IN ACTION FOR INFRINGEMENT NOT CONCLUSIVE IN SUBSEQUENT SUIT BY PATENTEE,

Where, in action at law for infringement of patent, jury awarded patentee practically \$70 for each infringing device, held that, on patentee's subsequent bill to recover damages and profits because of use of infringing devices after action at law, as well as use of other infringing devices, verdict of jury is not conclusive standard as to amount which patentee is entitled to recover for each infringing device, for an award of damages is compensatory; hence, where the record of the action at law was relied on to show the amount of damage, only nominal damages can be

2. PATENTS \$\infty\$ 324(5)—APPELLATE COURT WILL NOT CONSIDER AMOUNT OF PROF-ITS WHERE RELATIVELY UNIMPORTANT.

In an infringement case, where evidence as to profits of infringers was entirely unsatisfactory, and amount recoverable as profits was insignificant, compared with cost of litigation, held, that the appellate court is not disposed to disturb the ruling of the trial court as to profits.

3. Patents \$\igsigma 326(4)\$—Patentee not entitled to additional compensation because of infringers' contempt.

A civil contempt in a suit for patent infringement is no ground for additional damages to the patentee, and where defendants' delay in ceasing the infringement did not result in any loss to him, the patentee cannot complain that he was merely allowed a sum sufficient to cover his expenses of investigating whether there had been a compliance with the injunctional order.

- 4. Costs \$\insigma 13\top Allowance in equity discretionary.

 The allowance of costs in equity is discretionary.
- Costs ≡ 187—Fees of expert witness cannot be taxed as costs or disbursements.

While ordinarily witness fees are taxable, fees paid by defendant in an infringement suit to an expert witness cannot be taxed as costs or disbursements, for an expert cannot be required to testify as an ordinary witness, but sells his opinion, just as counsel sell their services.

Appeal from the District Court of the United States for the Eastern District of New York.

Bill by the Cheatham Electric Switching Device Company against the Transit Development Company and the Nassau Electric Railroad Company. From the final decree, plaintiff appeals, and defendants also appeal. Modified on defendants' appeal, and cause remanded, with directions.

The bill herein was filed July 14, 1911, and this case was before us in 209 Fed. 229, 126 C. C. A. 297, on appeal from an interlocutory decree. The accounting mentioned on this previous appeal having proceeded, the master reported, and the court allowed certain damages; but the master's finding that "as to profits it is not proven that the defendants made any" was confirmed by the District Judge. From the final decree, both parties have appealed.

by the District Judge. From the final decree, both parties have appealed. The plaintiff brings up also the refusal of the lower court to punish, or sufficiently punish, defendants for contempt; i. e., because they did not with sufficient speed obey the preliminary injunction issued in this case. The defendants raise in addition a question of costs, which will be adverted to hereafter. It will be understood that by the word "record," as used in this opinion, is meant the record of the whole case, viz., that submitted to us in 209 Fed. 229, 126 C. C. A. 297, in addition to the one prepared on these appeals.

O. Ellery Edwards, Jr., of New York City, for plaintiff. Thomas J. Johnston, of New York City, for defendants.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Pursuit by plaintiff of these defendants began with an action at law, in which summons was served on or about January 4, 1911. That action was tried before a jury, and resulted in a verdict, which found in effect that defendants, or one of them, had infringed plaintiff's patent by using eight electric railway switches, as to each one of which the jury awarded plaintiff \$68.93.

A writ of error was taken to this judgment, and we reviewed the case in 194 Fed. 963, 114 C. C. A. 599. 'This bill in equity was brought to recover such damages and profits as plaintiff might be entitled to by reason of (1) the use of said eight infringing switches after January 4, 1911; and (2) whatever similar recoveries the plaintiff might

be entitled to in respect of other similar switches not shown or proved to the jury in the action at law. The interlocutory decree (affirmed in 209 Fed. 229, 126 C. C. A. 297, and never complained of by plaintiff) provided:

"That as to the eight devices as to which a recovery has been had at law the complainant shall recover nothing further as profits or damages prior to January 5, 1911."

From the beginning one of the issues in this cause has been the relation of the Transit Development Company to the operation of these switches, and we held on the previous appeal that "the extent of the infringement will be a subject for inquiry on the accounting." On this point the master found as a fact that the Development Company—

"owns no lines of railway and no cars to be operated thereon, and neither owns nor operates nor otherwise uses any switches such as are complained of in this case."

This finding was not excepted to, and is not assigned for error. Another issue appearing in the pleadings is whether plaintiff marked its switch as patented, as prescribed by statute, or gave notice to defendants of their alleged infringement. On this point the master made a finding unfavorable to the plaintiff, which was excepted to on the ground that—

"He should have held that each of said switches was duly marked, notice was duly given, and that defendants continued their infringing

acts after such notice."

This exception the court sustained, but after examining the record we hold that plaintiff is not shown ever to have marked its switches, and that it gave no notice of infringement to the defendants, other than by bringing the action at law aforesaid on January 4, 1911.

The last of the offending devices ceased to be used (so far as this record shows) in April, 1912. The method of fixing damages pursued with partial success in the court below was as follows: Plaintiff introduced the record in the action at law (194 Fed. 963, 114 C. C. A. 599), and demanded \$68.93 damages for every switch proved to have been used by any defendant because that measure of damage had once been awarded by the jury, and for the same reason the same sum was demanded, not only for every infringing switch not shown to the jury, but for each of the previously proven switches whose use con-

tinued after January 4, 1911.

[1] It is now said that this quantum of damage became res adjudicata as between the parties hereto, and that the ruling of this court in 209 Fed. 229, 126 C. C. A. 297, is to that effect. We fail to discover that that decision in any way states such doctrine; indeed, it is beyond the power of any jury, or of any judgment resting on a jury's verdict, to set a standard of damage binding on every later trier of similar facts between the same parties. The jury referred to found that by defendant's use of the eight certain switches in certain places and at a certain time plaintiff suffered a certain damage per switch. But damages (when not punitive) are compensation for plaintiff's losses under a certain set of facts and circumstances; non constat that

this plaintiff lost as much by not selling defendants a switch in the month of December as it did by a similar failure in June, and it certainly does not follow that, because plaintiff lost \$68.93 by defendant's use of a switch down to the date of lawsuit brought, plaintiff lost another \$68.93 by defendant's failure to remove that switch until some time later.

An assessment of damages is not the fixing of a penalty, to be inflicted every time the same defendant injures the same plaintiff. It is a valuation of injury, which, while often the same in kind, can never be assumed to be the same in degree. The use of the record here by plaintiff does not rest upon reason, while on authority it is opposed to Ecaubert v. Appleton, 67 Fed. 917, 15 C. C. A. 73; approved in Cheatham, etc., Co. v. Brooklyn, etc., Co., 238 Fed. 172, 151 C. C. A. 248, and to the reasoning in Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195. There was, therefore, no evidence justifying an award of damages to plaintiff.

[2] In attempting computation of profits, plaintiff seems to have overlooked the above-recited language of the interlocutory decree and the undisputed finding of the master in respect of Transit Development Company. It certainly has assumed that defendants could be treated as liable for infringement, not from January, 1911, but from a much

earlier date.

The theory of profit computation advanced is that every infringing switch dispensed wholly with the services of a switchman, who had previously been employed for every day in the year and 24 hours per day; but it is plainly proven that at few points where any infringing switch was used had a switchmen ever been employed, and that at no point had a switchman's services been utilized all day and all night.

These errors always rendered any accurate computation of profits impossible, and when it is observed that under the interlocutory decree plaintiff's right to profits on the eight switches of the action at law began with January 4, 1911, that there were not over two infringing switches of the Nassau Company which supplanted a watchman even during the "rush hours," and that all right to either profits or damages as against the Transit Development Company (in respect of switches not shown in the action at law) was swept away by the master's unopposed finding, the possible residuum of recovery in this case becomes trivial in comparison with the costs of this protracted litigation. Under such circumstances, we are not disposed to interfere with the disposition of profits made by the court below.

[3] The contempt order questioned by plaintiff's appeal arose as follows: When in 1912 the preliminary injunction herein issued, obedience thereto meant either taking down or electrically disconnecting certain pieces of apparatus situated in somewhat widely separated regions of Brooklyn. We think that defendants obeyed the injunction rather leisurely. Plaintiff employed an investigator to watch their proceedings, and then made a motion to punish for contempt; such contempt consisting in delaying the substitution of noninfringing devices in places where some apparatus was necessary to carry on the

business of a public service corporation.

On this motion the court held that defendant's conduct "was not such a contempt as should be punished, beyond the expense of ascertaining whether defendants had complied" with the injunction. The judge then assessed expenses at \$150, entered orders accordingly, and plaintiff accepted and retained the money. The practice pursued herein is something as to which we express no opinion, but hold that (1) in substance the court did actually declare a contempt committed, and (2) in effect fined defendants \$150 therefor to the use of plaintiff.

Contempt is not to be regarded as a source of revenue or additional damages to a complainant. A civil contempt, such as this, may result in reimbursing complainant, not for infringements as to which he may seek damages and profits before a master, but for losses and expenses to which he is subjected by the offender's contumacious conduct. This record shows no loss of any kind to plaintiffs by reason of defendant's delay in disconnecting the aforesaid apparatus, and its expenses were reasonably covered by the \$150. We find no error in the result now

complained of.

[4, 5] The question of costs first above referred to is this: Defendants have twice paid an expert witness a considerable fee, in order that he might testify in the long series of litigations between these parties. It is urged that defendants should be permitted to tax the expert's fee on his second appearance as a disbursement. Allowance of costs, etc., in equity is discretionary, but definition of costs and taxable disbursements is a matter settled by statute or ruling authority, and we hold that expert's fees as witnesses are not legally taxable as costs or disbursements. Ordinary witness fees are taxable under the statute to be sure, but on the theory that the law requires the witness to attend and speak. An expert sells his opinion, as counsel sells his services, and he cannot by law be compelled to testify at all, while an attorney may be compelled to serve. There is considerably less reason for taxing experts' fees than might be urged for taxing the expense of legal counsel.

The decree under consideration is modified on the appeal of the defendants, and the cause remanded, with directions to enter a decree for nominal damages only. The defendant will recover one bill of costs in this court. The adjustment of costs between the parties on the entry of decree for nominal damages is a matter remitted to the

discretion of the District Court.

THE ANNIE.

Petition of PEOPLE'S NAV. CO., Inc.

(District Court, E. D. Virginia, December 15, 1919.)

Shipping &==208—Owner of steamboat not entitled to limitation of liability.

Owner of a small steamer employed in carrying passengers and cargo held not entitled to limitation of liability for loss of life and property resulting from explosion of her boiler, on the ground that the condition of boiler and furnace was known to be unsafe, and that repairs were made thereon without previous notice or subsequent inspection required by statute and inspector's regulations.

In Admiralty. On petition of the People's Navigation Company, Incorporated, owner of the steamer Arnie, for limitation of liability. Petition denied.

Edward R. Baird, Jr., and R. Clarence Dozier, both of Norfolk, Va., for petitioner.

Hughes, Little & Seawell, of Norfolk, Va., and A. F. Aydlett, of

Elizabeth City, N. C., for cargo owners.

Herman Sachs, S. M. Brandt, and John W. Oast, Jr., all of Norfolk, Va., for death claims.

WADDILL, District Judge. The petition in this case was filed on behalf of the People's Navigation Company, Incorporated, to secure a limitation of its liability as owner of the steamer Annie from losses arising by the explosion on and destruction of the steamer at a wharf in Elizabeth City, N. C., on the morning of April 5, 1918. The facts in connection with the ownership and operation of the vessel are briefly these:

The People's Navigation Company, a corporation duly organized' under the laws of the state of Virginia, owned the steamer Annie, a small single screw wooden freight and passenger steamer, 72 tons gross, 97 feet long, 23 feet 6 inches beam, and 6 feet 5 inches deep, and at the time of the disaster in question was engaged in operating her between the ports of Norfolk, Va., and Elizabeth City, N. C., through the Chesapeake & Albemarle Canal, making triweekly trips between the two cities. On the evening of the 4th of April, 1918, the Annie left Norfolk laden with a cargo of general merchandise, bound for Elizabeth City, where she arrived between 5 and 6 o'clock the next morning. About 8 o'clock of that morning, she was moved to the dock of W. J. Woodley, and while there, about 8:45 a. m., an explosion of great violence occurred on the steamer, whereby she was totally wrecked and destroyed, her boiler blown out of her, and a great part of the cargo destroyed, and the remainder badly injured and damaged. Five of the crew of the vessel, to wit, James Dowdy, assistant engineer, William Kinsey, second officer, Freeman Coleman, fireman, and Fred Robinson and George Smith, deck hands, and Anderson Morris, a bystander on the dock, lost their lives.

Shortly after the occurrence, to wit, on the 15th of April, 1918, the petition in this case was filed, setting forth the circumstances of the accident, and asking on behalf of the petitioner that its liability arising for and on account of the same be limited, pursuant to the statute providing for such relief in proper cases, and that the prosecution of all other suits growing out of said disaster be enjoined and restrained. Persons who had sustained losses, either in person or property, duly appeared in these proceedings, and the case is now before the court, having regularly matured, on the report of the special master as to the persons in interest and upon proofs taken on the merits of the case.

The essential facts regarding the ownership of the vessel, the happening of this disaster, and the losses sustained, both in life and property, are not seriously disputed, and the case turns almost entirely upon whether or not the petitioner is entitled to the limitation of its liability upon the facts as proved; in other words, was the vessel seaworthy at the time of the accident, or was her condition such, with the privity and knowledge of her owner, as to disentitle the petitioner to claim the benefit of limitation of liability under the laws of the United States?

Considerable testimony has been taken bearing on the accident, and the same is not free from conflict in some of its important aspects. The Annie was about 14 years old, and had had her last annual inspection about 11 months previous to the explosion, and some one of her intermediate, or 4 months, examinations, which is rather a superficial affair as compared with the annual inspection, had been made. At and about the time of the annual inspection in May, 1917, 41 staybolts were required to be put in the boiler, and at that time there was a crack of some 6 or 7 inches on the port side of the furnace, which was subsequently welded together. Later, some 50 other staybolts were put in. and some 13 were placed on the Sunday preceding the accident. The testimony showed that repairs to the boiler were made certainly four times during the 11 months subsequent to the annual inspection, and that on two or more occasions work was done at night and on Sundays at Elizabeth City, with such labor as could be procured for the pur-It also further showed that this work was not infrequently crudely done, and no proper or efficient test, hydrostatic or otherwise, made of the sufficiency of the same after it was done.

On the morning of the disaster, while tied to the dock, the boiler was leaking badly, as testified to by the fireman, who moved the steamer from her first landing to the dock where the accident happened, and one of petitioner's witnesses who worked on the vessel the Sunday before, a boiler maker and blacksmith, testified that on the completion of the work, upon being asked by the chief engineer about the condition of the boiler, replied, "It is all O. K. until it gives out again." It is true that the government inspectors, as far as they testified, tended to maintain the seaworthiness of the vessel; but a careful examination of their testimony will show that much of what they said and did was merely perfunctory, and that really the steamer was allowed by its owners to be used in a knowingly unsafe and dangerous condition.

The owners of the vessel make no claim to have complied with the rules and regulations of the Board of Steamboat Inspectors, imposing

the obligation upon owners of vessels not to make repairs or alterations to a steamer, affecting its safety, without notice. Subsection 5 of rule 6 of the General Rules and Regulations prescribed by the Board of Supervising Inspectors, Edition of November 21, 1916, p. 156, issued pursuant to section 4417 of the Revised Statutes (Comp. St. § 8172), is as follows:

"* * No repairs or alterations affecting the safety of the vessel, either in regard to hull or machinery, shall be made without the knowledge of the local inspectors. Notice of such repairs and changes is necessary, even if such work does not require the vessel to be placed in a dry dock, and even if there are no licensed officers attached to the vessel. Section 4417, R. S."

The repairs made as indicated on this vessel, sometimes at Norfolk, and sometimes at night and on Sundays at Elizabeth City, were of a character that affected the safety of the vessel in the highest degree, and consisted of welding cracks in the furnace, and removal of and substitution of staybolts in and about the fire box, and such like services, which, if not properly and efficiently performed, would inevitably bring about the accident which happened in this case. Nor does the petitioner claim to have caused proper inspection to be made of the boiler and furnace, after the making of important repairs, before using the steamer. Act Cong. June 26, 1884, c. 121, 23 Stat. 53 (1 Supp. R. S. § 440; Rev. Stat. § 4418 [Comp. St. § 8173]); The Annie Faxon, 75 Fed. 312, 319, 21 C. C. A. 366; Braker v. Jarvis & Co. (D. C.) 166 Fed. 987.

The court's conclusion, upon full consideration of the entire testimony, and having regard to the burden of proof properly resting upon the petitioner in such cases (In re Davidson Steamship Co. [D. C.] 133 Fed. 411; McGill v. Michigan S. S. Co., 144 Fed. 788, 75 C. C. A. 518; refused 203 U. S. 593, 27 Sup. Ct. 782, 51 L. Ed. 332; The Murrell [D. C.] 188 Fed. 727; In re P. Sanford Ross, 204 Fed. 248), is that the boiler and firebox of the Annie were not in such safe and suitable condition as to warrant their use and service in the business in which she was engaged, having regard to the safety of the lives and property of those likely to be endangered thereby, and, on the contrary, the same were in an unseaworthy condition prior to and at the time of the accident, with the privity and knowledge and full opportunity of knowledge on the part of the owners of the steamer's unfit condition, which resulted in the explosion, and the disaster that followed, and hence that the claim of the People's Navigation Company to a limitation of liability should be denied.

Counsel for the petitioner suggest that the force of the explosion, and the results thereof, was greater than would have arisen from an ordinary boiler explosion, and suggested that the same occurred by reason of dynamite or other high explosive having gotten in the coal bunker of the vessel. This theory is not supported, in the court's view, by any tangible evidence, nor is there anything in the suggestion that the explosion might not have resulted as disastrously as this did. Perhaps this may have been an unusual force, but the causes were likewise a defective boiler, fires banked, and water running into the fire box, which most probably would have resulted just as this one did.

The suggestion is strongly urged in behalf of certain cargo owners,

who lost heavily as a result of the explosion, that no limitation of liability should be allowed the petitioner, particularly as against those claims, because the petitioner undertook to carry cargo insurance for their benefit, and without which they would not have shipped by its line. It may be conceded as a matter of law that this position is well taken, if the facts warranted the assertion of the claim. Laverty et al. v. Clausen (D. C.) 40 Fed. 542; Great Lakes Towing Co. v. Mill Transportation Co., 155 Fed. 11, 17, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769. But, in this case, at most only nominal insurance, as compared with the losses sustained, was taken out, which had elapsed some six months prior to the disaster; and while, undoubtedly, considerable talk was had respecting the having and taking out of cargo insurance for the benefit of shippers at the time the shippers in question commenced to use the line, still there never was any positive agreement or meeting of minds of the parties on the subject, such as would warrant the court in holding that a contract to carry insurance was actually made.

A decree will be entered, upon presentation, in favor of the intervening petitioners and claimants, for the amounts respectively due them, on the same being ascertained, and holding that the petitioner, the owner of the steamer Annie, is not entitled to the limitation of liability prayed for.

AMERICAN STEEL & WIRE CO. OF NEW JERSEY v. DAVIS, Mayor, et ai.
(District Court, N. D. Ohio. December 17, 1919.)

No. 512.

1. Abrest \$\infty\$63(1)—Injunction \$\infty\$77(2)—Unlawful abrests.

Action by the mayor and chief of police of a city, pursuant to a publicly announced intention to arrest every person coming to the city to take employment in steel mills during a strike of their former employes, and carried out by causing wholesale arrests at incoming trains, without warrant or charge, of persons of respectable appearance and behavior, and marching them to police stations, where they were detained under pretense of investigation, and in many cases sent out of the city under police guard, without any charge having been made against them, held unlawful, and enjoined, where its effect was to prevent a large number of the persons so arrested from entering the employment for which some of them had contracted.

- 2. ARREST \$\infty 63(3, 4)\to AUTHORITY TO ARREST WITHOUT WARRANT.
 - Arrest without warrant may lawfully be made in case of felony only when the arresting officer has information or knowledge of facts reasonably calculated to induce a belief that a felony has been committed and that the person thus arrested without warrant is guilty of having committed it, and in case of misdemeanor only when committed in view of the peace officer making the arrest.
- 3. Injunction \$\infty 77(2)\$\top Against police officers; restraining unlawful arrests.

The power to preserve the public peace and to arrest and prosecute persons for crime cannot be made to support action depriving persons of their constitutional right to employ others, or to enter into employment, and injunction will lie to restrain police and other officers, when thus acting beyond lawful power.

In Equity. Suit by the American Steel & Wire Company of New Jersey against Harry L. Davis, individually and as Mayor of the City of Cleveland, Ohio, and Frank W. Smith, individually and as Chief of Police of the City of Cleveland. On motion for preliminary injunction. Injunction granted.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for plaintiff. Day, Day & Wilkin, of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. The plaintiff, a citizen of the state of New Jersey, brings this action against the defendants, citizens of the state of Ohio, to obtain a preliminary injunction. The case was fully heard upon amended bill, answer, and affidavits, and was argued orally and in briefs. Upon consideration thereof I am of opinion that a preliminary injunction as prayed should issue. The necessity for a prompt decision and the press of other matters prevent the preparation of an extended opinion. The reasons, however, for my conclusion will be adequately understood from the following observations.

[1] The plaintiff, the American Steel & Wire Company, operates in Cleveland and in Cuyahoga county seven plants for the manufacture of iron and steel products. It employs in these plants over 11,000 men. On September 22, 1919, a strike was declared by some of its employés in all these several plants, which strike has not as yet been settled, and, as a result thereof, the plaintiff has been and still is in need of additional men to carry on its business.

In order to obtain such men it has from time to time at great expense sought and procured persons not resident of the city of Cleveland, who have agreed to work in its several plants, and has, at its own expense, transported them from their several places of residence to Cleveland. A part of the terms of employment of all or some of these men is that the plaintiff will not only pay their transportation to Cleveland, but will pay their transportation back again to the former residence in the event any of them are dissatisfied with the positions to which they are assigned or the conditions of the employment on arrival at the plant.

All persons so engaged by the plaintiff, the affidavits show, have been American citizens and men of good character and habits. A careful scrutiny of defendants' affidavits fails to disclose any evidence to the contrary. In my opinion, however, the citizenship of the persons thus engaged is not a material circumstance. The law would be the same if they were any persons entitled to the privileges and immunities accorded to citizens of the United States, including aliens lawfully admitted, pursuant to treaty and the immigration laws.

The police force of the city of Cleveland, acting under the direction of the defendants, Harry L. Davis, mayor, and Frank W. Smith, chief of police, has, beginning shortly after the declaration of the strike, pursued a policy of arresting all persons thus brought to the city of Cleveland from outside the city to work in any of the plaintiff's plants. For this purpose police officers in uniform have met incoming trains

and have even boarded trains outside the city limits.

All such persons have been arrested without warrant and without any reasonable grounds to believe that they had committed felonies, and without finding any of them, at the time of such arrest, violating any penal statute of the United States or of Ohio or ordinance of the city of Cleveland.

This statement of facts is not in dispute. Defendants' affidavits call this procedure "detaining for investigation," and assert that all persons thus detained and investigated and not found, as a result of such investigation, to be properly guilty of a crime, or of violating any penal statute or any ordinance of the city, are released. The fact, however, is that all such persons are taken into custody on their arrival at the railroad station, and are taken thence either in an emergency police patrol wagon or in the custody of policemen, to some precinct station or to Central police station.

They are there enrolled and an inquiry made into their past history and occupation. Some affidavits show that they have been locked, if not in cells, in rooms at police stations from which escape was not possible. This is in law arresting each and every such person at the rail-

road station and keeping him under arrest until thus released.

It was not seriously contended before me that this procedure is legal. The law to the contrary is well settled. Ballard v. State, 43 Ohio St. 340, 1 N. E. 76; State v. Lewis, 50 Ohio St. 179, 33 N. E. 405, 19 L. R. A. 449; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458; John Bad Elk v. United States, 177 U. S. 529, 20 Sup. Ct. 729, 44 L. Ed. 874; Pritchett v. Sullivan, 182 Fed. 480, 104 C. C. A. 624. The law as thus settled is that police officers may not lawfully arrest and detain any one without a warrant regularly issued, except under certain definite conditions.

[2] In cases of felony arrest may be made without a warrant only when the arresting officer has information or knowledge of facts reasonably calculated to induce a belief that a felony has been committed and that the person thus arrested without warrant is guilty of having committed it. In cases of misdemeanors a warrant is always required, except when committed in view of the peace officer making the arrest.

The so-called "suspicious person" ordinance of the city of Cleveland confers no authority in conflict with those settled rules of law. It follows then that the procedure pursued by defendant is illegal and that if a violation of plaintiff's rights results therefrom that an injunction

should issue.

The affidavits show that on November 22, 1919, 25 men under contract with the plaintiff were thus arrested; that on November 29, 1919, 22 men were thus arrested, and that on December 3, 1919, 55 men were thus arrested. All of these men were held under arrest for several hours before being released. Of these groups, it seems, all except 4 eventually entered the employment of plaintiff, and that these 4, as a result of the humiliation to which they were subjected by such arrest, or for some other reason, elected to return to their former residences.

The history of defendants' interference with persons employed by plaintiff, or seeking to enter of their own initiative plaintiff's employment, is not fully covered by the affidavits on file; but, as already stated,

this procedure has been pursued since a few days after the declaration of the strike. On one day, October 16, 1919, some 200 persons came to Cleveland for the purpose of entering the employ, either of plaintiff or of some other manufacturer of steel and iron products. All of these were arrested, detained, investigated, and escorted by the police out

A graphic description of their departure is given in the affidavit of E. R. Shields. Mounted policemen were stationed outside the railway station entrance. A double line of police officers guarded the means of escape inside the station. The men in charge of the policemen were marched through the lines of guards to the departing train. One of the group who tried to escape was violently thrown back by the police into the ranks and compelled to go with the others.

All of the group, according to this witness, were men of respectable dress and appearance, and many of them in uniform of discharged soldiers of the United States army and navy. The newspapers of the city next day reported that 200 men who had come to the city to work in the plants of the plaintiff had been stopped by the police and compelled to board trains and leave town. This merely conforms to what the newspapers had previously reported and quoted the mayor as declaring would be done with all strike breakers.

Another affidavit, of a police officer, filed on behalf of the defendants, admits the arrest and detention of all these men, and further says that the men stated they had been brought to the city to work in the steel plant, and had been told that no strike was in progress, and that upon learning that a strike was still in progress they expressed a desire to return to their former residences upon transportation being secured.

He then says they were released, and that affiant is informed that they returned to Chicago. Duly considered, this affidavit does not contradict a single feature of the atrocities perpetrated upon these men. The officer's statement that, upon being informed a strike was in progress, they voluntarily expressed a desire to return is, to put it mildly, not worthy of credit.

Other affidavits filed on behalf of plaintiff, assert that as a result of this procedure plaintiff has, during the months of October, November and December, lost the services of some 400 men, and that the effect is to make it exceedingly difficult to procure men to operate its several plants. That such is the necessary and reasonable consequence of this

procedure seems evident.

Peaceful, law-abiding citizens stand in awe of being arrested, and have a proper respect for public authority. The mere proclamation by the mayor and chief of police of a city that all persons seeking to enter the employment of the plaintiff, to take the place of other persons who have left that employment, will be arrested, detained, and investigated, would inevitably tend to prevent the plaintiff from obtaining employés and other persons to enter into its employment. The prejudicial effects to the plaintiff are sufficiently proved.

[3] That plaintiff is entitled to relief by injunction in this situation is obvious from a consideration of well-settled legal principles. It is engaged in a lawful business and has a right to conduct that business

without unlawful interference, either by its striking employés or by any other persons. It may solicit and procure persons to work in its plant, no matter where they reside, or whether citizens of the United States or not. No one may lawfully interfere with this right of

plaintiff, and if deprived thereof its property is destroyed.

This is also equally true of all persons desiring to enter into the employment of plaintiff. To deny any such person that right because he does not live in Cleveland would be to abridge or deny to such person privileges and immunities belonging to every citizen of the United States and protected by its Constitution from a denial or abridgement by any state. The protection accorded by the Constitution of Ohio is equally sweeping. The power to preserve the public peace and to arrest and prosecute persons for crime cannot be made to support action depriving persons of these constitutional rights and privileges.

The courts have uniformly protected and enforced these rights by injunction. The legal principles which support equitable jurisdiction are too well known to require the citation of authority. The question has often arisen in suits to enjoin unlawful interference by striking employés and their pickets. Employés have ordinarily the right to leave an employment at will unless restrained by contract or law either singly

or in combination.

They have a right peaceably to persuade others to do likewise and to refrain from taking the places thus vacated. They have no right, however, by violence, intimidation, coercion, or threats to prevent the former employer from conducting his business at will, or from obtaining other persons to take their places or to prevent such persons from seeking and entering the places thus vacated. The rights are at least equal. In all cases in which picketing has been allowed, the courts have not hesitated to restrain or regulate picketing in such a way as is necessary to prevent violence, coercion or intimidation being used against the persons employed or seeking to be employed to take the vacant places.

In the Hotel Statler Case (no opinion filed) the late Judge James L. Lawrence, in order to prevent intimidation and coercion and unreasonable interference with the employer's right to conduct business, restricted the number of pickets to two and regulated the manner of picketing. In the Keith Hippodrome Case (no written opinion), upon full consideration, I entered an order limiting the number of pickets that might be used to two, and also regulated the manner in which notice might be given to patrons of the theater that a strike was in progress and that the strikers wished patrons to withdraw their beneficial patronage.

In the Overland-Willys Case, 263 Fed. 171, in Toledo, where some 18,000 employés were on a strike and large factory buildings with 12 entrances were involved, Judge John M. Killits limited the number of pickets on duty at any one time to 50, not more than 6 of whom should be on duty at any one gate, and required each of them to wear a conspicuous numbered badge, in order that any picket guilty of threatening, intimidating, coercing, or attempting so to do might be identified

and proceeded against for contempt.

The principles applied in the foregoing cases are equally applicable here. What striking employés may not themselves do to prevent an employer from conducting his business may not be done by police officers under the guise of preserving the peace or preventing crime. Such conduct is outside any power or authority conferred by the law on police officers. Injunction will lie against police and other officers when thus acting beyond lawful power.

Of the numerous authorities to this effect it will be sufficient to cite the following: Noble v. Union River Logging Railroad Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; Ex parte Young, 209 U. S. 159, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Philadelphia Co. v. Stimson, Secretary of War, 223 U. S. 620,

32 Sup. Ct. 340, 56 L. Ed. 570.

Nor will calling such employés strike breakers enlarge the power of police officials. A strike breaker is merely one who takes the place of a workman on strike. New Standard Dictionary and Webster's New International, 1919.

Defendants in this hearing seek to give a different meaning to the term "strike breaker," but the procedure followed since first adopted shows that the illegal arrest and interference has been with persons whose only offense was taking the place of plaintiff's former employés at the time on a strike. The criminal procedure for arresting and prosecuting for crime is no different when applied to strike breakers, as thus defined than to any other persons guilty of crime.

Certain positions taken by defendant's counsel should be briefly noticed in order to avoid misunderstanding. Numerous cases are cited in which the injunctions against police officers have been refused when sought by saloon keepers, pool sellers, and lodging house keepers, seeking to enjoin the lessee from interfering with their business by stationing a policeman in uniform at the entrance thereto, and, in some

cases, giving information to all persons seeking to enter.

Among these cases is Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209, 2 L. R. A. (N. S.) 678, 111 Am. St. Rep. 759, 5 Ann. Cas. 480. Numerous others are cited in a note thereto. Criticism of this case in the editor's note meets with my approval, but, subject to the limitation thus indicated, I entertain no views of the law different from those stated in the opinion, nor in the other cases cited. The plaintiffs in those cases do not come into equity with clean hands and were properly denied relief.

It may also be conceded that in certain exceptional situations the difficulty of preserving the public peace and danger of riot may be so great that a court of equity will not interfere on injunction to protect a party in the exercise of plain legal rights, but will leave him to his

political or legal remedies.

Of this class of cases is Bennett v. Babcock, decided October 30, 1919, by Shafer and Ford, common pleas judges in Pittsburgh, in which an injunction was refused because of the special conditions of the case to prevent the police from forbidding the exercise of the right of public assembly. The injunction might also have been refused on the ground that no right of property in plaintiff was involved, but only political rights.

Another case of this class is Star Opera Co., Inc., v. Hylan, 178 N. Y. Supp. 179, decided by Judge Giegerich of the New York Supreme Court, October 27, 1919, in which an injunction was refused to prevent police from prohibiting the giving of a public performance of a German opera. The judgment in both cases was rested upon the exceptional conditions stated in the opinions. I concur in both the judgment and the reasoning in both cases. Nothing appears in the present case disclosing any similar condition warranting the refusal of a court of equity in the exercise of sound judicial discretion to grant an injunction to protect plain property rights and remit the plaintiff to his legal remedies.

A preliminary injunction will be granted as prayed. Bond in the sum of \$2,000 will be given before the injunction takes effect. The scope of the injunction should be clear from this opinion; but, in order to prevent misunderstanding a provision may be added thereto in these words: That nothing herein contained shall be taken as preventing the arrest of any person on a warrant duly and regularly issued, nor the arrest without warrant of any person as to whom the arresting officer has information or knowledge reasonably calculated to induce the belief that such person be guilty of felony, nor the arrest without warrant upon view of any person found violating any penal statute of the United States or the state of Ohio, or ordinance of the city of Cleveland.

ISAAC KUBIE CO. et al. v. LEHIGH VALLEY R. CO.

(District Court, D. New Jersey. December 26, 1919.)

1. REMOVAL OF CAUSES 5 12-ORIGINAL JURISDICTION OF PARTICULAR DISTRICT COURT NECESSARY TO REMOVAL.

To authorize removal of a cause into a particular District Court on the ground of diversity of citizenship, the cause must not only be one over which a United States District Court is given original jurisdiction; but, unless plaintiff has expressly or impliedly consented to the removal, it must be one over which the selected court could have taken original jurisdiction in invitum.

2. REMOVAL OF CAUSES &== 16—PLAINTIFF DOES NOT CONSENT TO REMOVAL BY BRINGING SUIT WHICH MIGHT HAVE BEEN BROUGHT IN FEDERAL COURT,

By instituting in a state court a suit of which some United States District Court could have taken cognizance, if its jurisdiction had been invoked in the first instance, plaintiff does not impliedly consent to removal of the suit at the will of defendant.

8. Removal of causes \$\iff 49(3)\$—What constitutes separable controversy. Where the owner of property destroyed and an insurer, which has paid part of the loss and claims the right of subrogation pro tanto, join in an action to recover for the loss on the ground of negligence, there is no separable controversy between defendant and the insurance company, within the meaning of the removal statute.

4. Courts = 289—Suit is not one arising under laws of United States where failure to comply with interstate commerce regulation was

ASSIGNED AS NEGLIGENCE.

That one of the grounds of negligence alleged against a carrier in an action for loss of property by an explosion was failure to comply with a

regulation of the Interstate Commerce Commission for handling and storing explosives *held* not to make the action one arising under the laws of the United States, so as to give a federal court exclusive jurisdiction.

At Law. Action by the Isaac Kubie Company and the Liverpool & London & Globe Insurance Company against the Lehigh Valley Railroad Company. On motion to remand to state court. Granted.

Pitney, Hardin & Skinner, of Newark, N. J., for plaintiffs. Collins & Corbin, of Jersey City, N. J., for defendant.

RELLSTAB, District Judge. This suit is to recover damages for the loss by fire of raw sugar alleged to have been occasioned by the negligence of the defendant. One of the asserted grounds of negligence is that the defendant did not comply with the regulations of the Interstate Commerce Commission, prescribed for the handling and storing of explosives. The amount in controversy exceeds \$200,000.

Isaac Kubie Company, one of the plaintiffs, is a corporation and citizen of the state of New York, and was the owner of the sugar at the time of its loss. The sugar was partly insured by the Liverpool & London & Globe Insurance Company, the other plaintiff, which is a corporation and subject of the kingdom of Great Britain and Ireland. The Insurance Company paid a part of the loss, and claims the right, under its policy, to be subrogated, to the extent of such payment, to the Kubie Company's right to recover. The defendant is a corporation of Pennsylvania and a citizen of that state.

The suit was begun in the Supreme Court of New Jersey, and removed into this court by the defendant, on the grounds that it was one arising under the laws of the United States regulating commerce; that it was between citizens of different states, or between a citizen of a state and a foreign citizen or subject; that the United States District Court had original jurisdiction thereof; and that there was a separable controversy between the defendant and the alien plaintiff (Insurance Company), which could be fully determined as between them without the presence of the Kubie Company, the other plaintiff. The plaintiffs appear specially, and move to remand the suit to the state court on the ground that this court is without jurisdiction, as none of the parties is domiciled in this district.

The cases on the right of removal, while not harmonious in all respects, uniformly hold that the right to remove is purely statutory and must be clear. Sections 24, 28, 29, and 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [Comp. St. §§ 991, 1010, 1011, 1033]), regulate and control the jurisdiction of the United States District Courts in suits like the one here. Sections 24 and 51 deal with original jurisdiction. The former defines the character of suits, and the latter describes the district in which they may be brought. Section 28 authorizes removal to the District Court "for the proper district" of suits brought in the state court, and which could have been originally brought in a United States District Court, and section 29 provides for the removal of such suits "into the District Court to be held in the district where such suit is pending."

This court has had several occasions to pass upon the question of removal, and in Ostrom v. Edison, 244 Fed. 228, we held that, in suits over which the federal and state courts had concurrent jurisdiction, the right of the plaintiff to bring such suit in the United States District Court and of the defendant to remove it there from a state court was not reciprocal.

Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, held that no suit over which the federal courts were given jurisdiction could be removed into a selected federal court, unless that court original.

inally could have taken cognizance thereof.

In Waterman v. Chesapeake & Ohio Ry. Co., 199 F. 667, we were constrained to overrule one of the contentions that we have now, viz., that as this is the district in which the suit is pending, and as there is no other district into which the suit could be removed, the suit is removable here.

Undoubtedly this suit originally could have been brought in a United States court, if the plaintiffs so desired, but not of this district, unless the defendant expressly or impliedly consented; but because the defendant might have consented does not entitle it to insist, through

removal proceedings, to have it tried here.

So far as the plaintiff Kubie Company and the defendant are concerned, the relation of the parties, for jurisdictional purposes, is the same as that of the parties in the Wisner Case. In that case the opinion went farther than the facts required, and in some particulars has been modified by later cases. In re Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873; Exparte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392.

[1] However, the modifications declared by these cases do not change the rule, enunciated in the Wisner Case, that to remove a cause into a particular United States District Court, upon the ground of diversity of citizenship, the cause must not only be one over which a United States District Court is given original jurisdiction, but, unless the plaintiffs have expressly or impliedly consented to such removal, it must be one over which the selected court could have taken original jurisdiction in invitum. A different rule has been announced in some of the District Courts, for which see Louisville & N. R. Co. v. Western Union Tel. Co., 218 Fed. 91, and James v. Amarillo City L. & W. Co., 251 Fed. 337. Yet, as announced by this court in the Waterman and Ostrom Cases, supra, and now after further reflection reiterated, the rule just stated is still the law, and must govern the instant case, if applicable. A like view has been taken by other and later cases, of which I note only Peninsula Lumber Co. v. Royal Indemnity Co. (D. C.) 237 Fed. 297; Western Union Tel. Co. v. Louisville & N. R. Co. (D. C.) 201 Fed. 932; Guaranty Trust Co. of New York v. McCabe (C. C. A. 2) 250 Fed. 699, 163 C. C. A. 31 (certiorari denied 247 U. S. 505, 38 Sup. Ct. 427, 62 L. Ed. 1240).

[2] A plaintiff, in the first instance, has the right of choice between a state and a United States court to try a controversy of this character, but the defendant's right to remove is not a matter of choice. Having exercised their choice, and selected a state court, the plaintiffs in the instant case can be deprived or prevented from prosecuting the suit in the state court only if they have expressly or impliedly consented to this court taking jurisdiction. The defendant contends that the plaintiffs have impliedly consented; that is, that they have waived their right to object to the jurisdiction of this court. No general appearance has been entered by either of the plaintiffs, and no step taken by them here, except to move to remand the case to the state court, for which they appear specially. The sole contention of the defendant in this behalf is that by instituting a suit in the state court, over which some United States District Court could have taken cognizance if its jurisdiction had been invoked in the first instance, the plaintiffs have subjected themselves to the removal of the suit at the will of the defendant.

Generally stated, one does not waive his right to object until he is confronted with the duty of objecting. In the case of waiving objections to a court's assuming jurisdiction over his person, he is not called upon to object until such jurisdiction is exercised. In removal proceedings the duty of objecting arises only after the proceedings have been taken. It is what he does after the proceedings have been removed that is pertinent upon the question whether he has waived his right to object, not what he did before. If the defendant's contention as to waiver were sound, many, perhaps the greater number, of the suits remanded should have been retained.

The only case cited by defendant in support of its contention that the plaintiff waived its right to object to removal proceedings when it instituted the suit in the state court, is Barlow v. Chicago & N. W. Ry. Co. (C. C.) 164 Fed. 765, which so held. It is to be observed that in that case the court was dealing with a sole plaintiff, who was a nonresident alien, a situation which it considered sufficient to distinguish it from In re Wisner, supra, where all the parties were citizens. The doctrine enunciated in the Barlow Case has not met with general acceptance by the federal courts. The contrary has been expressly held in Mahopoulus v. Chicago, R. I. & P. Ry. Co. (C. C.) 167 Fed. 165; Sagara v. Chicago, R. I. & P. Ry. Co. (C. C.) 189 Fed. 220; Hall v. Great Northern Ry. Co. (D. C.) 197 Fed. 488; Ivanoff v. Mechanical Rubber Co. (D. C.) 232 Fed. 173; Jackson v. Wm. Kenefick Co. (D. C.) 233 Fed. 130. Whether, where an alien is sole plaintiff, In re Wisner, supra, is applicable need not be determined in the instant case, unless, as contended by the defendant, there is a separable controversy between it and the Insurance Company, the alien plaintiff.

[3] To my mind the coupling of the Insurance Company as a coplaintiff does not enlarge the right of removal. There is no controversy between the Insurance Company and the defendant, that "can be fully determined as between them," without the presence of the Kubie Company. No contractual relation existed between the Insurance Company and the defendant, and the latter owed no duty to the

former at the time of the alleged negligence.

The Insurance Company's status is that of a subrogee pro tanto, and there is no controversy in this suit that is wholly between it and the defendant. Its right to a part of the moneys demanded here is purely equitable, and is dependent upon the Kubie Company's right of action against the defendant. If the Kubie Company fails to establish the asserted negligence, there can be no recovery by the Insurance Company. Webb v. Southern Ry. Co. (C. C. A. 5) 248 Fed. 618, 160 C. C. A. 518 (certiorari denied 247 U. S. 518, 38 Sup. Ct. 582, 62 L. Ed. 1245), and cases cited. See, also, Weber v. Morris & Essex R. R. Co., 35 N. J. Law, 409, 10 Am. Rep. 253.

[4] The fact that the charge of negligence embraces, inter alia, a failure to comply with some of the Interstate Commerce Commission's regulations prescribed for the handling and storing of explosives, does not make the controversy one arising under the laws of the United States, so as to give a federal court exclusive jurisdiction thereof. Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536. But if it were otherwise, and the suit could be held so to arise, the limitation of section 51 of the Judicial Code, as to the place of inhabitancy of the defendant, would be applicable, and the defendant, unless consenting thereto, could not have been sued in the United States District Court of this district (Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300), and under the Wisner, Moore, and Winn Cases, supra, the plaintiffs cannot be compelled to submit their suit to this court.

As there is no separable controversy between the Insurance Company and the defendant, and as neither of the plaintiffs nor the defendant is a citizen or resident of this district, the motion to remand

is granted.

In re SWEET LABORATORIES CO. (District Court, S. D. Ohio. May 17, 1919.)

1. VENDOR AND PURCHASER \$\infty 246-Nature of vendor's lien.

A vendor's lien is a simple equity raised by the courts for the benefit of vendors, and it is indispensably necessary to the existence of such lien that the parties should stand in the relation toward each other of vendor and vendee of real estate, the purchase price of which has not been fully paid.

2. MORTGAGES MORTGAGE DISTINGUISHED FROM VENDOR'S LIEN.

Where a creditor advanced money to the debtor for use in erecting a building on a lot owned by it, taking a deed to the property as security, and afterward reconveyed the same by a deed reserving a lien for his advancements, such lien was not a vendor's lien, but was in effect a mortgage.

3. MORTGAGES ⇐==151(3)—MECHANIC'S LIEN TAKES PRECEDENCE OVER MORTGAGE GIVEN AFTER BUILDING COMMENCED.

Under Page & A. Supp. Gen. Code Ohio, § 8321, a mechanic's lien for work done on a building takes precedence of a mortgage given after the building was commenced for a past consideration, although before the contract was made under which the work was done.

(261 F.)

Where a Legislature adopts practically verbatim a provision of a statute of another state, which has been construed, the presumption is that it intended its own statute to receive the same construction.

In Bankruptcy. In the matter of the Sweet Laboratories Company, bankrupt. On petitions to revise order of referee. Reversed.

Hollis C. Johnston, of Gallipolis, Ohio, for petitioner Jones. Frank M. Raymund, of Columbus, for petitioner Yoerger.

SATER, District Judge. The bankrupt company purchased certain real estate on which to erect a building for the conduct of its business. Jones, its vice president and one of its directors, advanced it money and also became liable for a considerable sum on its notes. The money and the proceeds of the notes were applied toward the construction of such building, the contracts for which were made by the company. On April 27, 1917, he took a deed to the premises from the company, at which time he executed and delivered to it an instrument which recites that the title to the real estate was held by him as trustee as security for advancements made and to be made to the company and to secure him for liabilities incurred by him on its notes and other obligations, and that he would reconvey the premises to the company whenever he was repaid and relieved from liability or so secured by second mortgage as would protect him. Such instrument was not recorded, but his deed was duly entered of record, after which work on the building proceeded under previously made and partly fulfilled contracts.

In early November, the company, believing it could sell enough stock to clear up its indebtedness asked for a reconveyance of its property. An accounting was had between Jones and the company about November 5, and it was found that, after deducting his unpaid stock subscription, there was due him \$95,500. It was agreed that he should reconvey the property and should receive "a vendor's lien" for the sum due him. About November 19 notes were given him by the company for the above named amount, and at the same time he executed and delivered a deed to the corporation for the premises, in which deed the notes were described, and the amount thereof by some provision (apparently adequate, but not appearing in the record) made a lien on such realty. On December 14 the company made a contract with Yoerger for certain electrical work on the building, on the performance of which Yoerger entered on the day following, and which he fully completed on February 20, 1918.

The company did not file for record its deed from Jones until January 16, 1918. At the time of the delivery of such deed there was due from the company about \$16,000, of which Jones was ignorant. The sum ripened into mechanics' liens, none of which are here in dispute. Yourger perfected a mechanic's lien on the premises for the unpaid sum due him. The referee held the lien of Jones to be superior to that of Yourger, and that Yourger should prorate with

the other mechanic lien holders in the fund applicable to their payment. Both Jones and Yoerger brought the case here for review.

[1, 2] In the referee's court, as well as here, the argument proceeded on the theory that Jones had a vendor's lien on the premises, although his counsel concedes that, when he took the conveyance from the company, he held the real estate as mortgagee to secure certain indebtedness—a view which is manifestly correct. The lien which Jones has, whatever it may be called in his deed to the company, is not that of a vendor, but is reserved by express contract and is in the nature of, if not in fact, a mortgage. His reconveyance, with an express reservation of a lien for the sum due him, changed the form of his security, which was not for the unpaid purchase money of the realty, but for money advanced to construct the building thereon.

Whether his deed to the company with such reservation is, under the circumstances surrounding its execution, in fact a new mortgage for a new consideration, within the rule stated in Walters v. Walters, 73 Ind. 425, 429, 430, and Jones, Mortgages (5th Ed.) § 527a, need not be decided. A vendor's lien is invisible, and not recordable, and is not the same as the express lien often reserved in deeds, or conveyances for the payment of purchase money, or as strict mortgages or deeds of trust securing it, or as security held by a vendor who has duly given a title bond, or as a lien reserved in a deed for money advanced or loaned. White v. Downs, 40 Tex. 225, cited in 29 Am. &

Eng. Ency. Law, 734.

It is indispensably necessary to the existence of a vendor's lien that the parties should stand in the relation toward each other of vendor and vendee of real estate, the purchase money of which has not been wholly paid. The pure relation of debtor and creditor, or of buyer and lender, is incompatible with the existence of this species of lien, which is not the result of any agreement or any intention of a vendor or vendee, but is a simple equity raised by the courts for the benefit of the vendors of real estate. Hecht v. Spears, 27 Ark. 229, 11 Am. Rep. 784, 786; Royal Consolidated Min. Co. v. Royal Consolidated Mines, 157 Cal. 737, 110 Pac. 123, 137 Am. St. Rep. 165, 172; Tiernan v. Beam, 2 Ohio, 383, 384, 385, 15 Am. Dec. 557; Neil v. Kinney, 11 Ohio St. 58, 66, et seq.; Whetsel v. Roberts, 31 Ohio St. 503, 505; Chilton v. Braiden's Adm'x, 67 U. S. (2 Black) 458, 460, 17 L. Ed. 304.

We are not here concerned with a vendor's lien, or with the ordinary mortgage loan made by a lender to a mortgagor after the commencement of an improvement on the lots purchased, or a mortgage to secure unpaid purchase money for real estate conveyed by a vendor to a vendee. The lien which Jones has is for money advanced by him. prior to the execution of the deed in which his lien is reserved, for the erection of the bankrupt's building.

[3] Under sections 8310 and 8321, Ohio General Code, all perfected mechanics' liens attach and become operative as of the same date the date of the performance of the first labor, or the furnishing of the first machinery, material, or fuel, by the head contractor under his original contract. Under the middle paragraph of section 8321. Ohio G. C., the several bona fide mechanic's lien holders have no priority among themselves; i. e., they prorate as among themselves, excepting that a priority is given to persons obtaining a valid lien for manual labor performed during the 30 days immediately preceding the performance of the last labor. The last paragraph of section 8321, P. & A. Supp. G. C. Ohio, provides that—

"They [the several mechanic's liens] shall be preferred to all other titles, liens or incumbrances, which may attach to or upon such construction, excavation, machinery, or improvement, or to, or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said construction, excavation, or improvement."

The above section thus abrogates the previously existing rule as to mortgages given after the performance of work or the furnishing of material by one or more contractors and before work is performed or material furnished after such mortgage has been given, for which former rule and its application see Choteau v. Thompson, 2 Ohio St. 130; Ohio Savings, Loan & Investment Co. v. Johnson, 10 Ohio Cir. Ct. Dec. 752 (20 Ohio Cir. Ct. R. 96); Treadway & Marlatt's Ohio

Mech. Lien Law, pp. 122, 131, 147.

[4] The present Ohio law was modeled largely after that of Michi-Section 9 of the Michigan act (Comp. Laws 1915, § 14804; Wykes' Michigan Mech. Liens, § 111) is not stated in the same language as the Ohio statute, and does not declare that the several liens by several persons upon the same job shall have no priority as among themselves, but is couched in equivalent language, and provides that such liens shall be deemed simultaneous mortgages. It has been repeatedly held by the Michigan Supreme Court, in interpreting that section, that, in determining priorities, liens attach as of the date of the commencement of the building or improvement, regardless of the time when or the person by whom, particular work is done or materials furnished for which a lien is claimed. Wykes, p. 111, note, citing Kay v. Towsley, 113 Mich. 283, 71 N. W. 490, and other cases. The last paragraph of section 8321, Ohio G. C., is taken practically verbatim from section 9 of the Michigan act. The changes are so slight, and the language of the two passages is so clearly synonymous, that the two provisions must be held to all intents and purposes to be the same. It is reasonable to suppose that the Ohio Legislature, in adopting such provision of the Michigan act, did so in view of the construction which had been put upon it, and with the intention that it should receive the same construction as had been given it by the Michigan courts. Favorite v. Boohers, 17 Ohio St. 548, 555. The Michigan statute has been held to mean that a mechanic's lien takes precedence of a mortgage executed after the actual commencement of a building or improvement, although the contract for furnishing the materials and the performance of labor for which a lien is claimed was not entered into until after the mortgage was executed and recorded. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801; Wykes, pp. 114, 115, note. It follows from the foregoing that Jones' lien is subordinate to that of Yoerger, unless it falls within the exception regarding mortgages found in section 8321—1.

The provisions of section 8321 are severe, and, if unlimited, would quite often be productive of inconvenience, hardship, and loss, not only to the property owner but to contractors, subcontractors, materialmen, and possibly even to laborers. To ameliorate the harsh conditions imposed by section 8321, Ohio G. C., the Legislature therefore enacted section 8321—1, and thereby fixed the conditions under which an intervening mortgage may be taken and the proceeds thereof so disbursed as to insure a priority to the extent to which such proceeds are used and applied in the manner indicated by the mechanic's lien act. The section is too lengthy to be here abstracted, nor does the decision of the instant case require that such be done. If the holder of an intervening mortgage wishes to retain the priority of his lien, and to recover the money loaned, he will do well to follow closely the provisions of that section. Jones does not have, and never held, a mortgage such as is described by section 8321-1, nor did he, in providing funds, use or apply them or proceed in accordance with its requirements. His lien is therefore subordinate to that of Yourger and those of the other lien holders. This view finds support in West Side Lumber & Mfg. Co. v. Lancaster Paper Mill Co., 64 Bull. App. Supp. 566, 26 N. S. 413, 50 App. 253, in which it appears that the mortgage occupied an intermediate place as regards mechanic's liens.

An order may be taken in accordance with the foregoing.

WHITE et al. v. KEOWN.

(District Court, D. Massachusetts. December 6, 1919.)

No. 907.

- REMOVAL OF CAUSES \$\iflicolongleq 11\$—Suit to remove administrator not removable.
 A suit in a state court for removal of an administrator held not removable, for want of jurisdiction of the federal court over the subjectmatter.
- 2. Removal of causes \$\iff 70\)—What denial of civil bights within statute.

 The provision of Judicial Code, \$ 31 (Comp. St. \$ 1013), for removal of causes by a person who is denied his rights in the courts of the state, has reference to the system of laws of the state, and not to discriminations or illegal acts not authorized by such laws.

In Equity. Suit by James White and others against James A, Keown. On motion to remand to state court. Motion granted.

Curtin, Poole & Allen, of Boston, Mass. (William F. Poole, of Boston, Mass., specially), for plaintiffs.

James A. Keown, of Lynn, Mass., pro se.

ALDRICH, District Judge. The motion to remand being grounded on want of jurisdiction over the subject-matter of the proceeding in the state court, I see no substantial reason for considering any of the questions as to the right to appear, or as to the seasonableness

of the petition for removal, which were discussed, because no court would proceed with a case, however or when want of jurisdiction is discovered, only in the very exceptional situations in which jurisdiction may be conferred by waiver of the parties; and this is not such a case.

[1] The proceeding in the state court was to remove an administrator. Such a proceeding is plainly local, in the sense that it is one for the state court.

According to Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, an administrator appointed by a state court is an officer of that court, and, as such, cannot be disturbed by process issued from a subordinate federal court, and, reasoning upon the well-understood theory that the jurisdiction of federal courts of first instance is a limited jurisdiction, depending upon the existence of federal questions and statutes in respect to diverse citizenship, it is there said that, where these elements of jurisdiction are wanting, the federal courts cannot proceed, even with the consent of the parties.

In Ex parte Wisner, 203 U. S. 499, 27 Sup. Ct. 150, 51 L. Ed. 264, after explaining that the jurisdiction of the Circuit Court, which is now the District Court, depends upon acts of Congress, and cannot be extended beyond what is conferred, and that the Supreme Court of the United States alone possesses the broader jurisdiction derived immediately from the Constitution, it is said, in effect, that the test as to the jurisdiction of the subordinate federal courts under the removal provisions of the statutes is whether suit could have been originally brought therein, and, if not, that the case cannot be removed from the state court.

Applying such test to the present situation, and assuming that diverse citizenship exists, it is not a removable case on the ground of diverse citizenship, because the subject-matter involved in the proceeding in the state court, to remove the administrator, is not subjectmatter over which there is jurisdiction in the subordinate federal The exceptional instances, in diverse citizenship situations, where suits have been sustained in federal courts of first instance against local administrators to compel the payment of debts, suits to establish lost wills, suits to recover a particular legacy, bills in equity to annul wills as muniments of title, suits to establish debts against estates, proceedings in equity to establish liens upon undivided shares of heirs at law (the Ingersoll Case [C. C.] 127 Fed. 418; Id. [C. C.] 132 Fed. 168; Id., 133 Fed. 226, 66 C. C. A. 280; Id. [C. C.] 136 Fed. 689; Id., 148 Fed. 169, 178, 78 C. C. A. 303; Id., 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; Id. [C. C.] 174 Fed. 666; Id., 176 Fed. 194, 99 C. C. A. 548), and the like, have no pertinent application to a proceeding in a state probate court to remove an administrator, a proceeding which, in a broad and peculiar sense, relates to original and exclusive jurisdiction of probate courts in respect to the administration and settlement of estates in which many and diversified interests are necessarily involved.

[2] But the petitioner has what he claims to be a broader ground—that of the civil or equal rights guaranty vouchsafed by the federal

Constitution and an act of Congress. Section 641, Rev. Stat.; Section 31, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1096 [Comp. St. § 1013]). And he says in effect that he is not being treated fairly or reasonably by the state judges, and that wrong decisions have been made against him in the state court proceedings. He does not allege lack of due process, or that there is anything in the Massachusetts Constitution or the system of laws thereunder which denies to him, or to anybody, civil or equal rights, or which justifies proceedings which have rendered his trial unfair or prejudicial; but he does say, in effect, that he is discriminated against by the judges, and that he is not patiently and fully heard, and that the judicial and administrative acts of the judges and other state officials are such that he is denied his reasonable and essential rights.

As to such a ground as justifying federal interference, the Supreme Court has said, in effect, in Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692, a case which plainly involved substantial denial of justice, that the constitutional provision and the act of Congress, upon which the petitioner relies, have reference to a system of laws which impose restraint upon civil rights and equal protection, and that alleged discriminations and illegal acts, or even corrupt acts, not authorized by a state's system of laws, do not make a given case removable to federal courts of first instance, and that the remedy for wrongs of that character is to prosecute the case to the highest court of the state, with the right ultimately of prosecution by writ of error in the Supreme Court of the United States, a court of broader constitutional power.

It is quite unnecessary to say that the reasoning of Kentucky v. Powers, and of prior cases approvingly adopted by the Supreme Court, is altogether conclusive against any right of removal upon the ground claimed and against any authority in this court to hold jurisdiction. The remedy for such a grievance is plainly in the Supreme Court, where it may safely be assumed that if a federal question of merit is presented it will be fairly considered.

The cause is remanded to the court from whence it was removed.

CITY OF FT. WORTH, TEX., v. NATIONAL PARK BANK OF NEW YORK et al.

> (Circuit Court of Appeals, Fifth Circuit, December 2, 1919.) No. 3367.

1. Corporations \$\infty 404(2)\$—Conveyance by president passes title in ab-SENCE OF OBJECTION BY EXISTING CREDITOR.

A conveyance, signed and acknowledged by the president of a Texas corporation as such, which complied with Rev. St. Tex. 1911, arts. 1173, 1108, though voluntary and to the stockholders of the corporation, one of whom was the president, will pass title in the absence of objection by a then existing creditor; the corporation not appearing insolvent.

2. Trusts \$\infty\$=17, 18(3)-Resulting trust need not be evidenced by WRITING.

Under the Texas law, the fact that one having title to land holds it in trust for another need not be evidenced by writing.

3. Corporations 445—Convincing evidence necessary to rebut pre-SUMPTION THAT BENEFICIAL INTEREST PASSES BY CONVEYANCE TO STOCK-

A conveyance by a corporation to its stockholders, though voluntary, presumptively passes the beneficial interest, and the evidence sufficient to show that the corporation still held the beneficial interest must be clear and convincing.

4. Corporations \$\infty 445-No besulting trust on conveyance of lands by CORPORATION TO STOCKHOLDERS.

Where a corporation, without objection by then existing creditors, and which was then solvent, conveyed lands to its principal stockholders, held, that such conveyance, under the evidence, cannot be deemed to have carried with it only the legal title, but the beneficial interest passed.

5. Corporations \$\infty 542(3)\$—Conveyances to stockholders, not supported BY CONSIDERATION, MAY BE ATTACKED BY CREDITORS.

A conveyance by an insolvent corporation to its stockholders, which was not supported by an adequate consideration, may be attacked by existing creditors.

Appeal from the District Court of the United States for the North-

ern District of Texas; Edward R. Meek, Judge.
Bill by the National Park Bank of New York against the Reid Cattle Company and the City of Ft. Worth, Tex. From the decree for complainant, the City of Ft. Worth appeals. Affirmed in part, and reversed in part.

Sidney L. Samuels and P. Walter Brown, both of Ft. Worth, Tex. (T. J. Powell, Sidney L. Samuels, and P. Walter Brown, all of Ft. Worth, Tex., on the brief), for appellant.

S. H. Cowan, I. H. Burney, and R. W. Flournoy, all of Ft. Worth, Tex. (I. H. Burney and Flournoy & Smith, all of Ft. Worth, Tex., on the brief), for appellees.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. On a bill filed by the appellee, National Park Bank of New York, which, in April, 1914, became a creditor of Reid Cattle Company, a Texas corporation (which will be referred to

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 261 F.-52

as the Cattle Company), it was adjudged that lands described in two deeds executed by the Cattle Company, one on the 7th day of December, 1911, which embraced all the lands referred to, except two small tracts, and the other on the 25th day of August, 1914, embracing the last-mentioned tracts, were liable to be subjected to the payment of debts owing by the Cattle Company, on the ground that neither of those deeds was intended to divest the grantor therein of the beneficial ownership of the lands conveyed, and that the grantees in said deeds acquired title to and held the lands conveyed in trust for the grantor. The appellant, the city of Ft. Worth, which before the suit was brought acquired whatever right to the lands in question the two deeds mentioned conferred on the grantees therein, resisted the claim asserted by the bill on the grounds, among others, that no beneficial ownership in the lands remained in the Cattle Company after the execution of the deeds made by it, and that, if the grantees in those deeds held the lands conveyed in trust for the grantor, the trust was one which was not enforceable against the appellant, because it occupied the position of a purchaser of the lands for a valuable consideration and in good faith without notice of the existence of the trust.

The Cattle Company was incorporated in June, 1911, with a capital stock of \$150,000, divided into 1,500 shares, of the par value of \$100 each. There were three subscribers to the stock, R. T. Reid, E. E. Baldridge, and T. M. Presley. Reid and Baldridge each subscribed for \$74,950 of the stock. Presley's subscription was for one share, \$100. Reid and Baldridge paid \$125,000 on their subscriptions, by conveying to the corporation lands in Texas, an undivided one-half interest in which was owned by each of them, subject to the claim of the state of Texas for the unpaid part of the purchase price and interest thereon. The balance of the amounts called for by the subscriptions was paid in cash. Baldridge paid for the one share subscribed for by Presley, and was the owner of that share from the beginning. Presley's participation in the organization was for the purpose of complying with a requirement of the Texas incorporation statute. The Cattle Company's deed of December 7, 1911, was signed and acknowledged by Reid as president, the seal of the corporation being attached. By its terms the grantor—

"for and in consideration of the sum of ten dollars to it in hand paid, and for other good and valuable consideration, and for the further consideration, that the grantees hereinafter named assume, pay off, and discharge the amount due to the state of Texas on the land hereinafter described, have bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto E. E. Baldridge and R. T. Reid, of Tarrant county, Texas, all those certain lots, tracts or parcels of land lying and being situated in Crane county, Texas, and more particularly described as follows, to wit," etc.

The lands described were school lands bought from the state on long time; the deferred part of the price payable to the state bearing a low rate of interest. By warranty deeds made on June 8, 1914, and August 25, 1914, and hereinafter referred to, Reid conveyed to Baldridge an undivided one-half interest in the lands embraced in the deed of December 11, 1911. Baldridge died before this suit was brought.

[1-3] The last-mentioned deed was capable of conferring on the

grantees named in it the beneficial ownership of the lands described, if the parties to it intended it to have that effect. The deed was signed and acknowledged as required by the Texas statute prescribing the requisites of a conveyance of land by a corporation. Revised Statutes of Texas, arts. 1173, 1108. At the time it was made Reid and Baldridge owned all the stock of the Cattle Company. In the absence of objection by any one who was a creditor of the corporation at the time the deed was made, Reid, as president, could effectually make, in the name of the corporation, a deed of gift of its lands to himself and Baldridge. Harbor Co. v. Manning, 94 Tex. 558, 63 S. W. 627; Taylor Feed Pen Co. v. Taylor Nat. Bank, 181 S. W. 534. The claim that the grantees acquired the title and held the land as trustees for the grantor is based on the contention that the circumstances of the transaction were such as to show that the parties to it did not intend to effect any change in the beneficial ownership. On their face the terms of the deed indicate the contrary. The provision imposing on the grantees the obligation to pay what was owing to the state on the purchase price of the land strongly suggests the absence of an intention that the grantor should remain the owner and subject to the burden imposed by the debt owing for the land. If, however, no change in the beneficial ownership was intended, and the intention, when and after the deed was made, was that the grantees should hold the land, not for themselves individually, but for the grantor, that fact could be shown by parol evidence, as under the Texas law the fact that one having the legal title to land holds it in trust for another is not required to be evidenced by writing. Houser v. Jordan, 26 Tex. Civ. App. 398, 63 S. W. 1049; Agricultural Association v. Brewster, 51 Tex. 257. But clear, satisfactory and convincing evidence is required to overcome the presumptions arising from a deed, the terms of which do not indicate that the grantee was to hold the land conveyed for any one other than himself, and to show that he acquired or held it in trust for another. King v. Gilleland, 60 Tex. 271; Agricultural Association v. Brewster, supra; Bunel v. Nester, 203 Mo. 429, 101 S. W. 69; Goodrich v. Hicks, 19 Tex. Civ. App. 528, 48 S. W. 798.

[4] What principally must be relied on to show the existence of the alleged trust is evidence tending to prove that the parties to the transaction were moved to get the title to the lands conveyed by the deed of December 7, 1911, out of the Cattle Company and into the two individuals who owned all the stock of that company by a suggestion that the law of Texas did not permit corporate ownership of school lands situated as those conveyed were. All the evidence on that subject is found in the testimony of Reid, the only surviving grantee, and of

Judge George Miller, the lawyer who prepared that deed.

At the time Reid gave his testimony he was not interested in defeating the claim asserted by the bill, as he had been released from liability on obligations of the Cattle Company. On his direct examination as a witness for the plaintiff he testified to the following effect: A Mr. Caldwell, a lawyer of Midland, Tex., advised him to have the school lands deeded by the Cattle Company to its stockholders, on the ground that he feared that under some existing Texas law the land would be forfeited if the title was kept in the corporation. The witness informed Baldridge of the suggestion, and the latter advised him to consult their lawyer, Judge Miller. This was done, and the deed was made in pursuance of the advice of Mr. Caldwell and Judge Miller. The purpose of making that deed was to prevent a forfeiture of the land. There was no consideration other than that purpose. After the deed was made there was no change in the method of running the ranch or in the management of it. For two years after the deed was made the taxes on the lands conveyed were paid with funds of the Cattle Company, as were the expenses of the upkeep and operation of the ranch and interest due to the state of Texas. Reference will be made to testimony given by Reid on his cross-examination.

Judge Miller's testimony was to the following effect: As he understood from conversation with Reid and Baldridge, the reason for the deed being executed was that they had been advised by Mr. Caldwell that they were likely to lose their lands by reason of the title thereto being in the Cattle Company, a corporation, and that they desired to get the title in themselves, to avoid possible complications with the state. Witness advised Reid and Baldridge that he did not agree with Mr. Caldwell as to the construction of the statute the latter had in mind, but they wanted to take Mr. Caldwell's opinion rather than that of the witness. Witness advised them that if the title was transferred to them there probably would be no attack made on it by the state, if it could be attacked while in the corporation, which witness thought could not successfully be done.

We do not think that the above-recited testimony, or any part of it. standing by itself, is inconsistent with the conclusion that the deed in question was intended to have the effect of making the grantees the beneficial owners of the lands described. From the fact that the motive for making the deed was to prevent a forfeiture because of corporate ownership, it by no means follows that there was an absence of intention to effect a change from corporate to individual ownership. It well may be supposed that an effect on Reid and Baldridge of the fear or apprehension that the title to the school lands might be forfeited if the corporate ownership was continued would be to move them to get the real, not merely the apparent, ownership in themselves individually, if that could be done, and that they would conclude that the supposed peril would the more effectually be removed by the corporation divesting itself wholly of ownership. There was no evidence indicating that there was anything in the then existing situation to prevent that being accomplished.

So far as appears, a transfer to Reid and Baldridge of the ownership of the lands embraced in the deed did not have the effect of making the Cattle Company insolvent, or of preventing the continuance by it of the business in which it was engaged. It retained the ownership of other assets, including the cash capital with which it started business, or the property in which it had been invested. There is nothing to prevent a corporation carrying on a cattle business on lands belonging, not to it, but to some or all of its stockholders. Only a then existing creditor of the corporation would be entitled to raise an objection to the payment with money of the corporation of the taxes on land used in its business, but belonging to the two individuals who owned all the stock of the corporation. It is not disclosed that any one who was a creditor of the corporation when such use was made of its money was harmed

thereby or had any occasion to complain.

If the testimony given by Reid on his direct examination properly could be regarded as having a tendency to prove that the deed in question was not intended to have the effect of changing the beneficial ownership, other evidence adduced was such as to impair its probative value to that end. It was brought out on Reid's cross-examination that his conduct after the deed was made was inconsistent with the existence of an understanding on his part that the lands described continued to be the property of the corporation. In April, 1914, he returned for taxation the lands described in the deed as property owned by Reid and Baldridge. That was the first return of the property for taxation made by him after the date of the deed. In June, 1914, he made a warranty deed to Baldridge of an undivided one-half interest in those lands; the consideration received from Baldridge including a conveyance by the latter of lands owned individually by him, and which never belonged to the Cattle Company. So far as appears, nothing done by either Reid or Baldridge, after the deed of December 7, 1911, was made, was inconsistent with their individual ownership of the lands it embraced. Their conduct with reference to the lands did not indicate the existence of an intention or consent of either of them to hold the lands in trust for the Cattle Company after the deed was made by the latter. The conclusion is that the evidence adduced was wholly insufficient to show the existence of the trust alleged. To say the least, the evidence fell far short of clearly and convincingly showing that the making of the deed of Decem' er 7, 1911, was accompanied by an intention on the part of the grantees to hold the lands described in trust for the grantor.

[5] As to lands the title to which did not pass from the Cattle Company until the execution by it of the deed of August 25, 1914, the decree appealed from can be sustained on the ground that the Cattle Company then was insolvent, and its conveyance was not supported by such a consideration as would make the transaction valid as against the

grantor's then existing creditors.

The decree is reversed, in so far as it adjudged that the Cattle Company was the beneficial owner of the lands described in the deed of December 7, 1911. It is affirmed in so far as it relates to lands described in the deed of August 25, 1914, of the Cattle Company to Baldridge, which had not previously been conveyed by the Cattle Company.

Affirmed in part; reversed in part.

In re SOLA E HIJO, S. EN C. SOLA v. CADIERNO.

(Circuit Court of Appeals, First Circuit. November 26, 1919.) Nos. 1246, 1403.

1. BANKRUPTCY \$\igsim 165(1), 178(1)\$—EVIDENCE INSUFFICIENT TO SHOW FRAUDULENT TRANSFER OF PROPERTY.

Where real estate was conveyed to a partnership, on its organization, by one of the partners, with the knowledge of his partner that he had previously given a mortgage thereon, the fact that through his failure to record his own deed the mortgage did not become eligible to registry, so as to become a lien, until within four months prior to the firm's bankruptcy, when it was recorded, in the absence of evidence that the firm was then insolvent, the mortgage could not constitute a voidable preference, under Bankruptcy Act July 1, 1898, § 60a, 60b (Comp. St. § 9644), nor was it a transfer of property by the firm with intent to hinder or defraud creditors, under section 67e (section 9651).

2. Bankruptoy €==440—Ruling on petition asserting lien beviewable by appeal.

A petition asserting a lien on property in possession of the bankruptcy court presents a controversy in a bankruptcy proceeding, reviewable by appeal, and not on petition to revise.

Petition to Revise and Appeal from the District Court of the United States for the District of Porto Rico; P. J. Hamilton, Judge.

In the matter of Sola e Hijo, S. en C., a partnership, bankrupt; Segundo Cadierno, trustee. On petition by Celestino Sola to revise proceeding of the District Court with appeal by Celestino Sola from a decree of the District Court. Petition to revise dismissed, and, on the appeal, decree set aside, and case remanded, with directions.

Hugh R. Frances, of San Juan, Francis & De Jesus, and Joseph B. Jacobs and Jacobs & Jacobs, all of Boston, Mass., for appellant.

Jose R. F. Savage, of San Juan, P. R., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. [1] No. 1403 is an appeal by Celestino Sola from a decree of the United States District Court of Porto Rico of August 24, 1916, modifying two decrees or orders previously entered by said court on October 28, 1913, and January 6, 1914, and adjudging (1) that the marshal of the district court of the judicial district of Humacao pay to the trustee in bankruptcy, Segundo Cadierno, out of the moneys derived from the sale of certain real estate, so much thereof as will cover the proportionate shares of creditors of the bankrupt firm of Sola e Hijo, whose credits were incurred subsequent to the 8th of July, 1911; and (2) that Celestino Sola pay to said trustee out of the rents of the property paid over to him by the trustee the proportionate shares therein of the creditors of said bankrupt firm whose credits were likewise incurred subsequent to the 8th day of July, 1911.

It appears that on the 24th of August, 1905, a firm by the name of Sola e Hijo was formed for a period of two years, which was later extended for a period of five years from August 19, 1907; that the partners in this firm were Marcelino Sola, the father, and Marcelino A. Sola, the son, and that forming a part of the firm's assets was a certain warehouse on Ruiz Belvis street, Caguas, Porto Rico; that on January 4, 1909, the firm of Sola, Arguelles & Co. was formed, the managing partners being Magin Arguelles and Marcelino A. Sola, and the silent partners being Marcelino Sola and Celestino Sola; that on January 25, 1910, the firm of Sola, Arguelles & Co. was dissolved, and a firm of the same name, with the same partners, except as to Celestino Sola was formed; that at the time of the dissolution of the old firm of Sola, Arguelles & Co. it owed Celestino Sola, in addition to his capital in the partnership, the sum of \$7,949.72, which the new firm agreed to pay, and the payment of which was guaranteed by Magin Arguelles and the firm of Sola e Hijo jointly and severally; that on June 26, 1911, Marcelino Sola purchased from Marcelino A. Sola his interest in the firm of Sola e Hijo, and assumed the debts of the firm, and received from him a deed which, among other things, conveyed the warehouse above specified; that on July 8, 1911, the firm of Sola, Arguelles & Co. was dissolved by deed, wherein Marcelino Sola purchased the assets of the firm and assumed its liabilities, expressly binding himself to pay the indebtedness of Sola, Arguelles & Co. to Celestino Sola, which, at that time, had been reduced to \$6,449.70; that on the same day, July 8, 1911, the firm of Sola e Hijo was dissolved by deed, Marcelino Sola taking the assets and assuming the liabilities of the firm; that on that day, July 8, 1911, Celestino Sola waived his claim for \$6,449.70 and another claim for \$2,000, then due against the firm of Sola, Arguelles & Co., the first of which had been guaranteed by Magin Arguelles and the firm of Sola e Hijo as above stated, and accepted Marcelino Sola as his debtor in the sum of \$8,449.70, payable as follows: \$2,149.90 in January, 1912; \$2,149.90, January, 1913; \$2,149.90, January, 1914; \$1,000, January, 1915; and \$1,000, January, 1916—and received as security therefore a second mortgage on the above-mentioned warehouse; that thereafter, on September 30, 1911, a new firm by the name of Sola e Hijo was formed, with Marcelino Sola as managing partner and Marcelino A. Sola as silent partner; that as part of the firm capital Marcelino Sola deeded to the firm the warehouse in question, which it took with full knowledge of and subject to the provisions and terms of the mortgage deed of July 8, 1911; that the mortgage deed of July 8, 1911, was presented for record in the registry of property in July of that year, but its inscription was denied, for the reason that the record title in the registry was in the name of the old firm of Sola e Hijo, the deed from that firm to Marcelino Sola, the mortgagor, not having been recorded; that on May 11, 1912, the mortgage deed was again presented for record, and inscription was denied, for the same reason; that a cautionary notice of its presentation for 120 days was taken in the registry, and the requisites were complied with, and the mortgage recorded within the time limited

by the notice; and that on May 17, 1912, the new firm of Sola e Hijo filed a voluntary petition in bankruptcy, and on the same day was adjudicated a bankrupt. In the mortgaged deed of July 8, 1911, was the following provision:

"Eighth. It is agreed that, in case the debtor does not satisfy to the mortgage creditor at the time of its becoming due the principal of this obligation, the amount of the installment which has fallen due, until the time for the payment of the second, shall bear interest at the rate of 1 per cent. per month, and if at the time this second installment falls due, it also remains unpaid, the present deed shall be substituted for the time which still is to elapse in the mortgage, by a conditional sale of the house in favor of Celestino Sola Rodriguez, which act will be performed in a deed upon the demand which shall be made by Don Celestino Sola, who shall receive the rents of the property from the date of execution of said deed."

On February 1, 1913, none of the installments provided for in the mortgage having been paid, Celestino Sola, through a notary public, demanded from the trustee, Segundo Cadierno, the deed of sale provided for in the mortgage, and on September 4, 1913, filed a petition with the referee in bankruptcy, and procured an order directing the trustee to execute a conditional sale of the warehouse to him. On October 28, 1913, the District Court of Porto Rico, on petition for review, confirmed the order. On December 6, 1913, the referee, on motion of Celestino Sola, ordered the trustee to pay to Celestino Sola the moneys received by him as rent of the warehouse from February 1, 1913, to November 15, 1913, which order on a petition for review, was confirmed by the District Court January 6, 1914. On November 15, 1913, a deed of conditional sale was executed in favor of Celestino Sola. In the month of August, 1915, Villamil & Co., the owners of the first mortgage upon the warehouse, instituted foreclosure proceedings in the district court of Humacao, and sold the property by the marshal of the court for \$4,496. After satisfying the first mortgage and the costs of sale, there remained a balance of \$2,124.94 in the custody of the marshal.

On January 25, 1915, the trustee in bankruptcy filed a motion in the United States District Court, asking for a reconsideration of the orders of October 28, 1913, and January 6, 1914, for a cancellation of the conditional deed, for the return of \$383 paid by the trustee to Celestino Sola as rents upon the property, for an accounting of all sums received by Celestino Sola as rents from the property after November 15, 1913, and for the payment of the same to the trustee. A rehearing was granted, and the facts above stated were found and reported by the referee, together with the further facts: That the mortgage deed of July 8, 1911, was a bona fide transaction, free from fraud, and was executed in a proper and valid manner on the date indicated in the same; that—

"a few days before the bankruptcy the mortgagee, Celestino Sola, required of his brother, Marcelino Sola, the execution of the acts necessary to cause the inscription of the mortgage in the registry of property, and this was done * * * for the purpose of perfecting Celestino Sola's lien against the property, and Celestino Sola knew of the financial situation of the firm Sola e Hijo."

In view of the report of the referee, the court, on August 24, 1916, modified its orders of October 28, 1913, and January 6, 1914, in the manner above stated.

Among his assignments of error Celestino Sola complains that the court erred in holding that his rights under the mortgage deed of July 8, 1911, were subject to the rights of creditors of the bankrupt firm whose credits were created subsequent to the date of the execution of the mortgage deed.

The question presented is the right of Celestino Sola to the balance in the hands of the marshal derived from the sale of the mortgaged property after satisfying the prior mortgage of Villamil & Co., and to the rents amounting to \$383 that accrued prior to November 15,

1913, and the sums that accrued as rent thereafter.

In the court below the contention of the trustee was that the mortgage of July 8, 1911, under the law of Porto Rico, had no legal existence until it was recorded May 11, 1912, and being recorded within four months before the filing of the petition in bankruptcy was a voidable preference under sections 60a and 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. § 9644]). But, inasmuch as there is no finding that Sola e Hijo was insolvent on May 11, 1912, when the mortgage was recorded, this contention apparently has been abandoned, and rightly so, as we think, in view of the absence of the foregoing finding and of any evidence in the record from which

we would be warranted in making such a finding.

His contention now is that under the law of Porto Rico (Civil Code. § 1776; Mortgage Law, art. 146; Hidalgo v. Garcia, 4 Porto Rico, 64), the mortgage of July 8, 1911, had no legal existence until it was recorded as above stated; that its record on that day constituted the placing of an incumbrance upon the property by the firm of Sola e Hijo, the bankrupt, within four months prior to the filing of the petition in bankruptcy with the intent and purpose on its part to hinder. delay or defraud its creditors, and was null and void as to such creditors within the meaning of section 67e of the Bankruptcy Act (Comp. St. § 9651). If, in considering this contention, it be assumed without deciding the question that under the law of Porto Rico the mortgage did not exist as a mortgage lien until recorded May 11, 1912, we are unable to see how it can be said that it was an incumbrance made or given by the firm of Sola e Hijo. The mortgage had its inception July 8, 1911, at which time the legal title to the warehouse was in Marcelino Sola. Nothing at that time remained to be done to make the mortgage a legal incumbrance upon the property but to have it recorded, and its inscription in the Registry was dependent upon the mortgagor, Marcelino Sola, first recording the deed of the property from the old firm of Sola e Hijo to him. This he failed to do until May, 1912, having in the meantime conveyed the warehouse to the firm of Sola e Hijo, which took title with full knowledge of the mortgage of July 8, 1911, and the obligation of Marcelino Sola to do the acts necessary to permit the mortgage to be recorded in the registry. Under these circumstances we do not think that the acts of Marcelino Sola, which he was in duty bound and could be compelled to do to enable the mortgage to be recorded, can be said to have been done with the intention on the part of the firm of Sola e Hijo to hinder, delay, or defraud its creditors, either in fact or in law, and that the mortgage cannot be held to be void under section 67e.

[2] The case is rightly here on appeal, and not on petition to revise. In it the petitioner seeks to assert a lien on property which, at the time of the bankruptcy, passed into the possession of the bankruptcy court and the avails of which, since the reversal of the orders of October 28, 1913, and January 6, 1914, are constructively in the possession of that court. It presents a controversy in bankruptcy, reviewable by appeal, and not by petition to revise. Hewit v. Berlin Machine Works, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986.

In No. 1246 the petition is dismissed, but without costs to the trustee in bankruptcy.

In No. 1403 the decree of the District Court for the District of Porto Rico is set aside, and the case is remanded to that court, with directions to enter a decree for the appellant in accordance with this opinion, with costs.

MATTERS v. UNITED STATES. *

(Circuit Court of Appeals, Eighth Circuit. November 21, 1919.)
No. 5357.

- CRIMINAL LAW \$\oplus\$ 753(2)—MOTION FOR DIRECTION OF VERDICT.
 Overruling of a motion by defendant for a directed verdict is not error, where there is evidence sufficient to sustain a conviction on any count of the indictment.
- 2. Banks and banking \Longleftrightarrow 256(3), 257(4)—Intent of "misapplication of money, funds, and credits" by officer for jury.

The issuing by an officer of a national bank, without consideration, of certificates of deposit which are afterward paid by the bank, constitutes a "misapplication of its moneys, funds, and credits," within Rev. St. § 5209 (Comp. St. § 9772), and in a prosecution based thereon the intent with which the act was done is a question for the jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Misapplication.]

3. Banks and banking $\Longleftrightarrow 256(\frac{1}{2})$ —Making loss good no defense to criminal transactions with national bank.

The criminal character of transactions with a national bank is to be determined from the facts and circumstances existing at the time, and it is no defense to a prosecution based thereon that a loss resulting to the bank was subsequently made good.

In Error to the District Court of the United States for the District of Nebraska; Martin J. Wade, Judge.

Criminal prosecution by the United States against Thomas H. Matters, Judgment of conviction, and defendant brings error. Affirmed.

John Lee Webster and Frank H. Gaines, both of Omaha, Neb., for plaintiff in error.

T. S. Allen, U. S. Atty., of Lincoln, Neb. (F. A. Peterson, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. The plaintiff in error, hereafter defendant, was convicted and sentenced on each of 14 counts of an indictment charging violations of section 5209, R. S. U. S. (Comp. St. § 9772). Eleven of these counts charged the defendant with having aided and abetted one Luebben, president of the First National Bank of Sutton, Neb., in issuing and putting forth certain certificates of deposit without authority from the directors of said bank, with the intent to injure and defraud said banking association. Three of the counts charged the defendant with having aided and abetted said Luebben, as president of the bank, in misapplying the moneys, funds, and credits thereof with intent to injure and defraud said association. The jury returned a separate verdict of guilty on each of these counts. The defendant has brought the case here, assigning numerous errors in the proceedings which resulted in his conviction.

[1] Although indicted as an aider and abettor, the defendant was a principal under section 332, Penal Code. Act March 4, 1909, c. 321, 35 Stat. 1152 (Comp. St. 10506). There was a motion for a directed verdict, made by counsel for defendant at the close of the evidence for the prosecution; but this was waived by the introduction of evidence and the failure to renew it at the close of all the evidence. The court, however, was requested to instruct the jury to find the defendant not guilty on the counts which charged a misapplication of the moneys, funds, and credits of the bank. This request was refused, and the refusal is one of the errors assigned. If there is evidence sufficient to sustain the verdict on any count of the indictment, the assignment of error is without merit. Norton v. United States, 205 Fed. 593, 123 C. C. A. 609; Doe v. United States, 253 Fed. 903, 166 C. C. A. 3; Billingsley v. United States, 178 Fed. 653, 662, 101 C. C. A. 465; Haynes v. U. S., 101 Fed. 817, 42 C. C. A. 34; Tubbs v. U. S., 105 Fed. 59, 44 C. C. A. 357; United States v. Lair, 195 Fed. 47, 115 C. C. A. 49; Bartholomew v. U. S., 177 Fed. 902, 905, 101 C. C. A. 182; Evans v. U. S., 153 U. S. 609, 14 Sup. Ct. 939, 38 L. Ed. 839; Claassen v. United States, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966; Debs v. U. S., 249 U. S. 211, 216, 39 Sup. Ct. 259, 63 L. Ed. 566; Abrams et al. v. U. S. (November 10, 1919) 250 U. S. 616. 40 Sup. Ct. 17. 63 L. Ed. 1173.

Counts 16 and 17 charge a misapplication of the moneys, funds, and credits of the bank. The evidence on the part of the prosecution as to these counts shows that on June 14, 1913, Luebben, as president of the bank, issued two certificates of deposit, one payable to Mary E. Johnson, four months after date, for the sum of \$1,500, and the other payable to James Richardson, three months after date, for the sum of \$2,000. These certificates are known in the record as

Exhibits 26 and 27. Exhibit No. 26 bears the indorsement of Mary E. Johnson and Stockyards National Bank, South Omaha, Nebraska; Exhibit No. 27 bears the indorsement of James Richardson and City National Bank, Omaha. The testimony of Luebben in reference to these two exhibits, as given at the trial and as stated in the record in narrative form, is as follows:

"Mr. Luebben testified regarding these certificates 26 and 27: I did have a conversation with Mr. Matters over the telephone about these certificates 'the same day they were issued.' 'Mr. Matters called me up over the phone and told me he could get our bank a deposit of \$5,500, and he told me what size of certificates, and to whom they should be issued, should be made out, and asked me to send them to him, and he would deliver them over to those parties, get the money, and deposit it to our credit in the Merchants' National Bank. * * I wrote out three certificates of deposit, the two that you have recited here now, together with another one due to Mary E. Johnson, for \$2.000. I wrote a letter of which Exhibit 28 is a carbon copy, dated June 3d. I dated those certificates a day later, as that would be the time they would reach Mr. Richardson and Mrs. Johnson, I presumed. * * I wish to state that I had made out some certificates to those same parties under the same request, which were returned and canceled. * * If my memory serves me right, there was either a mistake made and those were substituted for the others; but my memory is just a little hazy about just what the reason was, or how it occurred, but however, there was \$5,500, in two certificates sent, two of them payable to Mary E. Johnson and one of them to James Richardson.' I called up Mr. Matters later, and asked him why we did not receive credit for those certificates. 'He said the deal wasn't closed yet, and the parties hadn't paid over the money.' 'I had several conversations with him in regard to those various certificates that were outstanding, and I can't say at any special time. I went up to Omaha and requested that he give me the certificates or give me the money. He said it was foolish to ask for the certificates, that they were in his vault, and that he would get that money for me. He didn't get the money for me. The money was never paid for the Johnson and Richardson certificates. Said certificates were presented to the bank for payment. Exhibit 26 was paid by the bank when presented for payment. 'My recollection is that Mr. Miller paid that over the counter without my knowledge, and he didn't know * * * that no money had been received for them, is my recollection.'

"No one connected with the First National Bank, aside from myself, knew anything about the transactions between myself and Mr. Matters relating to the Johnson and Richardson certificates. * * * Exhibit 27 was paid when presented to the bank for payment. I immediately called up Mr. Matters in reference to the coming in of this certificate and that we would be compelled to pay it. These certificates, from the time they were issued, were outstanding obligations against the bank. These two certificates were presented on different dates, and I called up Mr. Matters over the phone in reference to both of the certificates, but I cannot repeat the conversation I had with him. As near as I can recollect 'I called him up over the phone and told him the James Richardson certificate, which he said he had control of and was in his vault, was presented for payment, and that we paid it.' He said, 'My God, has it come in? and I said, 'We will have to charge your account with that right away, and that you must send money right away to cover it, because the account was already overdrawn.' I didn't charge the certificates to his account, because he didn't send anything to bring up his account. I had frequent conversations with him with reference to all three of those certificates. There is nothing more that I can say about these conversations, except that 'I pleaded with him to raise the money; * * * that he knew the penalties that would happen to both myself and him in the matter, and I believed his statements that he was doing all he could to raise the money.' I knew at that time, and I stated to him that I knew, those certificates were out of his hands. I had drawn the conclusion that Mr. Matters would not return the certificates to me because he did not have possession of them. He didn't tell at any time how he came to turn over to either James Richardson or Mary E. Johnson the respective certificates, Exhibits 27 and 26."

On cross-examination Luebben testified as follows:

"The Mary E. Johnson and the Richardson certificates were issued under the same date, June 4, 1913. Only one certificate of Richardson and one of Mary E. Johnson are covered by the indictment. I don't know why the other certificate was not included, unless it be that they did not have possession of it. It is not true that I was instructed to charge both those certificates to Mr. Matters' account. Our bank books did show an open account with Thomas H. Matters. There had been an open account with Thomas H. Matters for a long time prior to said date, and said account continued until the bank closed. I did state to Mr. Matters over the telephone that when the certificates came in for payment and were paid 'that I would have to charge his account with it.' It is true that on June 2d, which was two days before these certificates were issued, Mr. Matters did send to me as president of the bank a check for \$2,000, and which check was paid as appears on the face of it, June 8th."

The defendant was an attorney at law living at Omaha, Neb. The bank, as stated, was located at Sutton, in the same state. To sustain the claim made by defendant that these certificates of deposit were to be charged to his personal account in the bank, his counsel introduced in evidence what is known in the record as Exhibit 304, being a check dated June 2, 1913, for the sum of \$2,000, drawn on the Omaha National Bank, and payable to the order of Luebben, president, and indorsed, "Paid Omaha National Bank, June 3, 1913." Luebben testified in reference to this check as follows:

"The check, Exhibit 304, under date of June 2, 1913, is a check which was handed to me by Homer W. Gray between May 28 and May 31, 1913. Mr. Gray had been absent on a trip to Tennessee with Mr. Matters. Mr. Gray was absent on a trip to Tennessee with Mr. Matters, and on his return he wired me to meet him at Fairmont. * * * He wired me to meet him on the train by going to Fairmont and taking the train back to Sutton on which he was returning, and while on the train he told me that he had given Mr. Matters a check for \$2,000 on a deal which he was making with Mr. Matters in reference to a few acres of land just outside of Sutton, which was being traded for by Mr. Matters and the owner of the land, whose name I cannot now recall, for some Tennessee land, and that this deal would go through on my approval, or subject to my approval, and that he had a check from Mr. Matters for \$2,000 to offset that check that he gave Mr. Matters. * * * He had given Matters a check for \$2,000 on our bank, and the deal was subject to my approval. Inasmuch as Mr. Matters had not obtained that land, and the deal had not been consummated between Mr. Matters and the other party, I there and then stated that I did not approve of it, and he gave me the check for \$2,000 that Mr. Matters had given him. This is the identical check that was made payable to me, and when we returned to Sutton I immediately placed this check in the bank, made a deposit slip to the credit of Homer W. Gray for \$2,000 to meet the check Mr. Gray gave me on the First National Bank when it came in. This check was dated June 2d, but as a matter of fact it was dated ahead. The indorsements show that it was down in Kansas City on June 2d, and was paid in Omaha on June 3d."

[2] The evidence further showed without dispute that the defendant used the Richardson certificate to pay a personal debt owing by him to Richardson, and there was evidence from which the jury could find that the Johnson certificate was also used by him in a similar manner. The defendant did not testify. Beyond question the evi-

dence recited sustains the verdicts on counts 16 and 17, as the facts would authorize the jury to find that the moneys of the bank were misapplied with intent to injure and defraud the bank. Much argument and citation of authority is contained in the brief of counsel for defendant, for the purpose of showing that certificates of deposit are not moneys, funds, or credits. It is sufficient to say in answer to this contention that the defendant is not charged with aiding and abetting Luebben in misapplying certificates of deposit, but moneys, funds, and credits by using certificates of deposit as means and instruments whereby the moneys of the bank were misapplied. Luebben testified that no money or other consideration was received by the bank for the Johnson and Richardson certificates, and that they were paid by the bank when they were presented. If this does not present a case of misapplication of the moneys of the bank, it would be difficult to find one. The evidence being clearly sufficient to sustain the conviction under counts 16 and 17, the judgment below must be affirmed, so far as the sufficiency of the evidence is concerned. There may be other testimony in the record which counsel might claim was contradictory to the evidence of Luebben; but the question before us is as to whether there is substantial evidence to sustain the verdicts, and not whether the verdicts were right or wrong on conflicting evidence. We do not consider the other counts of the indictment on the question of the sufficiency of the evidence, for it would avail the defendant nothing even if the evidence was insufficient under all the other counts; moreover, it would extend this opinion to an unwarrantable length to detail the evidence as to each count.

Counsel for the defendant next contends that the trial court erred in not specifically stating to the jury that the issuing of certificates of deposit was a crime distinct from misapplying moneys. Conceding this question to be raised on the record, it is sufficient to say that if there was anything made plain by the charge of the court it was this same distinction. The law was stated by the court, and the different counts in the indictment were classified, and just what each group of counts charged was stated. The confusion which counsel seems to think existed arose, in our opinion, from the fact that counsel construed the counts charging misapplication of moneys as charging misapplication of certificates of deposit. It is pointed out, also, that Luebben testified that he had no intent to defraud the bank when he issued the certificates of deposit, and we may add that the defendant no doubt, if he had testified, would have testified in the same way; but such testimony would not determine the matter. The jury had a right, and it was their duty, to consider the overwhelming weight of the acts performed by Luebben and the defendant, and thereby reach a just conclusion as to what the intent of the defendant and Luebben was. The question of intent was for the jury, and there was abundant evidence to sustain their finding that the misapplication of the moneys of the bank as charged in the sixteenth and seventeenth counts was for the purpose of injuring and defrauding the bank. That was the legitimate and necessary result of the transaction.

Complaint is made by the twenty-fifth, twenty-sixth, twenty-seventh, and twenty-ninth assignments of error of certain language contained in the court's charge to the jury. It is claimed that the effect of the instructions was to have the jury believe all that Luebben and another witness, Honey, testified to, that was prejudicial to the defendant, and disregard the testimony wherein they testified that what they did was to aid, and not to defraud, the bank. We do not think the language of the court as contained in the charge is capable of any such construction as counsel seek to place upon it. Luebben's opinion of whether the defendant was guilty or not was irrelevant and immaterial, as the court stated. The court correctly charged that the jury were not obliged to take Luebben's word for what his (Luebben's) intent was, but that such testimony should be weighed by the jury, together with all the facts and circumstances in the case.

It is further claimed that the court erred in using the illustration set forth in assignment No. 27. It is urged that this illustration was equivalent to saving to the jury that the conduct of Mr. Luebben in issuing certificates of deposit for the simple purpose of borrowing money for the bank was as criminal as taking the \$1,000 out of the bank vaults to speculate in mining stocks, or the issuing of certificates of deposit to speculate on the Board of Trade, and the inquiry is made by counsel: Why should not the court have confined its illustrations to the facts in this particular case? The court was endeavoring to make the charge against the defendant plain to the jury, and the court could not have illustrated the present case by simply restating the facts as they appeared. That would not be illustration. It was impossible to make a comparison with only one set of facts. It was necessary to have other facts to use as an illustration. Another fault in the criticism of counsel is that it assumes that the certificates of deposit were simply issued for the purpose of borrowing money. That was not the case of the prosecution. The evidence in regard to the sixteenth and seventeenth counts shows that these certificates were issued without consideration, used by the defendant to pay his own debts, and subsequently paid by the bank. How can it be assumed that such certificates were issued for the purpose of borrowing money? We see no fault in the illustration used by the court.

Assignments of error Nos. 41 and 42 complain of the refusal of the court to give certain instructions requested by the defendant. The language contained in these requests was substantially given by the court in its general charge, except the closing part of the language contained in assignment of error No. 42. The expression "even though the methods employed by Mr. Luebben and defendant, Thomas H. Matters, may have been either unusual or irregular," was improper to give to any jury, as being misleading and leaving the jury to determine without guidance as to what was unusual and irregular.

[3] Assignment of error No. 23 complains of the refusal of the trial court to admit in evidence in behalf of the defendant the record

and proceedings in the case of Frank R. McCormick, Receiver of the First National Bank of Sutton, Nebraska, v. Thomas H. Matters, and also certain correspondence between the receiver of the bank, the Comptroller of the Currency, and counsel for the respective parties. The judgment was dated October 26, 1916, three years after the transactions set forth in the indictment, and was the result of a compromise between the receiver and the defendant. The judgment was in favor of the defendant for \$1,000. The purpose of offering these proceedings, as stated by counsel, was to show that the defendant was not indebted to the bank when it failed, or at the time of the judgment, and therefore defendant could not have intended to defraud the bank in transactions had three years before. The misconception of the law involved in this contention runs through counsel's whole brief. The contention is made in the brief that, as the defendant had a general account in the bank, he could not defraud the bank, if, when it failed, the bank owed him. This court in Norton v. United States, 205 Fed. 602, 123 C. C. A. 618, stated the elementary law upon the subject as follows:

"The criminal character of these transactions is to be determined from the evident facts and circumstances existing at the time of the respective transactions. The fact that subsequently the defendant may have made good to the American National Bank the amounts thereof, and that the bank did not lose by the transaction, does not change the unlawful character of the transactions when made."

The evidence offered was clearly inadmissible as irrelevant and immaterial regardless of many other valid objections.

Assignment of error No. 21 relates to the testimony of Koutsky, Ladd, and McElhenie. We do not think that this testimony was inadmissible; but, if it was, it did not relate to the sixteenth and seventeenth counts, and could not have prejudiced the defendant. The same may be said of assignments Nos. 5 and 6. Assignment of error No. 7 relates to the twentieth count, in which a verdict was directed in favor of the defendant. Assignments of error Nos. 8 and 9 are not among those specified in the brief as errors upon which the defendant would rely. Assignment of error No. 15 complains of the refusal of the court to receive in evidence a certain affidavit made by the witness Richardson. The witness subsequently testified to the contents of the affidavit, and the error, if any, was cured.

Assignment of error No. 16 relates to the refusal of the court to allow the witness George Honey to answer questions on cross-examination as follows:

"Q. Did you not say, at said time and place, to Miss Abbia M. Newberry, that if Mr. Thomas H. Matters would do what you, Mr. Honey, and Mr. Luebben, the former president of the First National Bank of Sutton, wanted him to do, you, meaning you, Mr. Honey and Mr. Luebben, would do what you could do and clear him of the charges against him, but Mr. Matters was not going to do what you asked him to do?"

"Q. And, Mr. Honey, one other question: Did you not, at the same time and place, say in the presence and hearing of Miss Abbia M. Newberry, that you, Mr. Honey, and Mr. Luebben, were both protected, and that Luebben was

being held by the government at its expense?"

"Q. Mr. Honey, did you not say at said time and place, in the hearing of the persons named, that you, meaning yourself, Mr. Honey, and Mr. Luebben, were both being protected?"

Conceding that the witness did say what it is assumed he said in the first question, it would simply be a declaration that in the circumstances mentioned the witness would tell the truth. Moreover, Honey's evidence did not relate to counts 16 and 17. The other questions were immaterial. Assignments of error Nos. 18, 19, and 20 relate to the question of Luebben's authority to issue certificates of deposit, a question not involved in counts Nos. 16 and 17.

Finding no errors in the record in reference to counts 16 and 17,

the judgments on those counts are affirmed.

CHASE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1919.) No. 5283.

- 1. Indians \$\iffsilon 13\$—Repeal of statute making allotment to Omaha Indians. The provision of Act Aug. 7, 1882, c. 434, \\$ 8, for making allotments to children of the Omaha Tribe of Indians born thereafter from the unallotted lands thereby required to be patented in trust to the tribe, held repealed by Act May 11, 1912, c. 121, \\$ 1, providing for the sale of such lands, with certain reservations, and the division of the proceeds among the children of the tribe.
- 2. Statutes €==227—Officers "Authorized" by LAW to act may be compelled to perform their duty.

A statute which "authorizes" a public officer to do a certain thing imposes upon him a positive and absolute duty to do such act, which may be enforced by those for whose benefit it is to be done, in the absence of words giving him a discretion.

- [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Authorize.]
- 3. Indians \$\iiii 13\)—Statutory right to allotment gives no vested interest.

 An Indian, given by statute the general right to an allotment from lands of the tribe, acquires no vested interest until the allotment is definitely selected, located, and set apart, and until such time Congress has plenary power to change the mode of disposition of the land.
- 4. Appeal and error \$\iff 1195(3)\$—Only question before appellate court is law of the case on reversal.

Only those issues of law which were before the appellate court and by it determined become the law of the case, when upon reversal the cause is retried, and the question of the effect of a statute which was not in issue nor considered is open for consideration upon the second hearing.

5. APPEAL AND ERROR \$\ightharpoonup 1097(2)\$\top \text{Erroneous prior decision may be set aside on second appeal.}

An appellate court by its decision does not preclude itself from doing justice between the parties, if on a subsequent appeal it should be convinced that its former decision was erroneous.

- APPEAL AND ERROR ⇐==1096(3)—PARTY NOT ESTOPPED TO BAISE QUESTION OF LAW ON SECOND APPEAL.
 - A party is not estopped from raising a question of law on a second appeal, because it might have been, but was not, raised on the former appeal.

S-For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 261 F.—53

Appeal from the District Court of the United States for the Dis-

trict of Nebraska; J. W. Woodrough, Judge.

Suit by Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, against the United States. Decree for the United States, and complainant appeals. Affirmed.

For former opinion, see 238 Fed. 887, 152 C. C. A. 21.

John Lee Webster, of Omaha, Neb. (Hiram Chase, of Pender,

Neb., on the brief), for appellant.

T. S. Allen, U. S. Atty., of Lincoln, Neb., and O. C. Anderson, Attorney for Omaha Tribe of Indians, of West Point, Neb. (Frank A. Peterson, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. May 19, 1910, this action was instituted under the provisions of the act of Congress approved February 6, 1901 (31 Stat. 760, c. 217), by Hiram Chase, Jr., a member of the Omaha Tribe of Indians, by his next friend, Hiram Chase, Sr., to secure a decree for an allotment of land in the Omaha reservation, which had been denied to him by the Secretary of the Interior. The case was before this court at a former term, and, as stated in the opinion of the court, on appeal from a decree dismissing the amended complaint for the reason that it did not state facts sufficient to constitute a cause of action. We then decided that the amended complaint did state a cause of action under the act of Congress of August 7, 1882 (22 Stat. 341, c. 434). 238 Fed. 887, 152 C. C. A. 21. When the case went back to the trial court, the appellee answered, alleging among other things the acts of Congress of March 3, 1893 (27 Stat. 630, c. 209), and May 11, 1912 (37 Stat. 111, c. 121), as repealing the act of 1882, so far as the right of Chase, Jr., to an allotment was concerned. After a trial on the merits, a decree of dismissal of the action was entered, and appellant appealed.

[1] As our former decision gave Chase, Jr., no right to an allotment under the act of March 3, 1893, but expressly decided that he was not entitled to an allotment under said act, and that it did not repeal the act of 1882, it need not be mentioned, except perhaps in a historical way. We also decided that Hiram Chase, Jr., was entitled to an allotment of 40 acres under the act of 1882, supra. The question, therefore, before us is as to whether the act of May 11, 1912, supra, took away the right of Chase, Jr., to an allotment under the act of 1882. The act of 1882 provided for the sale of that portion of the Omaha reservation lying west of the Sioux City & Nebraska Railway and the allotment in severalty to the Indians of that portion of the reservation lying east of said railway in quantity as follows: To each head of a family one quarter of a section; to each single person over 18 years of age one-eighth of a section; to each orphan child under 18 years of age one-eighth of a section; and to each other person under 18 years of age one-sixteenth of a section. The act further

provided that the Secretary of the Interior should cause patents to be issued for said allotments in the names of the allottees, which patents should be of the legal effect and declare that the United States held the land thus allotted for the period of 25 years in trust for the sole use and benefit of the Indians to whom such allotments had been made. These allotments were made in 1884. Section 8 of the act of 1882 reads as follows:

"That the residue of lands lying east of the said right of way of the Sioux City & Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha Tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha Tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha Tribe of Indians, in fee discharged of said trust and free of all * * incumbrance whatsoever: Provided, that from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: And provided further, that these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which provise shall be incorporated in the patent issued to the tribe."

Chase, Jr., was born December 3, 1895. Hiram Chase, Sr., testified that he transmitted to the Secretary of the Interior an application for an allotment for the land described in the complaint; that said application was denied; that witness was not able to produce said application nor the letter written him in reply thereto; that said papers had been lost or mislaid. The trust period mentioned in the act of 1882 expired in 1909. In the absence of other legislation it therefore appears that Chase, Jr., was within the terms of the act of 1882 allowing allotments to Omaha children born during the trust period. We proceed, therefore, to consider the question heretofore stated as being the question for decision. The act of 1912, supra, reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or as nearly as to the Secretary may seem practicable, and after such survey and appraisement, to sell and convey, in quantities not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian reservation, in the state of Nebraska, except such tracts as are hereinafter specifically reserved; Provided, that the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof: And provided further, that prior to such appraisement and sale any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri river shall be permitted to relinquish such allotment and select lieu lands of equal area from the unallotted lands, the lands so relinquished to become a

part of the unallotted tribal lands and subject to appraisement and sale under the terms of this act.

"Sec. 2. That the Secretary of the Interior is hereby directed to reserve from sale, under the terms of this act, the following tracts of land for the purposes designated: Forty-nine acres of the land now used for agency purposes to be reserved for agency and school purposes for so long as the need thereof exists; ten acres to be selected by the tribe for use as a tribal cemetery; ten acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious or educational purposes; two acres of the land on which is standing what is known as the old Presbyterian mission building, and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska: Provided, that of the land now reserved for agency purposes the Secretary of the Interior is directed to reserve and set aside for town-site purposes one hundred and sixty-four acres other than the forty-nine acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys, and parks, the lots to be appraised and sold under the terms of this act, and the streets, alleys, and parks are hereby dedicated to public use: Provided further, that the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or otherwise disposed of, shall be subject for a period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian coun-

"Sec. 3. That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this act, and after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow, shall be divided pro rata among the children of the Omaha Tribe living on the date of the passage and approval of this act who have not received allotments of land under the acts of August seventh, eighteen hundred and eighty-two (twentysecond United States Statutes at Large, page three hundred and forty-one) and March third, eighteen hundred and ninety-three (twenty-third United States Statutes at Large, page six hundred and thirty), and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the treasury of the United States, and shall bear interest at the rate of five per centum per annum, but in the event of the death of any such Indian while there remains in the treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the state of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

"Sec. 4. That for the purpose of carrying out the provisions of this act there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of three thousand dollars, or so much thereof as may be necessary, to be reimbursable out of the funds arising from the sale of said lands."

It appears on the record that no allotment of land was ever made to children born during the trust period under the act of 1882. The title of the Omaha Tribe of Indians and the individual members thereof in the unallotted lands mentioned in section 8 of the act of 1882 was merely one of occupancy or possession. United States v. Chase, 245 U. S. 89, 38 Sup. Ct. 24, 62 L. Ed. 168. From a reading of the act of 1912, it clearly appears, in our opinion, that the act deals wholly and completely with the unallotted lands referred to in section 8 of the

act of 1882. There is no repealing clause in the act, but we are of the opinion that it is so far repugnant to, and covers so completely the subject of, the disposition of the unallotted lands of the Omaha reservation, that it must be held to have repealed that portion of the act of 1882 which authorized allotments to Omaha children during the trust period. The act of 1912 comes within the rule that, where two or more acts are passed, and the latter act, whether in the form of an amendment or otherwise, covers the whole subject-matter of the former, and is inconsistent with it, and evidently intended to supersede and take the place of it, repeals the former law. U. S. v. Tynen, 11 Wall, 88, 20 L. Ed. 153; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60; Murphy v. Utter, 186 U. S. 95, 105, 22 Sup. Ct. 776, 46 L. Ed. 1070; The Paquette Habana, 175 U. S. 677, 685, 20 Sup. Ct. 290, 44 L. Ed. 320; Ency. U. S. Reports, vol. 11, page 98; 36 Cyc. 1082; Minn. Impr. Co. v. Billings, 111 Fed. 972, 50 C. C. A. 70.

[2] The Secretary of the Interior, of course, could not allot the unallotted lands under the act of 1882, and also sell them under the act of 1912; nor could he allot the unallotted lands and at the same time make the reservations which he is commanded to make by section 2 of the latter act. It is so plain that both acts cannot be carried out that it is unnecessary to discuss that question. It is claimed, however, by counsel for appellant, that the Secretary of the Interior is simply "authorized" to cause the unallotted lands to be surveyed and sold and make the reservations prescribed in section 2, and therefore it is discretionary with him whether he will perform the duty imposed upon him by the act or not, and that hitherto he has not acted. We are of the opinion that the nonaction of the Secretary is fully explained by the pendency of this suit and about 20 others like it since the act of 1912 was passed. An examination of the legislation of Congress shows that in many of the acts of Congress the word "authorized" is frequently used where a duty is imposed upon a public executive officer, and in no case are the duties imposed discretionary unless, after the word "authorized," the other words "in his discretion" are added. As was said by the Supreme Court of the United States in Mason et al. v. Fearson, 9 How. 258, 13 L. Ed. 125:

"Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons. * * * Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the Legislature, which is the test in these cases, seems under such circumstances to have been 'to impose a positive and absolute duty.'" Mayor of New York v. Furze, 3 Hill (N. Y.) 612; Minor et al. v. Mechanics' Bank of Alexandria, 1 Pet. 46, 64, 7 L. Ed. 47, and note; Livingston v. Tanner, 14 N. Y. 64; Ralston v. Crittenden (C. C.) 13 Fed. 508; Supervisors Rock Island County v. U. S., 4 Wall. 435, 18 L. Ed. 419.

It appears that the word "authorized" is used in the acts of 1882 and 1893, and in the act of 1882 in almost the identical language of

the act of 1912. Of course, we must presume that the act of 1912 was passed for the benefit of the Indians, and we are entirely within the facts shown by the record when we say that the act was the result of years of perplexity and negotiations between the Secretary of the Interior and those Indians who were interested in the unallotted lands of the Omaha Tribe. The case of Frost v. Wenie, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614, and U. S. v. Hemmer et al., 241 U. S. 397,

36 Sup. Ct. 659, 60 L. Ed. 1055, are not in point.

[3] Chase, Jr., never obtained a vested interest in the unallotted lands of the Omaha Tribe under any law, and Congress had plenary power to at any time change the mode of disposition of these unallotted lands. Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386; Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; Lone Wolf v. Hitchcock, 187 U. S. 557, 23 Sup. Ct. 216, 47 L. Ed. 299; Sizemore v. Brady, 235 U. S. 441. 35 Sup. Ct. 135, 59 L. Ed. 308; Cherokee Intermarriage Cases, 203 U. S. 76, 27 Sup. Ct. 29, 51 L. Ed. 96; Wallace v. Adams, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547; Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041; Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941. If we should concede that Chase, Jr., had a floating right in the unallotted lands, that right did not attach to a particular tract of land until such tract of land had been definitely located, selected, and set apart to the allottee. Woodbury v. U. S., 170 Fed. 302, 95 C. C. A. 498; Smith v. Bonifer (C. C.) 138 Fed. 889; Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039: Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; Gritts v. Fisher, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, and many other authorities that might be cited.

The result that would follow a decision by us that the act of 1912 was of no force or effect must be considered. It appears that besides the present suit there are about 83 other plaintiffs whose suits are now pending in the court below, all of whom have made their selections for allotments and instituted their suits against the United States subsequent to the passage and approval of the act of May 11, 1912. and if they are entitled to these allotments regardless of the act of 1912, it would amount to a repeal thereof by this court, as the land claimed by these various plaintiffs practically takes up all the unallotted tribal lands. It appears, also, that upon the lands mentioned in section 2 of the act of 1912 are located the government buildings described therein, also a large Presbyterian church, Presbyterian mission building, also a cemetery wherein the Indians have buried their dead for many years. Moreover, to rule in favor of the plaintiff in this action would be to decide contrary to the construction placed upon these laws for many years by the executive officers of the United States charged with their execution. While their construction is not conclusive it is entitled to much weight. This proposition is supported by a large number of decisions of the Supreme Court of the United States.

[4] It is contended, however, that conceding for the sake of argument what we have said in reference to the act of 1912 is true, the appellee is not in a position at this time to set up that act as a defense for the following reasons: (a) The decision of this court in Chase v. United States, supra, that appellant was entitled to an allotment under the act of 1882, as amended by the act of 1893, is the law of this case, and the District Court had no authority to hold otherwise; (b) that the Department of Justice was fully advised of the act of 1912 at the time of the original hearing of the case, and did not, either in the trial court or in this court, contend or claim that said act repealed the act of 1882, therefore appellee is now estopped from changing his position by pleading the act of 1912.

In considering these contentions it is necessary to look at the record as it stood on the former appeal. The record on this appeal does not show that the amended complaint was ever attacked as a pleading. It does show that a general demurrer was filed to the original complaint September 8, 1910, and sustained by the District Court October 2, 1911. It does not show that the complaint, either original or amended, or the action itself was ever dismissed. Turning to the opinion of

this court, on the former appeal we find the recital:

"The United States appeared in due time and moved to dismiss the bill, on the ground that its allegations were not sufficient to constitute a cause of action. This motion was sustained, and, plaintiff declining to plead further, the bill was dismissed."

We therefore conclude that the record on the former appeal did show that the bill or complaint was dismissed as stated. The appellant in his amended complaint, with the treaties of March 16, 1854 (10 Stat. 1043), and March 6, 1865 (14 Stat. 667), as a background, pleaded his right to an allotment under the act of 1882, and also pleaded the act of 1893, stating his view as to the proper construction of the latter act. The act of 1912 was not mentioned in the complaint. Appellee in his motion to dismiss insisted that the complaint did not state a cause of action. The trial court adopted this view. On appeal this court decided that the trial court was in error, in that under the facts pleaded appellant was entitled to an allotment under the act of 1882, and reversed the case. The appellee had pleaded nothing, except as stated. The question for decision, therefore, on the former appeal was necessarily confined to the allegations of the complaint. Appellee contended on the former appeal that the act of 1893, and which appellant pleaded repealed the act of 1882, and made no other contention. It is thus made clear that this court on the former appeal. so far as the record shows, did not consider the effect of the act of 1912, nor was it called to the attention of the court as conclusively appears from its opinion, and the briefs of counsel. The judgment on the former appeal being one of reversal, the rule as stated in Mutual Life Insurance Co. v. Hill, 193 U. S. 553, 24 Sup. Ct. 539, 48 L. Ed. 788, applies. It was there stated:

"Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration."

See, also, In re Fork & Tool Co., 160 U. S. 248, 16 Sup. Ct. 291, 40 L. Ed. 414; Ex parte Union Steam Boat Co., 178 U. S. 317, 20 Sup. Ct. 904, 44 L. Ed. 1084.

The question has been decided the same way by this court. The

court said:

"Only those issues of law which were before the appellate court, and by it determined, become the law of the case, when, upon reversal, the cause is retried." Iowa Central Ry. Co. v. Walker, 255 Fed. 648, —— C. C. A. ——.

What is called the "law of the case" is only a rule of convenience,

generally adhered to, of course, but not necessarily.

[5] The appellate court by such former decision did not preclude itself from doing justice between the parties, if it should be convinced that its former decision was erroneous. Messinger v. Anderson, 225 U. S. 436, 444, 32 Sup. Ct. 739, 56 L. Ed. 1152, 1156; Lewers & Cooke v. Atcherly, 222 U. S. 285, 295, 32 Sup. Ct. 94, 56 L. Ed. 202, 205, 206; Hertz v. Woodman, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001. There is no occasion, however, on this appeal, to consider whether our former decision was right or wrong, and we dismiss the matter without further notice. The position now taken is that the question before us on this appeal was not considered or decided on the former appeal, and is therefore, under the decisions cited, open for consideration and decision.

[6] We come now to consider the right of counsel for appellee to raise the question as to the effect of the act of 1912, because with knowledge of that act on the part of the Department of Justice the question was not raised on the former appeal. It is claimed that appellee is estopped from raising the question now, because it did not raise it on the former appeal, and further that it cannot change its position from that which it took on the former appeal. So far as the question of estoppel is concerned, we see no merit in that contention. Whether or not the act of 1912 repealed the act of 1882 was a question of law. It could have been raised without any mention of the matter in the answer filed to the amended complaint. To hold that, if counsel does not raise all the questions of law on the first appeal, he may not thereafter raise any new questions of law, would be a very severe rule. There may have been a change of counsel, and many other matters which caused the failure to raise all the applicable questions of law. The question now raised is not inconsistent with but simply an additional reason why the act of 1882 could not be relied upon by appellant as giving him an allotment. The real question is: Was the point now raised decided on the former appeal? As we are

clearly of the opinion that it was not, we think the point is still open for decision.

In view of what we have said, the decree below must be affirmed; and it is so ordered.

GILPIN V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1919.)
No. 5284.

Appeal from the District Court of the United States for the District of

Nebraska; Joseph W. Woodrough, Judge.

Suit by Mary Gilpin, a minor, by her next friend, Samuel Gilpin, against the United States. Decree for defendant, and complainant appeals. Affirmed.

John Lee Webster, of Omaha, Neb. (Hiram Chase, of Pender, Neb., on the

brief), for appellant.

T. S. Allen, U. S. Atty., of Lincoln, Neb., and O. C. Anderson, Attorney for Omaha Tribe of Indians, of West Point, Neb. (Frank A. Peterson, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. This case is ruled by our decision in Chase, v. United States, 261 Fed. 833, — C. C. A. —, this day decided. Decree affirmed.

BUTLER v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1919.) No. 5320.

APPEAL AND ERROR \$\ightharpoonup 1061(2)\$—Dismissal of intervening petition not error where action is dismissed on merits.

Dismissal of an intervening petition *held* not error, where the action was subsequently and rightly dismissed on the merits.

Appeal from the District Court of the United States for the District

of Nebraska; J. W. Woodrough, Judge.

Suit in equity by Claude Hallowell against the United States; Thomas Butler, Intervener. Intervener appeals from an order dismissing his petition. Affirmed.

Thomas L. Sloan, of Walthill, Neb., and Clinton Brome, of Omaha,

Neb., for appellant.

T. S. Allen, U. S. Atty., of Lincoln, Neb., and O. C. Anderson, Attorney for Omaha Tribe of Indians, of West Point, Neb., for the United States.

John Lee Webster, of Omaha, Neb. (Waldo C. Whitcomb, of Winnebago, Neb., on the brief), for appellee Hallowell.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

CARLAND, Circuit Judge. In this case appellant by leave of court filed an intervening petition in the case of Claude Hallowell, a Minor, by Alfred Hallowell. His Father and Next Friend, v. United States, pending in the United States District Court, District of Nebraska. The District Court, on hearing the Hallowell Case, dismissed the same upon the merits, and also the intervening petition. As the disposal by the trial court of the Hallowell Case was in accordance with our decision this date rendered in the case of Chase v. United States, 261 Fed. 833, — C. C. A. —, there was no error committed by the court below in dismissing the intervening petition of Butler.

Decree affirmed.

MUMFORD V. ROCK SPRINGS GRAZING ASS'N.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1919.) No. 5348.

1. INJUNCTION \$\igchtleftarrow 34-Right to restrain access to public lands for graz-ING PURPOSES OVER DEFENDANT'S LAND.

Complainant sheep owners held not entitled to injunction to restrain defendant, the owner of odd-numbered sections of tract of grazing land. the even-numbered sections being unoccupied public land, from interfering with complainants in driving and grazing their sheep on its lands while going to and from the government sections, where it was shown that there were numerous highways across the tract in different directions, that the section and quarter corners were plainly marked by steel posts, and that defendant had not interfered with the driving of the sheep over its lands to reach the government sections, but had freely given permits for the same, conditioned on payment of a reasonable price for the grass consumed from its lands.

2. Injunction @==11-Grounds of belief against exercise of lawful RIGHTS OF LANDOWNER.

A court of equity will not interfere to enjoin an owner of lands from exercising his lawful rights as owner, nor from doing that which admittedly is wrong, unless it is first shown that the wrong has been threatened, and that it is his intent to carry the threat into effect, to the irreparable injury of complainant.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit in equity by J. W. Mumford, for himself and others in common interest with him, against the Rock Springs Grazing Association. Decree for defendant, and complainant appeals. Affirmed,

Barnard J. Stewart, of Salt Lake City, Utah (Daniel Alexander, of

Salt Lake City, Utah, on the brief), for appellant.

John W. Lacey, of Cheyenne, Wyo. (T. S. Taliaferro, Jr., of Rock Springs, Wyo., and Herbert V. Lacey, of Cheyenne, Wyo., on the brief), for appellee.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. By bill in equity appellant seeks to enjoin the appellee, its agents, representatives, etc., from in any manner interfering with or depriving the appellant and others in common interest with him from passing to and from the unoccupied public domain of the United States with their sheep and other live stock, within the area referred to in the bill, and to enjoin the appellee from interfering with or depriving the appellant and others from passing over appellee's lands in moving their stock to and from and upon the said public domain. Appellant asks that it be decreed that he and others in common interest with him have the right, as licensees of the government of the United States, to pass to and from and over the unoccupied public domain of the United States within the area described in the bill, and that, when necessary in order to go upon the public domain, they shall have the right to pass over the lands owned or controlled by the appellee, and in the event appellee shall fail to point out with sufficient certainty the boundary lines of the lands so owned and controlled by appellee, adjoining or alternating the even-numbered sections of land, unoccupied public domain within the said area, and shall fail to designate a reasonable trail, path, or right of way through its lands along which appellant and others in common interest with him may drive or trail their sheep in passing to and from the public domain, then that the appellant and others in common interest with him shall have the right to select a reasonable path or way for the trailing of their sheep, and that if the boundary lines of the land so owned and controlled by the appellee shall not be designated and marked with reasonable certainty, so that the boundaries thereof can be readily located by the sheep growers desiring to cross and to graze the public domain within the said area, then it shall be decreed that appellant and others in common interest with him shall have the right to go upon the public lands and graze the same without liability to the appelled for trespass or otherwise for passing over and grazing the lands of appellee, and that the appellee, its agents, etc., be enjoined from prosecuting civil actions for trespass or otherwise intimidating, harassing or otherwise injuring the appellant and others in common interest with him or causing them expense because of their grazing the said unoccupied public domain and the lands of the defendant association within said area.

The bill is so voluminous it cannot be set forth in substance. Suffice it to say that the appellant by proper allegations sets forth and alleges jurisdictional facts, and that the appellant and other persons for whom the action was brought had been and are now the owners of large numbers of sheep; that they were and are engaged in the live stock business, are dependent upon the unoccupied public domain of the United States in the locality referred to in the bill for the grazing of their sheep, and are now grazing their sheep on the unoccupied public domain in Sweetwater county, Wyo., abutting and alternating the lands now leased and controlled by the appellee, described in the bill, except when interfered with by the appellee, its agents, etc., as set forth in the bill.

It is then alleged that the appellee is the owner of all odd-numbered sections, and sections 16 and 36, approximating 316,000 acres, for a distance of 20 miles north and south and 50 miles east and west; that

said even-numbered sections, except 16 and 36, alternating the oddnumbered sections within the area referred to therein, are practically all unoccupied public domain, and have an area of approximately the same number of acres—the odd-numbered sections owned by appellee and the even-numbered sections of unoccupied public domain being located alternately like the squares of a checkerboard. The appearance of the entire area is as nature left it, is that of a common, and peculiarly adapted and almost exclusively used for the grazing of sheep. It is further alleged that the appellee in the past has and now uses both its private lands and the public lands within the area as a common, without distinction as to use, and without attempting to physically separate the use and designate by mark, sign, or otherwise the boundary of either the government lands or its lands; that appellee has in the past and is now preventing and denying the appellant and others access to and upon all the public domain within that area, and because of the vast area of land so controlled, and the few limited highways leading across the same, the nature and character of the country, and its adaptability exclusively for grazing, it is impossible to trail the bands of sheep from the public domain on the south to the public domain on the north, or to and from the public lands within the area described, without passing over and upon the lands of the appellee.

It is further alleged that for many years past, and particularly in February, March, and April, 1916, the appellee asserted the right to prevent the appellant and others from passing over said odd-numbered sections or any portion thereof, with their sheep, and from going to and from the unoccupied public domain for the purpose of grazing the public domain, and has asserted and asserts the right to prevent, and does prevent, access to or passage over the odd-numbered sections owned by appellee, thereby obstructing and preventing free passage over and access to the public domain of the United States, in violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 (Comp. St. §§ 991 [21], 4997–5002).

It is further alleged that appellee for years past, and particularly at and just prior to the commencement of the action by force of arms, intimidation, fear, and threats of prosecution, and the institution of suits against the appellant and others in common interest with him, prevented the use and denied the right of access to and use of the said public domain within said area, and has prevented and is now attempting to prevent the appellant and others from going upon or trailing over or using the public domain within said area, and by said unlawful means is appropriating to its own use all of the public domain within said area; has obstructed and is obstructing passage over, to, and from the same, with the intent of appropriating to itself the exclusive use of said public domain, and depriving the public generally of access thereto or use thereof, and has thereby monopolized and is monopolizing the public domain; that appellee plowed a furrow around the outer boundary of said area, designating a mark called the "dead line," which appellee represented to the public as the line to which the public and stock growers might go, and no further, in grazing the public domain, and in order to prevent the crossing of said furrow by stockmen grazing the public lands, appellee is now keeping guards or riders along said line, armed with deadly weapons, acting under the instructions of and as agents for the appellee; that they notified the appellant and others that, if stock were driven across or permitted to cross said furrow, all persons so driving the stock would be subject to criminal prosecutions, and that civil prosecutions would be filed against them; that by such conduct and procedure and threats appellee has prevented and is preventing the appellant and others from going upon, occupying, and using the public domain within said area. Appellant further alleges that appellee has in the past leased the right to graze the whole of said area during the winter season of each and every year, and intends in the future to lease the same, and charge large sums of money, the effect of which is to compel grazers to pay appellee for grazing the public domain.

It is also alleged that in the month of January, 1916, appellant grazed his sheep on unoccupied public domain of the United States through and onto said area for the purpose of bringing his sheep in close proximity to the railroad, where appellant might procure shipment, for their subsistence, of corn and hay, held his sheep thereon and fed them a stated period, and then drove them back through said area, and was thereafter sued by appellee for the value of the grasses so utilized by appellant upon the lands of the appellee. It is then alleged that this action was brought in bad faith, and that the same was sham and frivolous, and that the real purpose of said action was to prevent the appellant and others from further exercising their rights as licensees of the government to use and occupy the public domain within said area.

Thereupon the appellee answered, with specific denials of the material allegations of the bill of complaint, but admitting the jurisdictional facts, and the ownership of the odd-numbered sections and even-numbered sections 16 and 36. Appellee alleges that there are numerous highways leading in different directions across the area, affording easy means of going from north to south and from east to west across said lands, and easy means of going from any point to another point across or over said lands; that the plaintiff and others for whom he is acting has and have always demanded of the appellee, and claimed the right, to drive his or their sheep across and graze the lands of appellee in any direction, and that the method of the appellant has not been to drive his sheep within the limits of any way across the appellee's lands, or any section of the same, but to spread them out, so as to occupy a space from half a mile to a mile wide, and then slowly to graze the sheep across each section of appellee's lands, consuming the grass and herbage thereon entirely, thus in driving the sheep from east to west and west to east over and across the lands of the appellee to consume all of the grass and herbage on appellee's lands within said area, and to compel appellee to permit them so to do without any compensation to appellee therefor, to appellant's benefit and to the wrongful injury and damage of the appellee; that appellant and others pretend that it is impossible to drive their sheep to any section of land belonging to the United States without spreading them out in the manner and in the width named, and permitting them slowly to graze across the adjoining lands in flocks and herds, that it is impossible to keep

them from consuming the grasses on the land of the appellee in obtaining access to any particular section of land belonging to the United States, and that appellee has no right to prevent such use of its said lands, or to prevent such consumption of the grass and forage growing upon its lands, or to demand any recompense for the loss sustained by appellee thereby.

Appellee specifically alleges that it has at all times offered to permit the appellant and those for whom he assumes to act to pass freely over each and every section of the lands of the appellee, provided, only, that the appellant and others should each obtain such permission, paying to appellee the value of the grass on the lands of appellee consumed and destroyed by the sheep in so passing over its lands, specifically denying that it has ever in any wise made any demand on the appellant, or any one else, except as above stated. Appellee alleges that it has the right to protect and preserve for its use and the use of its live stock and the live stock of its shareholders such grass and herbage on its own lands as are valuable for the nurture and fattening of live stock. Appellee alleges that the appellant or others have no right to graze large bands of sheep across the appellee's lands, and that to do so to the extent claimed by appellant would necessarily be destructive of the entire title of appellee to each and every section and portion of each section of its said lands, alleging that the grass and herbage growing upon such area is of a kind peculiar to the region, highly nutritious, and very valuable for the support, nurture, and fattening of live stock; that when it is grazed over and denuded once in any year, it will not reproduce itself in that year, and a single grazing over a particular portion in any year makes it impossible to further pasture or graze the same land for that year.

Appellee specifically denies that it ever had any intention or purpose to prevent the appellant or any one from grazing their live stock on the public domain of the United States, or from going to or from the same, and denies any intent or purpose to appropriate to itself for its own use and benefit the grass, feed, and forage growing upon the public domain within the said area; specifically denying that it ever prevented, or is now through force of arms or intimidation, fear of threats, or prosecution, or the institution of suits or otherwise, attempting to prevent the appellant or any person whomsoever from going upon or trailing over or using the public domain, or any of it, either within said area or elsewhere; denying that it ever used any unlawful means in or about the matters involved, or that it has appropriated or is appropriating to its own use the public domain of the United States within said area, or that it is obstructing or ever has obstructed passage over, to, or from the same, or that it has ever by any conduct or in any manner or method of procedure or by threats of violence monopolized or is now monopolizing the public domain or any part thereof within said area.

In the answer appellee also denies the allegations of appellant as to the facts out of which the suit arose, and alleges in substance that the action was brought for the grass and herbage appropriated by the appellant upon the lands of appellee during an extended period, while appellant was holding his sheep and feeding them hay and corn shipped on the railroad for that purpose, specifically alleging that said suit was brought in good faith, was not sham, but was brought for the enforcement of demands made by appellee in good faith for the willful trespass upon its premises. Appellee specifically denies that it threatened or ever has threatened to control or occupy the public domain, or in any manner obstruct or prevent access to or passage to and from the same, either by intimidation, threats of violence, bringing actions for trespass, or otherwise. Appellee alleges that a decree in favor of the appellant, as asked for, would be without right, and would destroy the right of appellee in and to its lands within said area, causing the appellee irreparable injury and damage—praying that the appellant

take nothing upon his bill of complaint.

The position of the respective parties is disclosed by the foregoing rather long reference to the issues made by the pleadings. The appellant attempts by this proceeding to establish a right to trail his sheep over and across and feed them upon the lands of the appellee in common with the lands of the United States, without hindrance on the part of the appellee, and without liability for the grass consumed. Upon the presentation of the rights of the appellant in this court, it was also insisted that the appellant and others similarly situated were entitled to a decree of right of way over and across the lands of appellee; also entitled to have a decree requiring the appellee to mark its lands, so they could be easily identified. This claim of right is based upon its allegation of force, threats, violence, and threats of bringing suits, etc., by the appellee against the appellant and others, and thus preventing and denying appellant and others the right to go over or across any of said lands. The contention of the appellee in short, is that it never has prevented or attempted to prevent, nor does it intend to prevent or to attempt to prevent, appellant from gaining access to the public domain, either by crossing the lands of appellee

I11 The issues of fact were by the trial court determined in favor of the appellee and against appellant, and these issues could not well have been determined otherwise, in the light of the record. Practically the undisputed evidence shows the appellee the owner of the odd-numbered sections and sections 16 and 36, within the area named in the bill of complaint; that it never at any time, by force, fraud, threats, or otherwise prevented any one from driving his stock onto, over, or across the said lands; that it did issue permits to those wishing to graze their stock over the said lands of the appellee upon the payment of a reasonable sum therefor; that it never exercised any right or in any manner assumed control of the government domain; that a permit was issued for the grazing of the sheep on the lands of the appellee, with a notice that the only lands claimed by appellee were the odd-numbered sections; that this privilege has never been denied any one making application therefor; that the appellant himself had such permits. The record sustains the trial court in its finding that the allegations of appellant with reference to range riders and the force and threats used by them were not sustained; that in driving sheep

over and across the lands in the usual way the sheep are subject to the will of those in charge, and are in no sense running at large, and are not out of the control of those having them in charge; that the lands in the area in question are distinctly and plainly marked by a steel post at each section and quarter corner and that these posts have markings that locate definitely each section, as well as the township and range in which it is located; that the posts are black, and the soil is light, and the result is that these stakes can be seen for a very long distance, standing a foot or a foot and a half above the grass; that there are numerous highways across the area in controversy in different directions, which afford access to different portions of the land and convenient passage across the area north and south and east and west, and intermediate directions; that sheep may be conveniently driven across this area in question in these various directions, or from different parts to other parts, along these highways; that the grasses grow in the summer, and ripen and make feed for the winter, and are valuable for the support and nourishment of live stock during the winter.

Upon the important question of preventing any one from passing over or driving or grazing sheep across the lands in controversy, the record clearly supports the finding of the trial court that appellee has not prevented or sought to prevent appellant or any one from driving over or grazing the area in question; the only demand that appellee has ever made of the appellant or any one else being that a nominal sum, fixed by appellee, be paid as the value of the grass and other herbage taken from the lands of appellee when so grazed.

The circumstances in the record reveal the good faith of the appellee in bringing action against the appellant for damages; its right to recover being dependent upon the truth of the allegations of its complaint. There is no pretense in this record of an attempt to sustain the claim of the appellant that the appellee denied appellant and those similarly situated a reasonable way of passage over its uninclosed lands upon demand. The record is entirely silent as to any demand by the appellant or other person that the appellee designate a right of way over and across the area in question.

The record sustains the finding of the trial court that the facts fail to show an intent on the part of the appellee to avail itself of the forage on the even-numbered sections in the area in question, except 16 and 36, or that it has ever made any use of those sections, or that it has ever made any claim of right or title to the possession of said govern-

ment sections, or to the grass growing thereon.

Nothing that was said by this court in Mackay v. Uinta Development Co., 219 Fed. 118, 135 C. C. A. 18, states or implies that sheep owners, the appellant or others similarly situated, could deliberately take possession of the lands of the appellee, those lands being plainly marked as the court found, and pasture them with sheep under the direct supervision and absolute control of those in charge, and thus pasture the lands of the appellee without making compensation, particularly if appellant and those similarly situated do this against the will of the appellee, and under such circumstances as to show a deliberate in-

tent to obtain the benefit of appellee's pasturage. It is not even contended in this record that the trespass by the sheep of the appellant and others similarly situated, while under their control, upon the lands of the appellee, is an accidental trespass caused by straying. The situation would be very different if a cattle owner allowed his cattle to stray. By their habits cattle cover a large area, but even an owner of cattle is not permitted to deliberately drive them upon the lands of another, in order that they may feed there, and if he did so it could hardly be claimed that he would not be bound to pay a reasonable rental. Lazarus v. Phelps, 152 U. S. 85, 14 Sup. Ct. 477, 38 L. Ed. 363. There is, therefore, a distinction between deliberate purpose on the part of appellant and those similarly situated to graze the lands of the appellee and destroy the forage thereon, and the granting of a way over and across the lands of the appellee for the purpose of reaching the public domain.

There can be no question but the appellant in common with other persons has the right to the benefit of the public domain, and the courts will not enforce any rule of property in the appellee that will deny to the appellant and those similarly situated a reasonable way of passage over the uninclosed tracts of land of the appellee. Mackay v. Uinta Development Co., 219 Fed. 120, 135 C. C. A. 18. This record fails entirely to show that appellant demanded such a way over and across the lands of appellee to the lands of the United States, and therefore there is no denial of this right.

[2] A court of equity will not intervene to enjoin an owner of lands, either from exercising his lawful rights as owner or from doing that which admittedly is wrong, unless it is first shown that the wrong has been threatened, and that it is his intent and purpose to carry the threat into effect, and that the person complaining will be irreparably injured, unless he is enjoined from doing the thing complained of or threatened. This record, therefore, does not present a situation which involves much that has been said upon argument in behalf of the appellant.

A different situation would be presented, here, if the record disclosed appellant and others similarly situated in a position where it was necessary to drive sheep, in the control of those in charge, over the lands of the appellee to reach the government lands, that a demand had been made upon the appellee for a reasonable way, and that appellee had failed or refused to designate such reasonable ways; such refusal being accompanied by proof of threats preventing appellant and others similarly situated from designating and using such a reasonable way.

The entire contention of the appellant rests upon the assumption that the allegations of his bill have been sustained. A careful examination of the record confirms the finding of the trial court that appellant has failed in this respect.

The judgment of the trial court, dismissing the bill of complaint, with costs to appellee, is affirmed.

261 F.-54

FIRPO V. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 18, 1919.)

No. 17.

- 1. Army and navy \$\iff 40\$—Harboring, concealing, or assisting deserter. An attorney employed by the father of a soldier 16 years old, who had enlisted without the father's consent, to obtain his release on the ground of nonage, by advising the soldier, who was then a deserter, to remain away from the authorities until notified, held not to have "harbored, concealed or assisted" the deserter, within Criminal Code, \\$ 42 (Comp. St. \\$ 10206), which requires, to constitute either of the offenses, some positive physical act, done with knowledge and intent to aid in the wrongful purpose of the deserter.
- Army and navy \$\infty 40\$—Criminal responsibility for concealing deserter.
 - To "conceal," as used in Criminal Code, § 42 (Comp. St. § 10206), providing for punishment of any one who shall harbor, conceal, protect, or assist any soldier who has deserted from service, means to hide, secrete, or keep out of sight.
 - [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conceal.]
- 3. Army and navy \$\iff 40\)—Criminal responsibility for harboring deserter. To "harbor," as used in Criminal Code, § 42 (Comp. St. § 10206), providing for punishment of any one who shall harbor, conceal, protect, or assist any soldier who has deserted from service, means to lodge, to care for, after secreting the deserter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Harbor.]

Hough, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the Eastern District of New York.

Criminal prosecution by the United States against Joseph Firpo. Judgment of conviction, and defendant brings error. Reversed.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (H. Harvey Harwood, of New York City, of counsel) for the United States.

Joseph G. M. Browne, of New York City, for plaintiff in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON Circuit Judge. The plaintiff in error was tried for having violated section 42, P. L. (chapter 4 of the Act of March 4, 1909, 35 Stat. 1097 [Comp. St. § 10206]), on three counts of an indictment returned against him by the grand jury, which accuse him as follows:

(1) "Joseph A. Firpo, late of the borough of Brooklyn, county of Kings, city, state, and Eastern district of New York, heretofore, to wit, at various times during the period from on or about the 13th day of October, 1917, up to on or about the 14th day of May, 1918, at the borough of Brooklyn, county of Kings, city, state, and Eastern district of New York, and within the jurisdiction of this court, did unlawfully and feloniously assist James Shillace, said James Shillace being at said times a soldier in the military services of the United States, who had deserted from said service, as said Joseph A. Firpo well knew; that is to say, he, the said Joseph A. Firpo, did at the times and places

aforesald, by advice and instruction, assist said James Shillace in continuing his desertion and avoiding apprehension and seizure by the military authorities, against the peace and dignity of the United States, and contrary to the

form of the statute in such case made and provided."

(2) "Joseph A. Firpo, late of the borough of Brooklyn, county of Kings, city, state, and Eastern district of New York, heretofore, to wit, at various times during the period from on or about the 13th day of October, 1917, up to on or about the 14th day of May, 1918, at the borough of Brooklyn, county of Kings, city, state, and Eastern district of New York, and within the jurisdiction of this court, did unlawfully and feloniously conceal James Shillace, said James Shillace being at said times a soldier in the military service of the United States, who had deserted from said service, as said Joseph A. Firpo well knew, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided."

(3) "Joseph A. Firpo, late of the borough of Brooklyn, county of Kings, city, state, and Eastern district of New York, heretofore, to wit, at various times during the period from on or about the 13th day of October, 1917, up to on or about the 14th day of May, 1918, at the borough of Brooklyn, county of Kings, city, state, and Eastern district of New York, and within the jurisdiction of this court, did unlawfully and feloniously harbor James Shillace, said James Shillace being at said times a soldier in the military service of the United States, who had deserted from said service, as said Joseph A. Firpo well knew, against the peace and dignity of the United States in such case

made and provided."

The law said to be violated provides:

Enticing Desertion from the Military or Naval Service.—"Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman, or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than two thousand dollars." Section 42, c. 4, P. L.; Act of March 4, 1909, c. 321, 35 Stat. 1080, 1097.

The evidence offered indicated that one James Shillace, a soldier, then said to be 16 years of age, left his duties on October 2, 1917, and during the interval between that day and March 25, 1918, remained away from the camp and apparently did not fulfill his obligations as a soldier in the army of the United States. He was a witness on behalf of the government, as were his father, his sister-in-law, his wife, and his brother-in-law. That he was a deserter from the army we may assume, from his conduct in remaining away from the performance of his duties, and because of his express statements that he did not intend to return.

[1] The plaintiff in error is an attorney at law, and engaged in the practice of his profession in the borough of Brooklyn, city of New York. He was consulted by Shillace's father in a proposed application to secure his son's release from the army upon the theory that he was not of sufficient age. He accepted a retainer of \$30, with a promise of the payment of \$70 if successful. Mr. Shillace, Sr., testified to the employment of the attorney, who advised him to have his son remain away from the authorities. The soldier says he visited the plaintiff in

error on March 25th, and he was introduced to the plaintiff in error and sat down—

"and I asked him under what grounds he was going to get me out. He says, 'All right, under what grounds; I know the grounds I am going to get you out on;' so he told me, personally, myself, to stay away from the house; to stay away from all military authorities and the police; and my sister-in-law says to me, 'Would it be any good if I go to Jersey City;' he said, 'No, it would be better if you go to Connecticut.' He asked me if I had any relations in Connecticut, so I went to Connecticut. I stayed there for three weeks, and he said, 'I will let Mrs. Dezage know when I want you here.' That is my sister-in-law. I received no answer from him whatever. So, I come back, and I stood home, and I hired a furnished room at Bedford avenue, and he told me, 'If anybody should catch you, tell them your name is not James P. Shillace.'"

This is the only occasion upon which Shillace saw his attorney. Can it be said that from this occurrence there is any evidence to warrant the District Judge in submitting to the jury, as a question of fact, the guilt of the accused?

That there was sufficient to raise a jury question as to whether or not Shillace was a deserter we may assume, but we are of the opinion that upon this mere occurrence the plaintiff in error cannot be charged with assisting Shillace in continuing his desertion and avoiding apprehension and seizure by the military authorities. Plantiff in error was lawfully engaged in the practice of his profession and was consulted by a client. It was not only lawful for him to advise with the soldier, but, indeed, it was his duty to give him his best professional advice as to his rights under the circumstances disclosed by the narration of the facts surrounding Shillace's position. For him to have closed the door against a consultation would have been a breach of his professional obligations. Assuming that Shillace was a deserter, it was true that he was subject to arrest and incarceration by the military authorities. But in the consultation with his attorney he disclosed an apparent ground upon which to base a claim that he was entitled to his release from the army. He says he was 16 years of age when he voluntarily enlisted without his father's consent, and was but 16 years old when he left the service. His father first sought the lawyer for advice, and later brought his son to the lawyer's office. There may be a debatable question as to the professional obligations of the plaintiff in error to make known to the military authorities where the soldier was to be found; but can it say that the failure so to do constituted a criminal offense? We think not.

Was it offensive to the statute above referred to for the plaintiff in error to advise his client to remain away from the authorities? It was the duty of the lawyer to his client to assist him in securing his release from the army. If there appeared to the plaintiff in error reasonable grounds for the expectation of success, it was not criminal for him to advise his client to remain away from the authorities. At least, such would be true, in the absence of bad faith or criminal intent on the part of the plaintiff in error. There is testimony that a representation was made to the attorney that the soldier was home on sick leave and could not return to his duties. Indeed, the soldier testified that he only became a deserter from the time he visited the law-

yer. Without knowledge of the fact of a desertion, there could not be

said to be a criminal intent to assist Shillace.

To assist, as used in the statute, implies guilty knowledge and felonious intent; knowledge of the wrongful purpose of the deserter. To assist, after such knowledge and intent, is serving the purpose of the deserter. It encourages him and aids him, and thus the offense may be committed. To assist, like to abet, involves some participation in the criminal act. Hicks v. U. S., 150 U. S. 450, 14 Sup. Ct. 144, 37 L. Ed. 1137.

To advise a client to commit an act which is a crime makes the lawyer an accomplice, and at common law he would be an accessory. We are not satisfied from this record that there was evidence to submit to the jury indicating a knowledge on the part of the plaintiff in error that Shillace was a deserter and was continuing in his desertion from the service of the army of the United States at the time when he was advised to remain away and go to Connecticut, where it was suggested that he had relatives. Indeed, the plaintiff in error's view seems to have been that Shillace was wrongly kept in the army and that he was entitled to discharge by reason of his age. We think the plaintiff in error was giving his best advise and opinion to his client, without any intent of violating the law, and in doing so what he thought was within the realm of his professional obligations to his client.

[2, 3] He has been convicted on the second count of concealing, and on the third count of harboring, a deserter. We find nothing in the charge defining the intendment of these terms as used in the statute. Nor do we find any evidence in the record upon which to base such a charge. To conceal, as used, means to hide, secrete, or keep out of sight. To harbor, as used, means to lodge, to care for, after secreting the deserter. The statute is aimed to make it a crime knowingly to harbor or conceal a deserter after knowledge of the existence of his status as such, and this with felonious intent to shield him from the

law.

We find nothing in this record which would justify submitting either the second or third count to the jury. No assistance or relief was given to Shillace, known to be a deserter by plaintiff in error, in order to help him continue his desertion. The conduct of the plaintiff in error was consistent with what might be innocent conduct in fulfilling his professional duties as he saw them. The motion for the direction of a verdict of not guilty should have been granted upon this record. The judgment of conviction on each of the counts is reversed.

WARD, Circuit Judge (concurring). My concurrence as to the first count of the indictment is on the ground that the word "assist," being associated in the act with the words "harbor, conceal, protect," contemplates some positive act; e. g., giving the deserter transportation away from the scene of his offense, or giving him civilian's clothes to substitute for his uniform. I do not think it applies to advice of a lawyer, employed to get the deserter discharged from the service because of nonage, that he had better go to Connecticut in the meantime.

HOUGH, Circuit Judge (dissenting in part). Shillace was over 16 and under 18 when he enlisted. Therefore he could be and was a deserter as fully as any adult. Solomon v. Davenport, 87 Fed. 318, 30 C. C. A. 664; Hoskins v. Pell, 239 Fed. 279, 152 C. C. A. 267, L. R. A. 1917D, 1053. Firpo, as an attorney, was peculiarly bound to know this law.

Desertion is not a single act, like striking a blow; it is a persistent absence from duty, with the intent of staying away, and is therefore a continuing offense. Firpo knew that this was his client's condition; the jury has so found. When the attorney advised his deserter client to go and hide and deny his identity (as the jury has also found), he counseled a continuance in crime, and the commission of a continuing crime.

There are only two reasons assignable (so far as I can see) why this conduct was not an "assisting" within the statute: (1) It would not make Firpo an accessory after the fact; (2) an attorney can lawfully give a kind of assistance forbidden to the laity. And I think both reasons are in effect advanced by the majority of this court.

As to the first, it is a very strict and narrow definition (or rather a partial description) of assistance to say that it is any word or act which would render the actor liable as an accessory after the fact; and that Firpo's behavior made him such accessory, see the line of decisions in 16 Corp. Jur. p. 138 et seq. As to the second point, I am referred to no authority compelling a ruling which seems to me dangerous alike to the bar and the commonwealth.

For these reasons, I dissent from reversal of conviction under count 1.

The words "harbor" and "conceal," whether considered separately or with their context, evidently refer to some physical act tending to the secretion of the body of the deserter. The concealment is not of the crime, but specifically of the criminal. Therefore I think no conviction should have been allowed on the second and third counts.

To the extent indicated I dissent.

PLOXIN V. BROOKLYN HEIGHTS R. CO.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.) No. 34.

1. Judgment \iff 570(5)—Dismissal for insufficiency of evidence not bar to second suit.

Under Code Civ. Proc. N. Y. § 1209, a judgment dismissing an action for failure of proof is not a bar to a second action.

2. Appeal and error $\Longrightarrow 930(1)$ —In review, on dismissal, evidence considered most favorably to plaintiff.

Where a complaint is dismissed on conflicting evidence, the appellate court must consider the case on the evidence most favorable to plaintiff.

3. Street railroads ⇐⇒98(7)—Pedestrian may cross in front of car where danger not imminent.

It a pedestrian, about to cross the track of a street railroad, sees a car coming at such distance that he has reasonable ground to suppose

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that he can cross in safety, he is justified in making the attempt; and if the operator of the car sees him, it is his duty to give him a reasonable opportunity to cross.

4. Street bailroads ⇔117(22)—Contributory negligence in crossing tracks at station a jury question.

It is not negligence as matter of law for a person to cross a street at a point where there is a trolley station at which cars passing in either direction habitually stop; he having a right to rely upon the fulfillment of the duty resting upon the street railroad company to have its cars under control at this point.

5. Street railroads \$\infty\$ 117(21)—Contributory negligence of person killed in crossing tracks a jury question.

In an action for the death of a person struck and killed by a street car while crossing the street at a trolley station, evidence *held* such as to require the question of contributory negligence to be submitted to the jury.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Goldie Ploxin, administratrix, against the Brooklyn Heights Railroad Company. Judgment of dismissal, and plaintiff brings error. Reversed.

Thomas J. O'Neill, of New York City (Leonard F. Fish, of New York City, of counsel), for plaintiff in error.

George D. Yeomans, of Brooklyn, N. Y. (John L. Wells, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff in error sued out this writ of error, asking to review a dismissal of the complaint in her action brought to recover damages for the loss of life of Louis Ploxin, her husband.

On September 1, 1914, the deceased was crossing Fulton street from the south to the north side, and was struck by a car approaching from the east, causing injuries which resulted in his death shortly thereafter. An action was commenced in the state Supreme Court for Westchester county. A verdict was had. An appeal thereafter taken to the Appellate Division resulted in a reversal of the judgment and a dismissal of the complaint, upon the ground that the intestate was guilty of negligence as a matter of law. The plaintiff in error then appealed to the Court of Appeals of the state of New York, in which court the order of dismissal was affirmed. She then commenced this suit in the District Court for the Southern District of New York, and after a trial, in which both the plaintiff in error and defendant in error submitted their proofs, the District Judge dismissed the complaint.

[1] It is conceded that the proof offered on this trial in the District Court is different from that presented in the state court. The plaintiff in error's contention is that there is additional proof and amplification of the old. The contention of the defendant in error is that the new proof but makes more difficult the plaintiff in error's

opportunity for success. Since there was a dismissal of the complaint in the state court, which was not upon the merits, but for failure of proof, that action is not a bar to the maintenance of this suit in the District Court of the United States. Bingham v. Wilkins, 3 Fed. Cas. 407, No. 1416; Wheeler v. Ruchman, 51 N. Y. 391; Hopesdale v.

Storage Co., 132 App. Div. 348, 116 N. Y. Supp. 859.

Fulton street runs substantially east and west at the point of the There are two car tracks thereon, one for the east and accident. one for the west bound traffic. Between Lawrence street on the east and Jay street on the west, there is a trolley station where passengers alight from and board passing Fulton street cars. Just before the occurrence, the deceased was seen walking across the street from the south to the north side. He was struck while proceeding across the west-bound track, which runs on the northerly side of the street, and there is evidence that he was passing over the northerly rail of the west-bound track when struck. There is a dispute as to whether he was passing straight across to the trolley station, or whether he was moving in a diagonal direction. There is evidence which supports the claim of the plaintiff, however, that he was proceeding straight across to the pole upon which is the sign "Trolley Station." This pole was approximately in the middle of the block between Lawrence and Jay streets, and about 114 feet west of the sidewalk line of Lawrence street. Lawrence street, from curb to curb, is about 35 feet. From the curb on the east line of Lawrence street to the building line, the sidewalk is about 15 feet more; therefore, from the east side of Lawrence street, the point of accident was distant about 165 feet. Fulton street is about 43 feet from curb to curb. It is 13 feet 9 inches from the south curb to the first track, and 23 feet 6 inches from the curb on the south side to the first rail of the west-bound track, and about 28 feet 3 inches from the south curb to the northerly rail of the west-bound track. The accident occurred between 7:30 and 8 o'clock in the evening, and at this time it was dusk. There is evidence that, when the deceased left the curb, he was seen to turn his head to the right and proceeded to cross, and that at this time the west-bound trolley car, which struck him, was not in the block, but about two houses east of Lawrence street, which would place the car at least 210 feet distant. The evidence discloses that cars proceeding east and west stopped at the trolley station, without regard to whether or not there were passengers to get on or off.

When the deceased was seen passing over the middle of the east-bound track, he was seen to look both ways. One Brown, testifying, says that before the deceased crossed there passed in front of him, on the south side, a large barrel truck going easterly; that he waited for this to pass, and then proceeded in the rear of the truck. There is evidence that, when the deceased stepped on the track on which the car which hit him was coming, the car was at the corner of Lawrence street; that its speed was increased, and it struck him, going the width of four houses before it stopped. There is also testimony that the motorman was inattentive, in that he was looking toward the north

sidewalk. There was a car proceeding east, which, when the deceased left the sidewalk, was at Smith street.

[2] These facts are in dispute; but, since there was a dismissal in the court below, the facts most favorable to the plaintiff in error must be considered in determining the correctness of the conclusion reached below. Sackheim v. Pigneron, 215 N. Y. 62, 109 N. E. 109; Place v.

Railroad Co., 167 N. Y. 345, 60 N. E. 632.

[3] There is ample proof of the defendant in error's negligence, which required its submission to the jury. The chief question presented is whether, under the facts disclosed by this proof, the deceased was guilty of contributory negligence as a matter of law. The burden is upon the defendant in error to affirmatively establish facts which support the claim of contributory negligence. To make out the case of contributory negligence as a matter of law, the facts must be established beyond the possibility of two or more reasonable minds drawing different inferences from the evidence. A pedestrian lawfully attempting to cross the track must use his faculties of sight and hearing. Even though he uses his eyes and miscalculates his danger, he may still be free from fault. If the deceased attempted to cross the track of this street railroad company, and saw the car approaching at such a distance that he had reasonable ground to suppose that he was able to cross the track in safety, he was justified in the attempt. It was the duty of the operator of the street car to give him a reasonable opportunity to cross if he saw him crossing. At least, it was necessary for him to slack the speed of his car, and have it under such control as to have regard for the rights of the deceased. The deceased, in crossing the track, had the right, without being charged with contributory negligence, to assume that the operator would perform his duty.

The rights of pedestrians to cross the street must be respected. If he crossed with the car in plain sight and was imprudent in the attempt, or if he did not hasten his movements and danger was imminent, a jury might well hold that he was guilty of negligence; that he had been negligent, in fact, for trying to cross in front of a

car but such a short distance away and in plain view.

[4] If the plaintiff in error's testimony be truthful, the motorman could see the deceased crossing. He had ample time and sufficient distance, if he had his car under control, to prevent running down the deceased as he was crossing. This being a trolley station, at which cars passing in either direction habitually stopped, it was not contributory negligence as a matter of law for the deceased to attempt to cross a public street at this point. He had a right to rely upon the fulfillment of the duty resting upon the street railway company to have its car in control at this point, for the paramount right of way that exists in favor of railroad companies at such crossings must be exercised with due regard for the rights of pedestrians crossing at these points.

[5] From the foregoing evidence, it is apparent that the deceased was obliged to take notice of, and have regard for, the truck loaded with barrels which passed in front of him and the trolley car which

was bound east. This required his looking up and down the street, so that he might not be endangered by the passing of either or both. His passing in the rear of the barrel truck may also have obstructed, to some extent, his view or his line of vision. With the care which it is testified the deceased exercised, and which we must accept in testing the justification for this dismissal, we are satisfied that the question of deceased's contributory negligence was one of fact for the jury.

Judgment reversed.

In re PERPALL. Petition of PRENTICE.

(Circuit Court of Appeals, Second Circuit. November 17, 1919.)

No. 37.

1. Trusts \$\infty 33_Broker's day loan creates no trust.

A broker's day loan, made by a bank by crediting the amount to the broker's account, taking an agreement that he would use the money to acquire or release stocks or securities, hold them in trust, and turn them or their proceeds over to the bank before the close of the day, unless the loan was sooner paid, held not to create a trust fund, but to be merely a loan of money, with an agreement to pledge the securities.

2. BANKRUPTCY \$\igcred{2}\$-\$184(2)\$—Unrecorded pledge agreement void under laws of state.

Laws N. Y. 1916, c. 348, amending section 230 of the Lien Law, by providing in effect that written mortgages, pledges, or liens securing day loans, covering securities to be delivered on the same day, shall be valid during such day without record, but in case of nondelivery must be filed on the following day, contemplates liens on specific securities, and a written agreement to deliver in pledge securities not identified, which was not filed on the next day, held not to create a lien on securities in the hands of the borrower's receiver in bankruptcy.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Clarence C. Perpall, doing business as Clarence C. Perpall & Co., bankrupt. On petition of Ezra P. Prentice, trustee, to revise an order in favor of the Continental National Bank of New York. Reversed.

See, also, 256 Fed. 758, 168 C. C. A. 104.

Rosenberg & Ball, of New York City (J. N. Rosenberg, of New York City, of counsel), for receiver.

S. K. Lichtenstein, of New York City (M. L. Lesser, of New York City, of counsel), for bankrupt.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a petition of the trustee in bank-ruptcy of one Perpall to revise an order of the District Court directing him to turn over to the Continental Bank of New York certain moneys and securities that came into his possession as receiver.

[1] July 1, 1918, between 3 and 4 p. m., an involuntary petition in bankruptcy was filed against Perpall, a stockbroker trading under the

name of Clarence C. Perpall & Co. At 10 a. m. of the same day Perpall had made the usual broker's day loan of the Continental Bank of New York under the following agreement:

"New York, July 1, 1918.

"The undersigned hereby applies to the Continental Bank of New York for a loan of fifty thousand dollars (\$50,000), to be credited to the account of the undersigned, upon the terms and conditions below stated, and to be repaid at or before the close of business this day. The avails of said loan shall be received and used by the undersigned only for one or both of the following purposes: To pay, in whole or in part, the purchase price of, and thus to obtain, certain securities which the undersigned has contracted to purchase and receive; or to pay, in whole or in part, another loan or other loans heretofore made to the undersigned, and thus to release certain securities held as collateral to such other loan or loans. The undersigned, as trustee for the bank, shall obtain possession of the securities aforesaid, and shall deliver, or cause to be delivered, the same to the bank, as security for this loan, before the close of business on this day, unless in the meantime the amount of this loan shall have been repaid to the bank. The undersigned may, however, before the close of business this day, sell or transfer, for cash or its equivalent, or pledge for money contemporaneously loaned, or exchanged for other securities, any or all of said certain securities, but the proceeds of such sales, transfers, and pledges shall be received by the undersigned as trustee for the bank, and shall be delivered by the undersigned to the bank before the close of business this day, where they shall be credited in payment pro tanto of said loan, and the securities received in exchange shall be in all respects charged with the same trust, and subject to the same rights of the bank to possession. and otherwise, as herein provided in respect of the certain securities so ex-

"The undersigned, as further security to the bank, hereby assigns to the bank, its successor and assigns, all of the right, title, and interest of the undersigned to and in the certain securities hereinabove referred to, and to and in any and all claims of the undersigned against third parties now existing and that may be created this day for the purchase price, or any present unpaid balance thereof, of any of said certain securities sold or that may be sold by the undersigned, and to and in all claims of the undersigned against customers of the undersigned for the balance due or to become due this day of the purchase price of any of said certain securities delivered or deliverable to such

customers.

"Nothing herein contained is intended to lessen the liability of the undersigned to the bank arising from the making of said loan; nor to impair the effect of any general collateral agreement given by the undersigned to the bank; nor to confer upon the undersigned any authority to create any liability on the part of the bank.

Clarence C. Perpall & Co."

The District Judge found that the moneys and securities in the receiver's possession claimed by the bank were securities or proceeds of securities bought by Perpall with the moneys loaned him by it, held by him in trust for it, and should therefore be delivered by the receiver to it. He said:

"I do not think that the negligence of the bankrupt fully to segregate the money received from the Continental Bank can be imputed to the bank. Judge Learned Hand, in the case of Hotchkiss v. National City Bank (D. C.) 200 Fed. 294, said: 'Had they said that they meant to create a trust such a trust would arise.' This opinion, while a dictum, was reiterated by the Circuit Court of Appeals, and no criticism that I can find is made of it by Justice Holmes. He and the Supreme Court simply agreed that in the case under consideration the parties did not mean to create a trust. In that case there was no language creating a trust or imposing a trust obligation, and the parties seeking to prove that relation substantially relied on a custom which the court thought was not esfablished. * * There was turned over to the

receiver on July 1st or July 2d a mixed fund of securities and certified checks representing the proceeds of a sale of securities purchased with moneys withdrawn from the account amounting to \$75,183.23. Apparently there were at all times stocks, certified checks, or cash equal to the sum of \$50,000, by which the assets of the bankrupt were augmented. I can see no substantial difference between this case and that of Importers' & Traders' National Bank v. William H. Peters, 123 N. Y. 272, 25 N. E. 319, and that of Brennan v. Tillinghast, 201 Fed. 609, 120 C. C. A. 37. As long as there was at all times after the deposit of the \$50,000 cash on hand, or securities purchased therewith or released thereby, 1 can see no reason why the well-established presumption that Perpall regarded the law and did not dissipate the trust fund for improper purposes should not entitle the bank to an equitable lien upon the property in the hands of the receiver to the extent of the so-called 'day loan.'"

We read the contract as a loan of money from the bank to Perpall, with an agreement by Perpall to give security for repayment. It recites that the bank has made a loan of \$50,000 to Perpall, to be credited to his account and to be repaid the same day. There is no ground for saying that the loan created a trust fund. If Perpall's account had been attached by a creditor, nothing contained in this agreement could have saved the money as being money of the bank. It was the broker's money absolutely, and all that he undertook to do in respect of it was to give the bank security for repayment. The only reference to anything in the nature of a trust is his covenant to get possession of securities bought or released by him with the proceeds of the loan, and as trustee for the bank deliver them to it on the same day, unless the loan in the meantime had been repaid. This is an agreement to give a pledge. Then follows as further security for the loan an assignment of all of Perpall's right, title, and interest in the securities, and his claim against purchasers thereof, which is an agreement to give a mortgage.

[2] Since the decision in Hotchkiss v. National City Bank, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, and no doubt as a result of it, the Lien Law of the state of New York (Consol. Laws, c. 33) has been amended by chapter 348, p. 942, Laws 1916. It is entitled "An act to amend the Lien Law in relation to mortgaging or pledging stocks and

bonds as security for a loan," and reads:

"Sec. 230. Chattel Mortgages to be Filed. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article. This article shall not apply to agreements creating liens upon merchandise or the proceeds thereof for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, where the conditions specified in section forty-five of the personal property law are complied with, 1 nor shall this article apply to the mortgage or pledge of or lien upon stocks or bonds mortgaged or pledged to secure payment of a loan, which stocks or bonds, by the terms of a written instrument creating such mortgage, pledge or lien and setting forth the conditions of such loan, are to

¹ Remainder of section new.

(261 F.)

be delivered to the lender on the day such loan is made, and every such mortgage, pledge or lien, of such securities, shall be valid as against creditors of such mortgagor or pledgor, provided, however, that if such securities are not delivered to the pledgee or mortgagee on the day such loan is made, the mortgage, lien or pledge therein intended to be created shall be absolutely void and of no effect as against the creditors of such mortgagor, pledgor or lienor unless such instrument, or a true copy thereof, is filed as directed in this article, on the day following the making of such loan, and provided also that every such mortgage, pledge or lien shall be absolutely void as against purchasers, pledgees or mortgagees in good faith of such stocks or bonds provided such stocks or bonds are delivered to such purchaser, pledgee or mortgagee at the time of such purchase, pledge or mortgage."

Obviously with a view of covering brokers' day loans, the act gives effect to pledges and mortgages of stock, etc., for one day, notwith-standing that possession of the securities has not been given. It plainly contemplates a mortgage or pledge of specific securities; otherwise the requirement that if the loan be not paid the day it is made the agreement must be filed the next day would be useless as notice. The only specific information the agreement in this case would have given, if filed, would have been that the bank had loaned \$50,000 to Perpall. As the agreement was not filed the next day, July 2, 1918, it became void as a mortgage or pledge by the law of New York, and invalid under section 67a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. § 965]) for want of recording.

Were this not so, still Perpall, not having perfected his covenants by delivery of possession of the securities or by executing a mortgage, equity would not do so at the expense of general creditors in a bankruptcy proceeding.

The order is reversed.

BALDWIN v. JARDINE MATHESON & CO., Limited.

(Circuit Court of Appeals, Second Circuit. November 8, 1919.)

No. 13.

1. Principal and agent \Leftrightarrow 124(3), 174—Authority to purchase and ratification questions for jury.

In an action by a broker for commission on a sale of merchandise, whether the agent who made the purchase had authority, or whether, if not, his action was ratified by his principal, both *held* questions for the jury.

2. Brokers &== 63(1)—Compensation earned although seller refuses to perform.

It is sufficient to entitle a broker to his compensation if it appears that a sale was effected through his agency in procuring a buyer, and his right is not affected by refusal of the seller to perform the contract made, whether in good or bad faith.

3. Trial =139(1)-Authority to direct verdict.

The court may only direct a verdict where the evidence is undisputed, and so plainly preponderant that it practically becomes conclusive, so that reasonable minds could not differ as to the conclusions to be drawn from it.

Hough, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Francis H. Baldwin against Jardine Matheson & Co., Limited. Judgment for defendant, and plaintiff brings error. Reversed.

Max D. Steuer, of New York City, for plaintiff in error.

Norwood, Appell & Walsh, of New York City (Carlisle Norwood, of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff in error (plaintiff below) sues to recover commissions earned for services he rendered in procuring a purchaser for 10,000 base boxes of tin plate. His commission was to be such sum of money as was received in excess of \$8.50 per base box. After hearing the evidence of both plaintiff and defendant below, the court directed a verdict in favor of the defendant, against the objection and exception of the plaintiff. We shall refer to the par-

ties as plaintiff and defendant, as in the court below.

[1] The question presented here is whether, upon the testimony given at the trial, a jury question was presented which required its submission to the jury impaneled. The complaint alleges that on the 9th of January, 1918, the plaintiff and defendant entered into an agreement wherein and whereby the plaintiff agreed to sell, for the account of the defendant, 10,000 boxes of tin plate, and that the defendant agreed to deliver such boxes to the buyer secured by the plaintiff; that the plaintiff secured a buyer, the American Trading Company, for such boxes of tin plate at a price of \$9.25 per base box. The defendant agreed to and accepted the terms of the sale, payment to be made upon receipt of the tin plate at the dock of the American Trading Company at Yokohama, Japan, and therefore the plaintiff was entitled to 75 cents for each box of tin plate so sold. It was further alleged that, in violation of the agreement made with the American Trading Company, the defendant refused to make delivery of the boxes of tin plate, or to pay plaintiff his commission.

The plaintiff's contract was oral. He sought an interview with Mr. Wardell, representing the defendant, which company had a large quantity of tin plate for sale. Plaintiff testified that he was requested to secure a purchaser at \$8.25 per base box, and was offered all in excess of such sum as he could obtain. Mr. Wardell wrote the quantity and price on a piece of paper and handed it to plaintiff at the interview. Plaintiff then saw a representative of the American Trading Company, Mr. McChesney, who was in charge of the Japan exports, and offered the tin plate to him. The latter said he could use it and would cable Japan. Report of this was made to Mr. Wardell, who said that this was fortunate, because he had an export license for Japan. However, he declared, there were extra expenses in such a shipment, and stated the price to them must be \$8.50 per box, instead of \$8.25. On January 15th Mr. McChesney informed the plaintiff that he accepted the tin plate; that it could be used by the American Trading Company in Japan. A report of this was made to the defendant, and this to a Mr.

Crombie. Thereupon Mr. Crombie refused to deliver the tin plate at \$8.50 per box, and requested \$9. A dispute arose as to this, and the plaintiff left the office. Later Mr. Crombie telephoned Mr. Baldwin, and advised him to settle the matter and take \$2,500 for his services in selling the tin plate. The plaintiff requested that this be put in writing. Plaintiff then saw Mr. McChesney, who requested him to take a Mr. Kelly, of the American Trading Company, around to the office of the defendant, so that he might examine the license and arrange about the terms. This was done. Crombie then refused to permit Kelly to see the export license and later insisted that the American Trading Company must pay cash or give a certified check for the goods. This led to a dispute, which was finally settled by Mr. Crombie's talk with his superior, and the American Trading Company was then accepted as a purchaser. Mr. Crombie then stated that the goods might be shipped to Japan, and the documents exchanged on the other side; the cost, freight, and insurance to be charged against them. Plaintiff was then asked:

"Q. And then what did you gentlemen do? A. Why, Mr. Kelly then went down to—Mr. Kelly and I went down together. Well, Mr. Kelly and I went to lunch together.

"The Court: Kelly accepted that, did he?

"The Witness: Well, he thought everything was all satisfactory, and told me so at the table when we were eating dinner.

"Q. And that closed the incident? A. Absolutely."

Later the same day Mr. McChesney telephoned the plaintiff that the tin plate had been sold. Plaintiff further testified on cross-examination:

"Q. During all these transactions, was nothing said at any time as to where the tin plate was to be delivered? A. Surely, with Kelly. After Mr. Crombie had gone in and had seen his superior, he came back and he said. We will accept your conditions and ship it abroad, and we will exchange documents on the other side.' I was rather surprised in his change of attitude, and when I went to Mr. McChesney, and told him about it, Mr. McChesney said 'Well, I am not surprised at that offer, because in Japan we have always exchanged courtesies with Jardine Matheson & Co., and our companies know one another very well.' And he said, 'I am surprised that he made such exacting terms and such arbitrary terms.' He was surprised that they demanded cash right here in New York."

Kelly saw the export license. It appears from the testimony of the plaintiff that the essential terms of the contract were agreed upon, the goods were to be billed at \$9, payment in New York, and delivery C. I. F. Japan, American Trading Company's dock at Yokohama, with an exchange of documents on the other side. It was after this that Mr. Crombie telephoned to Mr. McChesney that the sale was off.

The reason assigned for the action of the District Judge was that Mr. Kelly had no authority to bind the American Trading Company, and that his acceptance of the terms could not be said to be an acceptance by the company. But the testimony is that Mr. Kelly did not come merely to inspect the form and words of the license, but was authorized to obtain an option on the plate and arrange terms of payment and delivery. The terms were discussed as above related, which were op-

posed by Mr. Kelly. His opposition seems to have secured to the American Trading Company a more advantageous contract, for the proposal to ship to the coast was Kelly's. It was at first refused by Crombie, and later accepted after his talk with his superior. Indeed, Kelly was the person sent by McChesney to see the defendant's representative and report the terms of sale to Mr. McChesney. This was also done by Baldwin. If Mr. Kelly did not have the authority to make the terms, there was a ratification of Kelly's bargain by Mr. McChesney. The terms were reported by both Kelly and Baldwin. Mr. McChesney, who had authority to buy, accepted the terms.

In Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183, the court said:

"A principal can adopt and ratify an unauthorized act of his agent, who in fact is assuming to act in his behalf, although not disclosing his agency to others, and when it is so ratified it is as if the principal had given an original authority to that effect, and the ratification relates back to the time of the act which is ratified. He must disavow the act of his agent within a reasonable time after the fact has come to his knowledge, or he will be deemed to have ratified it. Bringing a suit upon the contract of his agent, which was unauthorized at the time and in excess of the authority conferred upon the agent, is a ratification of the unauthorized act; and it is no answer to the ratification that prior to its taking place the principal is not bound, and hence there is no right on the part of the other party to enforce as against him the unauthorized act of his agent. These principles are well known. * * *"

Crombie was the general manager of the export department of the defendant. McChesney had authority to purchase the tin plate for the American Trading Company for export to Japan. And the authority of Kelly to inspect the license or accept terms of sale, under the proof disclosed, at least presented a question of fact for the jury.

Another question was presented upon the evidence in the record, if the jury found Kelly had no such authority, and that: Was the action of Kelly ratified by the American Trading Company under the circumstances disclosed in the record? Here, from the failure to dissent, under the circumstances, the ordinary intelligent man would be justified in inferring that the principal, the American Trading Company, assented. Where reasonable men may fairly draw from the evidence an inference that there was such assent, the question is one for the jury. It is only where reasonable men can fairly draw only one inference from the facts stated that the court may decide the question is one of law.

The purpose of seeing the license seems to have been to ascertain whether the tin might be shipped to Japan, in view of the war regulations which might forbid. It did not follow that Mr. McChesney intended that the American Trading Company would be the consignee named in the license. The cablegrams indicate this. Whether or not the defendant had such a license as was within the contemplation of the parties' intent at the time of the contract was a jury question. The name in the license could be changed on request. Indeed, the need for the license on the part of the American Trading Company was dispensed with, for it was agreed to make actual delivery by way of the Pacific coast and then C. I. F. Japan, and exchange documents on

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the other side. What the parties intended by the several cablegrams which were exchanged, was a question for the jury. The cable was some evidence, but not conclusive evidence, of the attitude of Mr. McChesney toward the bargain made between Kelly and Crombie on the 17th. It was of some probative value, but was not conclusive. It may be deemed some evidence of Mr. McChesney's mind in regard to the contract, but that was all. Later cablegrams may just as well be argued as a support of plaintiff's theory that McChesney ratified Kelly's act, and approved the contract, and endeavored to sell in Japan.

[2] The plaintiff was entitled to succeed, irrespective of whether the defendant acted in good or bad faith in endeavoring to deprive him of his commission. There is no difference between failure to perform because of bad faith or because of inability. This has been expressly held in Dotson v. Milliken, 209 U. S. 237, 28 Sup. Ct. 489, 52 L. Ed. 768. See, also, Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; Charles v. Cook, 88 App. Div. 81, 84 N. Y. Supp. 867; Rosenstein v. Bogel, 124 App. Div. 527, 108 N. Y. Supp. 957; Folinsbee v. Sawyer, 8 Misc. Rep. 370, 28 N. Y. Supp. 698. It is sufficient to entitle the broker to his compensation if it appears from the evidence that a sale was effected through his agency in procuring a buyer. If his communications with the purchaser have been the means of bringing the purchaser and principal together, and the sale agreed upon in consequence thereof his right to compensation is perfect. The broker is not entitled to compensation for unsuccessful efforts to make a sale unless the failure had been caused by fault of his principal. When he has been allowed a reasonable time to effect a sale, and has failed, and the principal has in good faith terminated the agency and effected the sale through his own efforts the latter is not liable for commissions. Walton v. Chesebrough, 167 N. Y. 606, 60 N. E. 1121; Levering v. Paova Oil Co., 243 Fed. 553, 156 C. C. A. 251; Hammond v. Crawford, 66 Fed. 425, 14 C. C. A. 109.

[3] If the evidence created prima facie that a sale was effected, and that the plaintiff was the procuring cause in bringing the purchaser and seller together, it is improper to direct a verdict. The court may only direct a verdict where the evidence is undisputed, and so plainly preponderant that it practically becomes conclusive, so that reasonable minds could not differ as to the conclusions to be drawn from the testimony. Standard Trust Co. v. Commercial Nat. Bank, 240 Fed. 303, 153 C. C. A. 229; Swiss v. Zimmermann, 240 Fed. 87, 153 C. C. A. 123; Shadoan v. Cinn. R. R. Co., 220 Fed. 68, 135 C. C. A. 636.

We are of the opinion that the evidence is sufficient to require the submission to the jury of the question whether or not both parties consider that negotiations had resulted in a definite agreement which they agreed to consummate. If the jury answered this question in the affirmative, it would follow that the plaintiff, employed by the defendant, had done all that he was requested to do, and had earned his commissions, and cannot be deprived thereof by the failure of his employer to consummate the bargain.

It was error to direct a verdict for the defendant, and for this reason the decree is reversed.

the decree is reversed

HOUGH, Circuit Judge (dissenting). If one regards the complaint herein, Baldwin was not a broker, and did not sue as one, nor for a commission. He was a salesman, entitled to everything over a certain price when he sold a definitely specified lot of goods. No such sale was ever made. But, if a broker's employment be somehow spelled out, then both the alleged vendor and vendee testified fully that their minds never met; while that no sale resulted from plaintiff's efforts, and that such efforts in no way assisted in the final disposition of the goods, is admitted.

Plaintiff's efforts failed, because the parties to the proposed sale could not agree about the license, so important in war time; therefore there never was a contract. This court in substance holds that there should have been a contract, and therefore gives a jury a chance of saying that there was one. I cannot agree to that, and dissent.

STEAMSHIP KNUTSFORD CO., Limited, v. BARBER & CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 21.

1. Shipping \Leftrightarrow 49(3)—Injury within provision in charter party for deduction for loss of time from breakdown of machinery, etc., need not be structural.

Where a charter party provided that, in event of loss of time from breakdown of machinery, stranding, or damage preventing the working of the vessel, payment of hire should cease until the vessel should be in an efficient state to resume service, it is not necessary that damage which prevented the working of a vessel be structural, in order to entitle the charterer to a deduction of hire.

2. Shipping \$\infty 49(3)\$—Charterer not entitled to deduct for period during which vessel was injured 80 as to prevent working where time was used in discharging cargo.

Where fire broke out in the hold of a vessel, which had to be flooded, and for that reason the cargo had to be removed and examined, held that, though the fire caused a buckling of bulkheads, and it was necessary to clean the holds, etc., before the vessel was again in a seaworthy condition, the charterer is not entitled to deduct hire during the period consumed in removing the cargo, etc.; and where the evidence did not show the length of the period after removal of cargo during which the vessel was unfit for service, a reference may be taken on that matter.

3. Shipping \$\infty\$=\infty\$58(2)\to Burden on charterer to show right to deduct hire during period vessel was unfit for service.

Where fire broke out in the hold of a vessel, and the cargo had to be removed, and the hold, which was flooded, cleaned, etc., the charterer has the burden of showing what period of subsequent delay was due to the inefficiency of the vessel, so as to entitle the charterer to take advantage of the provision of the charter party providing that hire should cease for the period for which the vessel was incapable of operation, etc.

 SHIPPING ⇐⇒49(3)—No tacking together of small delays, each less than twenty-four hours, to recover damages.

Where charter party provided that hire should cease where the vessel was delayed for more than 24 hours, due to a breakdown of machinery, etc., the charterer cannot tack together several small delays, each less than 24 hours, so as to deduct a day's hire.

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5. Shipping \$\infty\$=49(3)—Charterer not entitled to deduct for inefficiency of machinery which lessened vessel's speed.

A charterer is not entitled to deduct hire for inefficiency of machinery, which icssened the vessel's speed, under a provision of the charter party providing that hire should cease on the breakdown of the vessel, etc.

Manton, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the Steamship Knutsford Company, Limited, against Barber & Co., Incorporated. From a decree for respondent, libelant appeals. Modified, unless respondent should choose to take a reference.

The libel was by the owner of the steamship Knutsford upon a charter party entered into on March 11, 1915, by which the libelant let the Knutsford on a time charter for two round trips—the first to the United States, Atlantic Coast, then to the west coast of France not north of Havre; the second to the west coast of France, not north of Havre, returning direct to West Kingdom to be redelivered. The material portion of the charter party was article 16, which read as follows: "That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four (24) consecutive hours, payment of hire shall cease until she shall be again in an efficient state to resume her service; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to cargo, such detention or loss of time shall be at the charterer's risk and expense."

The Knutsford made the two voyages in question, and the respondent paid hire with certain deductions, which were the subject of the suit, and which can be divided into three general classes: First, a deduction on account of delays due to alleged breakdowns to machinery at sea between April 12th and April 17th, totaling 1 day and 1½ hours. This deduction was made up of five separate periods, the longest of which was 10 hours and 25 minutes. The second deduction was for 2 days' hire for loss in efficiency of the machinery by alleged damage. This loss was based upon the assumption that imperfect working of the machinery between the 2d and the 19th of April caused a delay of 2 days in the ship's arrival. The third deduction was for 7 days and 12 hours, from 7 p. m. on July 16th to 7 a. m. on July 24th. The ground for this deduction was a fire which occurred on July 16th in the cargo stowed in hold 2 forward of the engine room. The fire broke out on July 16th at 7:10 p. m. and was put out at 4:40 a.m. on the 17th; but the hold remained flooded until 7 o'clock on the evening of the 17th. The 18th was Sunday and there is a dispute in the evidence as to whether the holds at that time were sufficiently dry to permit the discharge of the vessel. In any event, nothing was done until Monday, the 19th, when the captain began to shift the cargo from this hold. This was of five kinds—sugar in bags, carbon, cases of machinery, steel billets, and spelter. It did not appear how the cargo was stowed.

On Wednesday, the 21st, the sugar having been removed to the deck, the captain employed a surveyor to examine the hold. He found that in a part of the fore and aft steel bulkhead the steel plates had somewhat buckled, and that a wooden thwartship bulkhead that had been used to divide off a part of the hold for a reserve bunker had been burned and charred. He also found that some hatch covers had been destroyed, some of the battens burned, and the bilges, strainers, and suction pipes fouled and choked with melted sugar. He recommended that the wooden bulkhead be removed, the cargo battens be renewed, the charred portions of the ship's structure scraped clean, and the bilges, etc., that were fouled by melted sugar, cleared. This was done by the morning of the 23d, on which day the charterers, for their own purposes, built a magazine in the ship to carry explosives. The question was what portion

of this time should be deducted in favor of the charterer.

The District Court disallowed the first two deductions, but allowed the third, upon the theory that during all the period after the fire the vessel had been damaged, so as to prevent her "working," within the language of article 16.

Charles R. Hickox and L. De Grove Potter, both of New York

City, for libelant.

Harrington, Bingham & Englar, of New York City (D. Roger Englar, of New York City, and Vine H. Smith, of Brooklyn, N. Y., of counsel), for respondent.

Before ROGERS and MANTON, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1-3] We quite agree with the learned District Court that within the language of article 16 it is not necessary that the damage should be "structural" in the sense that the frame of the ship must be injured, so as to prevent her "working." In this case the buckling of the fore and aft bulkhead was not such damage, and the charterer's right, under article 16, must rest upon the fact that the holds had to be cleaned before the ship was in seaworthy condition and that the charred bulkhead had to be removed. We further agree that the ship was not again in efficient state to resume her services until the morning of the 23d. Therefore, if article 16 had read that the charterer should not pay while the ship was in such a damaged condition as prevented her "working," we should have no difficulty in agreeing that during the whole of that period the hire ceased. However, in reaching such a result under the actual terms of this charter party. we should have to disregard the words, "in the event of loss of time," which were certainly intended to provide indemnity, if only partial indemnity, to the charterer. It follows that, if the cargo had been removed, not because of any damage to itself, but only to give access to the necessary repairs, then, as indeed Mr. Hickox admitted, all the time until July 23d would have been on the owner's account, but that, if the cargo had to be removed in any event for examination and restowage, the time taken for that purpose was not lost by reason of damage to the ship.

The evidence is far from clear, but it sufficiently appears that the sugar was taken out because it had to be. The hold had been flooded, and the charterer must examine and restow it before the ship could proceed. The same apparently was true of the cases of machinery, and possibly of the carbon, too, although the record is silent as to the last. But as regards the steel billets and the spelter it must be assumed that they were not injured. These being the circumstances, we think that the time necessary to examine and restow the sugar was not "loss of time" within the meaning of article 16, but that the charterer was using the ship at that time for a purpose which, though it necessarily delayed her, was still his own, and was not due to any "damage" to the ship. It seems to us that article 16 does not justify a deduction during that period, or until the charterer began to lose the use of the ship after he again wished to load her.

Had the spelter and billets been stowed at the bottom of the hold,

in such wise that it had to be discharged before the bilges, limbers, etc., could be cleared, or the charred remains of the wooden bulkhead removed, then the ship would have gone off hire in our judgment from the time the discharge of the cargo had reached the spelter and billets. The rest of the time would have been lost only because it then became necessary to remove that portion of the cargo to gain access to the damaged parts. It would have been upon the owner's account. So far as we can gather from the somewhat fragmentary proof, the last day lost because of the removal of the sugar was the 21st, on which the repairs began. The only question that can arise, therefore, is of the 22d, for on the morning of the 23d a certificate was given to the ship, showing that she was again "in an efficient state to resume her service."

The only evidence of what was done by the charterer on the 22d is contained in the testimony of the master, who says that cases of machinery were taken out for examination on the 21st and 22d. If this is to be understood as meaning that the 22d as well as the 21st were necessary for the purpose of examining the cases of machinery -some of which were later taken off the ship—the ship would not have been off hire at all. It is impossible upon such a meager record to tell whether this was the reason, or whether the unloading of the cases had proceeded in a leisurely way because in any case the ship must be laid up for repairs on the 22d. The burden of proof to bring article 16 into operation is upon the charterer, and on this record it, strictly speaking, fails to sustain that burden. However, since the decree is to be modified, a reference may be taken, if the parties cannot agree, to ascertain at what time on the 21st the charterer had completed so much of the discharge of cargo as was necessary for its examination before proceeding to reload, had the ship then been in an efficient state to resume her service.

As we have already indicated, all the time after 9 o'clock on the morning of the 23d we charge to the charterer's account. As held in Smailes & Son v. Evans & Reid [1917] 2 K. B. 54, the clause does not provide full indemnity to the charterers, but only until such time as the vessel is in efficient condition for "working." We are in full accord with the judgment of Mr. Justice Bailhache in that case.

Finally, there is the question whether the ship's holds were clear of water by 7 p. m. on July 17th, or whether the failure of the stevedore to work on the 18th was because they were not so cleared. The master says the holds were cleared, with the exception of some water in the bilges. The stevedore, Spillane, says that he did not believe the men would have gone into the holds on Sunday, the 18th. Yet at most there were only 6 inches of water on his own statement, and such a condition scarcely supports his belief. We think that the respondent has not borne the issue on this point.

In Hogarth v. Miller, [1891] A. C. 48, it was held that, while the ship was being used for discharge, she was on hire though she was not in fact efficient to resume her service, because her machinery was broken down. There the ship had broken down at Las Palmas, and was towed from there to Harburg, her first port of discharge,

where the charterer discharged her in part. The charterer was excused from paying hire during the period of the towage, and held during the period of discharge. The period of towage was not, indeed, lost time; certainly all of it was not; but the towage charge had been included as an expense in general average and was treated as a separate venture. We understand the case as meaning that the damage "prevented the working of the vessel," though possibly that is not

wholly clear from the judgments delivered.

In Lake Steam Shipping Co. v. Bacon (D. C.) 129 Fed. 819, affirmed in this court without opinion in 145 Fed. 1022, 74 C. C. A. 476, the facts were substantially the same as in Hogarth v. Miller, except that the ship made port under her own steam in a crippled condition. The distinction regarding the towage charge above noted in Hogarth v. Miller seems not to have been observed, and it must be owned that the result is somewhat inconsistent in allowing a deduction for loss of time due to crippled power in steaming, while refusing to allow it for the period of discharge. Moreover, the allowance appears to us to be in face of the decision of the District Court here, which this court unanimously accepts, that the allowance is to be made only in case the breakdown prevents working of the vessel. However that may be, the allowance was refused during the period of discharge, and we see no distinction between that and the period of discharging the cargo for examination in the case at bar.

The Canadia, 241 Fed. 233, 154 C. C. A. 153 (C. C. A. 3d Cir.), squarely supports our ruling. In that case the vessel was held to be off hire during the period of a fire, but on hire while being discharged, though in an unseaworthy condition, being available for the purposes required by the charterer. We see no substantial difference between that form of expression and the one which we somewhat prefer: i. e., that the charterer has lost no time because of the damage.

The ruling reported in the note to The Santona (C. C.) 152 Fed. 520, made by Judge Choate while acting as arbitrator, does not seem to us to bear out the libelant's contention that a damage such as the Knutsford suffered did not bring her within the breakdown clause. We understand the damage in that case to have been altogether to the cargo, except for some slight repairs, which could safely have been postponed. We do not regard the damage done to the Knutsford as of that class, for, in spite of the master's statement to the contrary, the surveyor clearly did not think her seaworthy without some repairs.

[4, 5] As to the first point, we agree with the learned District Court that article 16 by its language precludes tacking together periods of less than 24 hours. We also agree as to the second point, that the vessel's reduced speed, due to the inefficiency of machinery, is not covered by the language "preventing the working of the vessel."

These points are too obvious to require extended discussion.

The decree will therefore be modified, by allowing the owner full hire, unless the charterer shall choose to take a reference as above indicated. Costs of this appeal to the appellant,

MANTON, Circuit Judge. I dissent in part. I cannot agree with the prevailing opinion, in so far as it disagrees with the conclusions reached by the court below. The clause of the charter party which we are to consider provides:

"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than 24 consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On the voyage in question, the loading had been going on for several days, and prior to 1:30 p. m. on July 16th the hatches were closed down, as further cargo was not available. At 7:10 on July 16th fire was discovered in No. 2 hold, which had been loaded with steel billets and machinery in boxes and sugar. The fire was put out at 4:10 a. m. on July 17th. The hold, at this time, was flooded to a depth of 14 feet 6 inches. A salvage boat pumped the water out, and this work was completed at 7 p. m. on July 17th. No work was done on the two intervening days, but on July 19th the stevedores, assisted by the crew, took the damaged sugar out of No. 2 hold, and this work was completed on July 21st. An examination revealed that the wooden bulkhead which partitioned off the reserve bunker space, was burnt out. After a survey, it was recommended that the wooden bulkhead and the battens be renewed; also that repairs be made to the sounding pipe, and that the bilges be cleaned out where possible. The bilges and strainers had been made foul, due to the sugar water and syrup. The work was completed on July 22d. On the 23d of July the charterers built a powder magazine in between decks, and on the 24th at 7 a.m. resumed the loading of the cargo.

The District Court held that the libelant could not recover for hire during the period after the fire in the vessel until reloading—that is, between July 16th, at 7 p. m. and the 24th, at 7 a. m.—and this because the damage caused prevented her working within article 16. During this period the ship was unfit for the service of receiving the cargo; that is, while the fire was raging, and until it was extinguished, the water removed, the hold repaired, and the pipes cleaned. We cannot read into this clause that the reason for the delay in loading cargo must be due to some damage of a structural character. Whether the damage was of a structural or nonstructural character is un-

important.

It is claimed, however, that the charterer's deduction of hire for the period referred to should be disallowed, upon the theory that during the period certain portions of the cargo were being shifted, and that the loss of time thus occurring was due to this cause, and not to damage preventing the working of the vessel, in the sense of the breakdown clause of the charter. This contention is untenable, because the interpretation of the charter party, upon which it rests, is irreconcilable, not only with the authorities, but it does not, when applied to the facts in the case, defeat the deduction of hire. Charter party provisions almost the same in effect—indeed, in hæc verba—have been held to authorize a suspension of hire for the period within which the vessel was not in a condition fit to perform the service required

of her, and this notwithstanding the fact that the charterer was able to and actually did make some use of the vessel during the period for the whole of which the deduction was sustained. To say that the loss of time here was due to cargo movements in which the charterer was interested, and not to the necessity for putting the vessel again in condition to resume her service, cannot be supported under the facts disclosed in this record. In the cases which are depended upon to support this claim, it will be found that the loss of time was due to other causes, and, in fact, there was not loss of time, or, at least, no loss covering the entire period for which the deduction was sustained. A controlling decision found in the English reports is Hogarth v. Miller, 60 L. J. P. C. 1, where the charter party provided:

"In the event of loss of time from * * * breakdown of machinery, want of repairs, or damage whereby the working of the vessel is stopped for more than 48 consecutive hours, the payment of the hire shall cease until she be again in an efficient state to resume her service."

In that case, the vessel put in at Las Palmas, owing to a breakdown in her engine. Thereafter a tug was sent out by the shipowners, under arrangement with the charterers, and the vessel proceeded with the aid of the tug, partly using her engines, to her destination, and there discharged her cargo. The Lord Ordinary held that the vessel was entitled to hire for the average period of the voyage from Las Palmas to the port of destination, and allowed a deduction only to the extent by which the duration of the voyage actually made with the assistance of the tug exceeded the duration of such average voyage. The House of Lords, however, held that the charterer was entitled to deduct the hire for the entire period of the voyage from Las Palmas to the destination. Lord Halsbury said:

"* * The test by which the payment for hire is to be resumed is the efficient state of the vessel to resume her service; so that each of those words, as it appears to me, has relation to that which both of the parties must be taken to have well understood—namely, the purpose for which the vessel was hired, the nature of the service to be performed by the vessel, and the efficiency of the vessel to perform such service as should be required of her in the course of the voyage."

In Lake Steamship Co. v. Bacon (D. C.) 129 Fed. 819, affirmed 145 Fed. 1022, 74 C. C. A. 476, which is cited by the appellant, Judge Adams, in the District Court of New York, dealt with similar facts, and reached a like conclusion. The court held that the charter hire was suspended during the entire period of the vessel's voyage from St. Thomas to New York, although during that period she was carrying cargo for the carriage of which, on arrival at New York, the charterer collected a freight charge in a substantial sum. There the vessel left Port of Spain, Trinidad, for New York, on April 9, 1903. On April 11th, 36 hours later, she was stranded on a reef. She was removed from the reef on April 16th and proceeded to St. Thomas, 45 miles distant. She was there repaired, and went on to New York under her own power and unassisted, where she arrived in bad condition. It was held that the vessel was not fit for carrying service at any time after the stranding, and that hire was suspended from that

time until the vessel reached New York and was in a position to discharge cargo. The breakdown clause, construed in that case, was identical in wording with that in this case, and is undistinguishable in its effect. In each of these cases the suspension of hire was continued until the vessel was again in an efficient state to resume her services. The suspension of hire was held to begin when the vessel became unfit for her service, and that under the breakdown clause, in particular, the words used, "again in an efficient state to resume her service," meant that hire did not begin again until revived by the vessel again becoming efficient for the service required. Like authority may be found from a reading of The Canadia, 241 Fed. 233, 154 C. C. A. 153, and Olsen v. U. S. Shipping Co., 213 Fed. 18, 129 C. C. A. 607.

We should not construe differently the same language in this charter party of later date. The vessel was not fit to receive cargo while she was afire, or while the fire was being extinguished, nor while the hold was flooded; and she was not in an efficient state to resume her service until the repairs found necessary were completed. To say that it is incumbent upon the charterer to remove the cargo, because that was damaged, is ignoring the effect of the Hogarth v. Miller and Lake Steamship Co. v. Bacon Cases, supra. Moreover, it appears that through the period while the fire was in progress, while it was being extinguished, and while the vessel was being repaired and the hold cleared in consequence thereof, there was a loss of time from damage preventing the working of the ship, and if, during part of the time, the charterer was in fact shifting cargo for his own account, the fire and its consequences were nevertheless, throughout the entire period, a concurring cause of the loss of time. Here the vessel itself was actually on fire. There is no evidence to bear out the suggestion, made upon the argument, that it originated in the cargo. A consequence was the flooding of the hold, that created the need for shifting the cargo, all being occasioned by the fire, and also the necessity for repairs after the fire.

So far as the undamaged part of the cargo which was removed is concerned, manifestly there was no occasion to shift that, except for the damaged condition of the ship, and for the purpose of enabling the owner to make the necessary repairs to the ship. The portion of the sugar which had been melted and drawn into the suction pipes in the operation of the pumps, or deposited, mixed with water, upon the limber boards, had ceased to be of any interest to the charterer and no longer existed as a cargo. It was a total loss so far as the charterer was concerned. The clearance of this sugar, as of any other obstruction in the pipes or hold, was the duty of the owner, not the charterer, and the ship was not fit to proceed to sea until this, as well as the repairs, whether classified as arising from structural or nonstructural damage, had been made. It appears that some of the sugar had only been partially damaged, and still had value as merchandise. It was necessary to be shifted, in order to preserve or recondition it. The master, however, was obliged to remove this from the hold—that is, the sound as well as the damaged cargo—in order

to ascertain and repair the damage to the ship. Therefore all this work, including the movement of the cargo, was approximately caused by the fire, and the consequential damage by water, with its resulting damage to the ship. It seems clear to me, therefore, that the deduction of hire for this period was properly allowed by the District Court.

In reaching this conclusion, I do not overlook the decisions which have held that charter hire, after a period of suspension, begins to run again when the ship itself is fit for service, although certain consequences of the damage continue, involving actual loss of time to the charterer beyond the period during which the vessel itself is not fit for service. Small & Sons v. Evans, 2 K. B. 54, 33 T. L. R. 233.

Merely because one of the consequences of the unfitness is to require the charterer to perform some operation on his own account, it by no means follows that charter hire runs while the vessel is unfit. As in the case above referred to, the hire begins to run again because the vessel is "again in an efficient state to resume her service," not because the further period of delay is deemed not to be causally connected with the ship which suspended the accrual of hire.

For these reasons, I think the judgment of the court below is right,

and should be affirmed.

BATSON v. ROSOFA.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.) No. 25.

1. Appeal and error с⇒927(7)—Evidence considered in favorable light to appellant where judgment is directed.

Where judgment was directed against plaintiff in error, the evidence is to be considered in the light most favorable to him by the appellate court.

2. Brokers \$\infty\$ \$\infty\$ Sufficiency of evidence jury question in action for commissions.

In an action by a broker for compensation for procuring underwriting for the sale of stock, the direction of verdict for defendants, on ground that it did not appear that the underwriter procured was ready, willing, and able to carry out the agreement, held improper, though complaint alleged the broker had produced an underwriter ready, etc.; the bill of particulars alleging, and there being evidence showing that the underwriter procured was the one defendants desired, and that they agreed to pay the compensation, if the broker induced such one to act.

In Error to the District Court of the United States for the Southern District of New York.

Action by Roland R. Batson against Juan Bianchi Rosofa and others. Judgment on a directed verdict for defendants, and plaintiff brings error. Reversed.

Koenig, Sittenfield & Aranow, of New York City (F. Aranow, of New York City, of counsel), for plaintiff in error.

Bouvier & Beale, of New York City (P. Beale, of New York City, of counsel), for defendants in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. [1, 2] This is a writ of error to a judgment directed by the court in favor of the defendants. In this situation the record is to be read as favorably to the plaintiff as possible. The sequence of events is as follows:

Exhibit A.

"New York, March 25, 1918.

"Mr. R. B. Batson, 120 Broadway, New York City—Dear Sir: We, Succesores de Bianchi, a copartnership residing in Porto Rico, beg to confirm our

verbal agreement with you, which is as follows:

"(1) You are hereby authorized by us to procure for us underwriting for fifty-six thousand eight hundred and sixty-five (56,865) shares of preferred stock and twenty-two thousand seven hundred and forty-six (22,746) shares of common stock of the West Porto Rico Sugar Company, at the price of eighty-six dollars (\$86) per share of preferred stock, carrying 40 per cent. of common stock as bonus upon the form of underwriting agreement annexed hereto.

"(2) We agree to pay you two per cent. (2%) on the amount of underwriting as your compensation for services in procuring such underwriting agree-

ment signed.

"Yours very truly,

Sucesores de Bianchi,

"By J. Bianchi.

"Accepted and agreed to: R. R. Batson, Witness."

Exhibit B.

"New York, March 25, 1918.

"Mr. R. R. Batson, 120 Broadway, New York City—Dear Sir: This is to explain more explicitly the terms of the contract, hereto annexed, entered into with you, which provides for the payment to you of a commission of two per cent. (2%) on the amount of underwriting you may secure for us on an issue of fifty-six thousand eight hundred sixty-five (56,865) shares of preferred stock and twenty-two thousand seven hundred forty-six (22,746) shares of common stock of the West Porto Rico Sugar Company, which stock represents the properties of the sugar estates known as Coloso, Progresso, Vanina, and Loiza, and lands adjacent, situated in Porto Rico, having a total acreage exceeding twenty-five thousand (25,000) acres, which stock we agree to deliver when and as called for by Messrs. Toole, Henry & Co., 120 Broadway, New York, who, it is agreed, are to be managers of any underwriting syndicate that may be formed.

"(1) In the event that any member or members of the underwriting syndicate are unable to live up to the terms of the annexed underwriting agreement, because of any acts of commission or omission on our part, you shall still be entitled to and shall receive upon demand, the commission of two per cent. (2%) mentioned in the contract next attached.

"(2) It is understood that, should the underwriters to the agreement referred to refuse to carry out the terms of said agreement, in that event no

commission is to be paid to you.

"Yours very truly,

Sucesores de Bianchi,

"By J. Bianchi.

"Accepted: R. R. Batson. March 26, 1918."

Exhibit C.

"Consolidation of West Porto Rico Sugar Co.

"The undersigned, as syndicate participants, agree to subscribe to 69,000 shares of the West Porto Rico Sugar Company, preferred stock at \$86 per share, and with which the undersigned will receive as bonus 27,600 shares of common stock, or forty (40) shares of common stock for each 100 shares subscribed for under this agreement, which ratio applies to all syndicate participants.

"The total number of shares which the syndicate as a whole shall subscribe for is 69,000 out of a total authorized issue of 100,000. The balance of the 100,000 shares of preferred stock which is not offered for subscription to this syndicate shall remain in the treasury of the company unissued dur-

ing the life of this agreement, and neither shall the company sell or offer for sale or otherwise part with, during the life of this agreement, any common stock other than that necessary to complete the bonus under the terms out-

"Messrs. Toole, Henry & Co., 120 Broadway, New York, shall be managers of the syndicate, and as managers are entitled to and shall receive as compensation a commission of 11/2% of the total value in dollars of the amount

of stock subscribed for.

"The 69,000 shares of preferred stock (and the 34,500 shares of common stock less the number of shares to be exchanged with the old company) shall be offered for public subscription at such time and upon such terms as the syndicate managers shall determine upon. They are also empowered to market stock in any other manner they may deem advisable, but any profits derived from the public offer and sale of syndicate stock shall be divided pro rata amongst syndicate participants in proportion to the amount of their subscription, but after deducting the expenses of sale; and a just and fair measure of expenses for marketing the stock as it will be accounted for by syndicate managers.

"The payment of the stock as above subscribed shall be made in four installments of 25% each as called for by the syndicate managers, the first upon five days' notice, and the last three upon thirty days' notice, and at intervals

of not less than six weeks each.

"The syndicate shall be kept alive and this agreement shall continue until such time as a majority in amount of stock subscribed for shall vote that the syndicate shall cease.

"New York, 16th day, March, 1918.

"[Signed] Toole, Henry & Co. "Form of syndicate agreement approved by Suc's Bianchi, by J. Bianchi."

The plaintiff testified that the defendants employed him to get Toole, Henry & Co. to sign Exhibit C. March 19, 1918, the defendants returned these papers to the plaintiff pinned together; Exhibit C being approved by them, but not yet signed by Toole, Henry & Co. March 25 defendants wrote Toole, Henry & Co.:

Defendant's Exhibit 4.

"New York, March 25, 1918.

"Messrs. Toole, Henry & Co., 120 Broadway, New York City-Dear Sirs: Referring to the syndicate agreement covering an issue of 69,000 shares of preferred stock of the West Porto Rico Sugar Company, out of an authorized issue of 100,000 shares, and the shares of common stock necessary to complete the bonus under the terms of the syndicate participating agreement, which stock represents the properties of the sugar estates known as the Coloso, Progresso, Vanina, and Loiza, and lands adjacent, situated in Porto Rico, having a total acreage exceeding 25,000 acres, we wish to say:

"(1) You are hereby given full authority to act as syndicate managers in any underwriting that may be formed, and you are granted by us all of the

powers enumerated in the syndicate participating agreement,
"(2) It is understood and agreed that we shall deliver this stock to you

when and as called for by you.

"(3) It is understood and agreed that we shall supply you, as syndicate managers, upon demand, with any documents you may call for relating to this issue.

"Yours very truly,

Sucesores di Bianchi."

March 28 plaintiff obtained the signature of Toole, Henry & Co. to Exhibit C. Eo die plaintiff wrote:

"I have to inform you that I have formed a syndicate to underwrite the stock of the West Porto Rico Sugar Company referred to in your agreement with me, dated March 26, 1918, and that the aforesaid shares have been subscribed for."

Eo die defendants replied:

Defendant's Exhibit 2.

"R. R. Batson, New York, N. Y.—Dear Sir: We have received your letter informing us that a syndicate to underwrite the stock of the West Porto Rico Sugar Company as per agreement, has been formed, and that stock has been subscribed for.

"We notice that said letter is signed by you personally.

"It is our understanding that all negotiations for this underwriting have been carried out with you as representative of Messrs. Toole, Henry & Co., and therefore we beg that the letter stating that stock has been subscribed for be signed by Messrs. Toole, Henry & Co., or personally by you as a representative of said concern.

"Just as soon as we receive same, we will be glad to procure the release on behalf of Messrs. Toole, Henry & Co., which form you have sent us.

"Very truly yours, [Signed] Bianchi."

Toole, Henry & Co. replied:

Defendant's Exhibit 3.

"Toole, Henry & Co.

"120 Broadway, New York, April 2, 1918. "Messrs. Sucesores de Bianchi, 82 Beaver Street, New York City—Dear Sirs: We hereby notify you that we will act as managers of the syndicate underwriting the stock of the West Porto Rico Sugar Company as effected by Mr. R. R. Batson. The matter is now receiving our attention.

"Yours very truly, Toole, Henry & Co."

The complaint did allege that the plaintiff had produced an underwriter ready, willing, and able to perform the syndicate agreement, Exhibit C, but by two bills of particulars required of him the issue to be tried was whether he obtained Toole, Henry & Co. to subscribe for the whole issue under that particular agreement.

The District Judge, construing Exhibit C as a subscription by Toole, Henry & Co. for the whole issue of stock, as well as a consent to act as syndicate managers, directed a verdict for the defendants, on the ground that the plaintiff had not produced an underwriter ready, willing, and able to perform the syndicate agreement:

"The so-called syndicate agreement, marked Plaintiff's Exhibit C, appears to me to contain on the one hand subscriptions by the subscribers, and on the other hand an agreement by the subscribers or proposed subscribers, appointing Toole, Henry & Co. syndicate managers, and providing for their compensation and the mode in which they should market the stock. It does not in my opinion relieve the persons who signed the agreement from the ordinary obligation of paying for the stock in the regular way, nor is the effect of the whole transaction such as to relieve the broker, whom the plaintiff claims to be, from the obligation to establish that a person or persons whom he obtained as subscribers to a transaction, whether it be for the purchase of stock or for the purchase of real estate, were ready, able, and willing to perform. I think that is a condition, unless it is clearly provided against in some way, and the contract which is admittedly here the contract contained in the letters A and B clearly should set forth that Toole, Henry & Co., irrespective of their financial ability, would be accepted as adequate subscribers. I do not think, unless that were done-and it was not here done-that it would satisfy the ordinary requirements of law which a broker must meet. So far as this case shows, the plaintiff mainly obtained the signature to a paper involving enormous obligations, and claims \$98,000, without having adduced any proof that the persons whose signatures he secured were ready, able, and willing to perform."

But if the plaintiff's story is true his engagement was merely to get a particular underwriter, viz. Toole, Henry & Co., and this the jury might find he did. If so, there is no question of that underwriter being ready, willing, and able, because the defendants got exactly what they bargained for.

The judgment is reversed.

JOHNSON v. CADILLAC MOTOR CAR CO.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 20.

 Negligence ← 119(7)—Recovery must be on negligence alleged in complaint.

Where a complaint alleges that, because of the negligent failure of the manufacturer of a motor car to properly inspect it, plaintiff, a purchaser from a dealer, was injured by the breaking of a wheel, there can be no recovery on the theory that the manufacturer was guilty of fraud in falsely representing that the wheels were of great strength.

2. Negligence &==27--Manufacturer of automobile liable to purchaser injured by defective wheel.

The manufacturer of an automobile, who fails to use reasonable care in inspecting and testing the wheels, is liable to a purchaser, injured by the breaking of a defective wheel, though such purchaser bought from a dealer.

3. Appeal and error &=1097(2)—Decision on former writ of error may be set aside, if clearly erroneous.

Notwithstanding the rules as to stare decisis, and that a decision of an appellate court becomes the law of the case on retrial, the Circuit Court of Appeals may, where former decision in the same case was clearly erroneous, and announced a wrong rule, which might well affect many persons adversely, reverse its earlier decision on writ of error after retrial; the rule as to the law of the case being largely one of convenience and policy.

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of New York.

Action by E. Wells Johnson against the Cadillac Motor Car Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

Homer J. Borst, of Schenectady, N. Y. (Andrew J. Nellis, of Albany, N. Y., and Daisy L. Snook, of Amsterdam, N. Y., of counsel), for plaintiff in error.

William Van Dyke, of Detroit, Mich. (William L. Carpenter, of

Detroit, Mich., of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is an action against a corporation manufacturing automobiles, and which sold one of its cars to a retail dealer, who resold to the plaintiff. The car was defective, and while being used by plaintiff, broke down and overturned, seriously in-

juring the plaintiff, who brought this action to recover damages in the

sum of \$40,000.

The action was commenced in the Supreme Court of the state of New York in 1910, and was regularly removed to the United States Court for the Northern District of New York, where it was tried and judgment obtained in plaintiff's favor in the amount of \$8,000. The judgment was brought to this court on writ of error covering some 500 pages. This court reversed the judgment upon the ground that, as no contractual relation existed between plaintiff and defendant, there could be no recovery. 221 Fed. 801, 137 C. C. A. 279, L. R. A. 1915E, 287, Ann. Cas. 1917E, 581.

The action was tried again before the court, and without a jury this time, and judgment was entered dismissing the complaint. The trial court found as a fact that the injuries were occasioned by the negligence of defendant, and that plaintiff was free from any contributory negligence, and that the damages amounted to \$10,000. The dismissal of the complaint was based on the decision of this court upon the former writ of error, when we held that no contractual relation existed.

The plaintiff, in February, 1909, purchased from the Utica Motor Car Company a Cadillac touring car manufactured by the Cadillac Motor Car Company, a foreign corporation, organized under the laws of the state of Michigan, and having its principal office in Detroit. The Utica Motor Car Company is a dealer in motor cars and purchased to resell. It was the original vendee or immediate buyer, and

plaintiff is the subvendee of the car.

The plaintiff, who was an experienced driver of automobiles, stored the automobile in question for some months. But, after some little previous use of it, he was on July 31, 1909, driving it on a main public highway and one in good condition at the time. The car was running between 12 and 15 miles an hour, when the front right wheel of the car suddenly and without any notice broke down, and the car turned over on the plaintiff, and, as the trial court found, "cut, mangled, and seriously and permanently injured him." The court also found that plaintiff had not recovered from the injuries which resulted from the accident and that he never would recover. The finding is that—

"His face and ear and eye are distorted, and the sight of his one eye is partially destroyed and so injured as to affect the sight of the other; plaintiff's shoulder and ribs were broken; his mouth and face was paralyzed; he cannot work his jaws at all, cannot smile, whistle, nor spit, nor control his lips at all; some of the nerves of his throat are paralyzed; he cannot speak clearly or distinctly; his right ear was torn out and the inner ear fractured. The plaintiff to the present time has been in part unable to do work or to look after his business to any extent; and he never will be able to look after his said business, or to conduct and manage any business. That prior to the time of the said accident, plaintiff was in good health, free from pain and suffering, and of the age of 44 years."

The court has also found as a fact that this automobile was manufactured, assembled, and put on the market by the defendant with a weak, inadequate, and defective wheel thereon, and that this defective condi-

tion was the proximate cause of the accident, and that the car, when defendant put it on the market, was dangerous to human life and unsafe for use, and that defendant ought to have known it, and, had it exercised ordinary care, would have known it.

The defendant did not manufacture the wheels, but purchased them of another company. The court found that defendant carelessly and negligently failed and omitted to use reasonable inspection and tests to discover the real condition and weakness of the wheels. There were other findings, some of which will be considered in a subsequent part of this opinion.

The amended complaint upon which the present action was tried is the same as that upon which the former action was tried. Nothing has been added to it, and nothing has been subtracted from it. The

basis of the action is negligence.1

[1] The amended complaint does not contain any allegation of deceit or fraud, and those words are not to be found anywhere therein. There are no allegations that any representations were fraudulently or deceitfully made. The only allegation as to any representation is found in the following:

"It [defendant] had represented and declared to such ultimate purchaser, who relied thereon, that the machine was capable of enduring such use and operation, its wheels were the best obtainable, and equal to those of the highest priced cars, made from well-seasoned second-growth hickory, with steel hubs, the spokes special strength, wide spokes of ample dimensions to secure great strength."

1 "That the defendant, well knowing the premises, and that the said motor vehicle was to be used by the purchaser thereof for the purposes hereinbefore alleged, and to carry passengers, and to run at a considerable speed, wrongfully, negligently, and carelessly put in spokes in the said wheel and in the hub thereof made out of dead, dozy, and rotten timber, which was unfit for that purpose, and was not strong, and was liable to break; that the defendant also wrongfully, negligently, and carelessly bored through five of the ten spokes in said wheel, and put bolts through the same, so that the strength of the same were almost entirely destroyed, and were wholly unable to stand the strain or load which the same was designed to stand and hold, and broke as hereinbefore alleged, and caused said accident, and all through the wrongful, negligent, and careless acts of the defendant.

"That the defendant further negligently painted the said spokes of the said wheel over, and the hub in which the same went, and varnished the same, and thereby concealed from the plaintiff and the purchaser of the said vehicle the condition of the said spokes, and the fact that the said spokes were nearly cut off by the said bolts and were defective, so that this plaintiff was entirely ignorant of the condition of the said wheel and the spokes and the hub thereof, and did not know that the same was constructed of said improper material and timber, and that the strength and efficiency of the same was weakened by the said bolts passing through the said spokes; that the said wheel was constructed negligently, without any notice to this plaintiff, and by reason thereof the said accident was caused, and this plaintiff injured as herein alleged, all through the said wrongful and negligent acts of the defendant, and all to the great damage of this plaintiff in the sum of \$40,000.

* * * * "

And, after stating the representations the defendant was alleged to have made as to the wheels it used in its cars, the amended complaint concludes: "Nevertheless defendant carelessly and negligently omitted and failed to use reasonable inspection and tests to discover the real condition and weakness of said wheels and the several parts of each of them."

The complainant goes on to say that, if the wheels were not as represented, the car would be a deadly instrument. Then it alleges that defendant "carelessly and negligently omitted and failed to" use a reasonable inspection to discover the real condition of the wheels. There is no allegation that any representation was made with a fraudulent intent, and fraudulent intent is in most jurisdictions an essential ele-

ment in every actionable fraud.

As the cause of action stated in the pleadings is the defendant's negligence, and not defendant's fraud, whatever judgment is entered must conform to the cause of action stated in the plaintiff's pleadings. It must conform, not only to the proofs, but to the issues tendered by the pleadings. When a complaint tenders one cause of action, judgment cannot go upon another and different cause of action. But, whatever the cause of action is, it cannot be denied that it is the identical cause of action that was here, and upon which this court passed, when the case was here before; and so far as the evidence or proof in the record is concerned that is in no respect different.

When the second trial was begun, it was stipulated that the testimony introduced by the plaintiff on the first trial should be considered in evidence as the plaintiff's case on the second trial, and that no other testimony should be introduced, except that the plaintiff might introduce the testimony of one additional witness, who was specified, to establish the same facts which that witness had testified to in another case. As matter of fact, however, no such testimony was introduced. The defendant was content to have the case disposed of upon the testimony presented by the plaintiff, and no testimony for defendant is found in the record.

The first time the case was tried by a jury, and the second time, as already stated, by the court. So that we have before us now certain findings of fact which were not in the record when the case was here before. Some of these findings are without warrant, there being nothing in the record to support them; as for example:

"Nevertheless defendant carelessly and negligently failed and omitted to use reasonable inspection and tests to discover the real condition and weakness of the wheels on said machine as hereinafter described, and the several parts of each of them, and to conceal any defects in the spokes of the wheels on the said machine so purchased by the plaintiff it painted and varnished the same, so that the defective condition thereof and the spokes in said wheels were rotten and dozy could not be seen nor determined by the plaintiff or other purchaser by any reasonable inspection."

There is no evidence that the spokes were painted and varnished with intent to conceal their defective condition. That they were painted and varnished the evidence showed, but it did not show the intent. There is evidence showing that paint hardens the surface of hickory spokes

and gives them a glossy appearance.

Counsel in the argument to this court put stress upon certain representations made by defendants in their catalogues and literature in reference to the wheels with which their cars are equipped, to the effect, as found by the trial judge, that such wheels were the best obtainable, and equal to those used on the highest priced cars; that they were of the artillery type, made from well-seasoned second-growth hickory,

with steel hubs and spokes of ample dimensions to insure great strength. And the judge has found the plaintiff purchased his car relying upon the representations. But this finding clearly cannot change the issue made by the pleadings, which we have already considered.

[2, 3] The question presented, and which this court decided on the former appeal, was whether defendant owed a duty of care to the plaintiff, who was not the immediate purchaser of the car, but a subvendee. This court then held that, as there was no contractual relation between plaintiff and defendant, there could be no recovery. This court, in an opinion written by Judge Ward and concurred in by Judge Lacombe (221 Fed. 801, 137 C. C. A. 279, L. R. A. 1915E, 287, Ann. Cas. 1917E, 581) stated the law governing the liability of manufacturers as follows:

"One who manufactures articles inherently dangerous—e. g., poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure—is liable in tort to third parties which they injure, unless he prove that he has exercised reasonable care with reference to the article manufactured. * * * On the other hand, one who manufactures articles dangerous only if defectively made or installed—e. g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on—is not liable to third parties for injuries caused by them, except in case of willful injury or fraud."

Judge Coxe filed a vigorous dissenting opinion, in the course of which he said:

"The principles of law invoked by the defendant had their origin many years ago, when such a delicately organized machine as the modern automobile was unknown. Rules applicable to stagecoaches and farm implements become archaic, when applied to a machine which is capable of running with safety at the rate of 50 miles an hour. I think the law as it exists to-day makes the manufacturer liable if he sells such a machine under a direct or implied warranty that he has made, or thoroughly inspected, every part of the machine, and it goes to pieces because of rotten material in one of its most vital parts, which the manufacturer never examined or tested in any way. If, however, the law be insufficient to provide a remedy for such negligence, it is time that the law should be changed. 'New occasions teach new duties;' situations never dreamed of 20 years ago are now of almost daily occurrence."

Since this court decided this case, when it was here before, the New York Court of Appeals has decided MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440 (1916). That court affirmed the court below in holding, in a case similar in its facts to the instant case, that the manufacturer of an automobile is not at liberty to put his product on the market without subjecting its component parts to ordinary and simple tests, and is not absolved from the duty of inspection because it buys the wheels from a reputable manufacturer. The court held the manufacturer's liability was not confined to the immediate purchaser, but extended to third persons not in contractual relations with it. In the course of its opinion the court, Judge Cardozo writing, said:

"Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go 50 miles an hour. Unless its wheels were sound and strong, injury was abnost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew, also, that the car would be used

by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent, also, from the fact that the buyer was a dealer in cars, who bought to resell. The maker of this car supplied it for the use of purchasers from the dealer just as plainly as the contractor in Devlin v. Smith supplied the scaffold for use by the servants of the owner. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."

In the Buick Case the court reviewed the authorities at great length, and reached its conclusion in a well-reasoned and discriminating opinion. Its conclusion upon the law is the reverse of that which this court reached in its former decision. The question we must now decide is whether we shall consider the matter as settled as between these parties, or whether we may still look into the matter to ascertain whether an erroneous doctrine was laid down in our former decision, which we are at liberty to correct, now that the same suit is here again on a second writ of error.

The answer to be given to the question is somewhat the more difficult because the court as now constituted differs in its membership from the court as it was constituted when the former opinion was rendered; two of the judges who were on the bench at that time having retired. The question now here is exactly the same question which Judges Lacombe, Coxe, and Ward passed upon.

It has been said that whatever is once established between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts in the case. Gee v. Williamson, 1 Port. (Ala.) 313, 27 Am. Dec. 628. And it has been a maxim of the law that it is the duty of a judge to keep the scales of justice even and steady, and not let them waver with every new judge's opinion. Broom's Legal Maxims (7th Ed.) 147. His duty is to expound the law as he finds it has been decided, and not as he may wish it to be. In Parsons v. Gingell, 4 C. B. 560, Coltman, J., said:

"It is not our province to invent rules. It is our duty to discover and be guided by the rules that guided our predecessors."

In Thompson v. Maxwell Land Grant Co., 168 U. S. 451, 456, 18 Sup. Ct. 121, 123 (42 L. Ed. 539), Mr. Justice Brewer speaking for the court said:

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case."

The court, long before this decision was rendered, had announced the same doctrine. In Himely v. Rose, 5 Cranch, 313, 3 L. Ed. 111 (1809), the Supreme Court reversed a decree of a Circuit Court, and the cause was remanded, with directions to enter a final decree con-

formable to the Supreme Court's opinion. From a decree then entered by the Circuit Court an appeal was taken. On the argument Chief Justice Marshall declared that "nothing is before this court but what is subsequent to the mandate," and he begins the opinion of the court by saying:

"A decree having been formerly rendered in this cause, the court is now to determine whether that decree has been executed according to its true intent and meaning."

In Browder v. McArthur, 7 Wheat. 58, 5 L. Ed. 397 (1822), the court denied an application for a rehearing upon the merits, made after the cause had been remitted to the court below to carry into effect the decree of the Supreme Court according to its mandate. The court declared the application came too late, and it stated that a subsequent appeal for supposed error in carrying into effect the mandate brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. In Roberts v. Cooper, 20 How. 467, 15 L. Ed. 969 (1857), Mr. Justice Grier declared that the court could not "be compelled on a second writ of error in the same case to review our own decision on the first." And he added:

"To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. * * * There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members."

And see The Santa Maria, 10 Wheat. 431, 442, 6 L. Ed. 359; Corning v. Troy Iron & Nail Factory, 15 How. 451, 466, 14 L. Ed. 768; Sizer v. Many, 16 How. 98, 103, 14 L. Ed. 861; Ex parte Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167; Tyler v. Magwire, 17 Wall. 253, 284, 21 L. Ed. 576; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Clark v. Keith, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; Guarantee Co. of North America v. Phenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376; The New York, 104 Fed. 561, 44 C. C. A. 38; United Press Association v. National Newspapers' Association, 254 Fed. 284, 165 C. C. A. 572.

In Ellison v. Georgia Railroad Co., 87 Ga. 691, 13 S. E. 809, Chief Justice Bleckley, speaking for the court, said: "Some courts live by correcting the errors of others and adhering to their own." And he declared that, when the court was satisfied that it had fallen into a great error "the maxim for a Supreme Court, supreme in the majesty of duty as well as in the majesty of power, is not stare decisis, but fiat justitia ruat cœlum."

In Missouri, Kansas & Texas Railway Co. v. Merrill, 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287, the court on a second writ of error overruled its earlier opinion on the first writ of error, saying:

"Counsel for defendant in error have invoked the rule stare decisis, and insist that the former decision must govern on the second appeal. This would come to us with more force, if we were not now considering the same case, with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before

the litigation in which the error has been committed has terminated finally. We are fully satisfied that the rule of the former case is shattered by the pressing weight of opposing authority, and that reason is against it."

In Baker v. Lorillard, 4 N. Y. 257, 261 (1850), Judge Harris, speaking for the New York Court of Appeals, said:

"It [the court] may, and undoubtedly ought, when satisfied that either itself, or its predecessor, has fallen into a mistake, to overrule its own error. I go farther, and hold it to be the duty of every judge and every court to examine its own decisions, and the decisions of other courts, without fear, and to revise them without reluctance. But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been res nova, it is not at liberty to disturb or unsettle such decision, unless impelled by 'the most cogent reasons.' 'I cannot legislate,' said Lord Kenyon, 'but by my industry I can discover what my predecessors have done, and I will tread in their footsteps.'"

In Cluff v. Day, 141 N. Y. 580, 36 N. E. 182 (1894), the court, after expressing the opinion that to permit the parties to an action to reopen a discussion on the law or the facts once deliberately determined by the court of last resort on a subsequent appeal in the same case on a suggestion of error in the former decision would encourage litigation and diminish respect for judicial tribunals, went on to say:

"There is no iron rule which precludes a court from correcting a manifest error in its former judgment, or which requires it to adhere to an unsound declaration of the law. It may, for cogent reasons, reverse or qualify a prior decision, even in the same case. But the cases in which this will be done are exceptional, and the power should be sparingly exercised. Where by inadvertence a settled principle of law is supposed to have been overlooked, or a rule of property violated, the court affords by its rules an opportunity to have its attention again called to the matter before final judgment is entered. If the party against whom the judgment is rendered omits to avail himself of this opportunity, or if, having applied for a reargument, the application is denied, and the case goes to a new trial on the law as declared, the circumstances must be very unusual which would justify the court in reversing its decision on a second appeal in the same case and upon the same facts. The decision is a precedent upon the point of law involved which the court may or may not follow in cases subsequently arising, but in the particular case it is 'more than authority-it is a final adjudication' between the parties."

The fact that the action is the same action, and the litigation has not yet terminated, and the further fact that the original error, if error was committed, was the error of a divided and not a unanimous court, are circumstances which are entitled to consideration.

There are other cases, some of them cited below, in which the courts have declined on a second appeal or writ of error to be bound by a decision rendered upon the first appeal, and have declared that the rule is not inexorable and without exception that a decision on the first appeal is in all cases to be adhered to. Bomar v. Parker, 68 Tex. 435, 4 S. W. 599; Bird v. Sellers, 122 Mo. 23, 26 S. W. 668; Chambers v. Smith, 30 Mo. 156, 158; Barton v. Thompson, 56 Iowa, 571, 9 N. W. 899, 41 Am. Rep. 119.

In 2 Van Fleet's Former Adjudication, § 664, the doctrine is stated as follows:

"If a cause is reversed in a higher court, the lower one is bound to proceed in accordance with the opinion sent down. The parties are compelled to re-try

the case on the new rules laid down, and to shape their respective causes of action or defense accordingly. Having done so, and in many cases having irretrievably changed their positions, it would work injustice to overturn these rules on a second appeal, and these again on a third, and so on ad infinitum. The suit might never end. Besides, it would be very undignified, and tend to bring the courts into merited disrespect, if the lower court should be compelled to retrace its steps on one appeal, and then to trace them back again on a second, and so on. Hence, with a few exceptions, it is a rule that a matter decided on appeal becomes in effect res judicata in that cause; or, as it is frequently expressed, it becomes the 'law of the case' in all its subsequent proceedings. * * * The rule under consideration is not a cast-iron one, nor strictly one of res judicata, but simply one of expediency, which is not to be lightly disregarded."

The writer then quotes the extract, already quoted from the New York Court of Appeals, that the rule is not an iron rule which precludes the court from correcting a manifest error, or which requires the court to adhere to an unsound statement of the law, and declares his approval of the statement.

In Wells on Res Adjudicata and Stare Decisis, § 624, the author, referring to the doctrine of stare decisis, declares that the rule must not

be so rigidly pressed as to shield error needlessly, adding:

"And although prior decisions are not lightly to be departed from, yet any error may be corrected when no substantial injury is to be expected from the change, or when the evils of adherence are manifestly greater than those of departure. It must, of course, be clear that there is an error, and, as we have seen, it is not sufficient that a present court would have decided the matter differently, if it were res integra. But where this is clear, and a plain rule of law is manifestly violated, and especially if the rule established is mischievous, rather than beneficial to the community at large, in its practical operations, or to a particular class of the community, as, for example, the holders of commercial paper, it should be abrogated without delay."

We recognize the full force and effect of the doctrine of stare decisis, and the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not be again considered. It is, like the rule of res adjudicata, not a mere rule of practice inherited from a more technical time than ours. It is a rule "of public policy and of private peace," and is to be cordially regarded and followed in all proper cases. Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 298, 37 Sup. Ct. 506, 61 L. Ed. 1148. But the rule is not an inexorable one. and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. We are satisfied that the present case falls under the exception to which we have referred. We shall not consider at length the reasons which have satisfied us that a serious mistake was make in the first decision. The reasons may be found in the opinion in the Buick Case, to which we have already referred, and which render it unnecessary to traverse the ground anew. We cannot believe that the liability of a manufacturer of automobiles has any analogy to the liability of a manufacturer of "tables, chairs, pictures or mirrors hung on walls." The analogy is rather that of a manufacturer of unwholesome food or of a poisonous drug. It is every bit as dangerous to put upon the market an automobile with rotten spokes as it is to send out to the trade rotten foodstuffs. The liability of a manufacturer of food products was considered by this court at length in Ketterer v. Armour & Co., 247 Fed. 921, 160 C. C. A. 111, L. R. A. 1918D, 798 (1917). In that case we laid down the rule that one who puts on the market an imminently dangerous article owes a public duty to all who may use it to exercise care in proportion to the peril involved, and we declared that the liability does not grow out of contract, but out of the duty which the law imposes to use due care in doing acts which in their nature are dangerous to the lives of others.

The judgment is reversed.

WARD, Circuit Judge (dissenting). The opinion of the court concedes that the record on this appeal is the same as that on the former appeal. If the question then decided were raised between different parties, we should be affected only by the rule of stare decisis, and might overrule our former decision on the law; but between the same parties our former decision makes the law of the case, and is in this respect res adjudicata. I refer, among many other opinions of the Supreme Court, to Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Clark v. Keith, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; Thompson v. Maxwell, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539; We have so understood the law in this circuit (Development Co. v. King, 170 Fed. 923, 96 C. C. A. 139), and it has been so declared in the following Circuit Courts of Appeals: Fourth Circuit, Linkous v. Virginia Ry. Co., 242 Fed. 916, 155 C. C. A. 504; Fifth Circuit, Woodruff v. Yazoo Co., 222 Fed. 30, 137 C. C. A. 567; McClellan v. Rose, 222 Fed. 67, 137 C. C. A. 519, certiorari refused 241 U. S. 668, 36 Sup. Ct. 552, 60 L. Ed. 1229; Seventh Circuit, Standard Co. v. Leslie, 118 Fed. 557, 55 C. C. A. 323; Eighth Circuit, United Press Association v. National Association, 254 Fed. 284, 165 C. C. A. 572; Ninth Circuit, Matthews v. Bank, 100 Fed. 393, 40 C. C. A. 444; National Bank v. U. S., 224 Fed. 679, 140 C. C. A. 219.

I think the opinion of the court is a departure from a wise and salutary rule, which requires us to affirm the final judgment in this case, and therefore dissent.

THE VAN DER DUYN.

(Circuit Court of Appeals, Second Circuit. November 13, 1919.)
No. 32.

Where, on the outward passage on a voyage from New York to Cuba and return, one of the bones in a seaman's forearm was broken, but a physician who examined the injury at Cuba did not discover the fracture, and directed the treatment which was followed by the officers on the return trip, after which the fracture was treated in a hospital, with a result as favorable as it would have been if treated at first, the shipowner held not liable in damages beyond the expense of treatment and cure.

2. SEAMEN @==11-SHIP'S DUTY TO INJURED SEAMAN.

The requirement of a ship is to give reasonable medical treatment under all the circumstances to an injured seaman, and it will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to existing conditions.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Alfred Testut against the steamship Van der Duyn; the Siberian Steamship Corporation, claimant. Decree for libelant, and claimant appeals. Reversed.

For opinion below, see 251 Fed. 746.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, of White Plains, N. Y., of counsel), for appellant.

Silas B. Axtell, of New York City (Arthur Lavenburg, of New York City, of counsel), for respondent.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On the 21st of April, 1916, while the steamship Van der Duyn was at sea, the respondent, a coal passer, received a fracture of the ulna of his right arm. His right arm was caught between a bucket of ashes and the upper edge of an opening in the side of the ventilator. While the bucket was being hoisted up to the level of a doorway, through which it was to be put back out on the deck of the vessel, respondent's arm became caught and injured. The cause of the injury was due to the failure, on the part of some one operating a winch, to use due care and diligence.

No evidence of unseaworthiness or a failure to provide proper appliances for the vessel was adduced, and from this record the injuries resulted from the negligence, if any, of a seaman on the vessel. The vessel sailed from New York on April 20th, bound for Saga La Grande, Cuba. She was a Dutch ship. Respondent signed the regular shipping articles, joining the vessel on April 19, 1916. About five days later, the vessel arrived at Cuba. At this time respondent's arm was badly swollen. He was examined by a doctor, but was not sent to a hospital, and returned on the voyage of the vessel back to New York. After landing, about two weeks after the accident, respondent went to the Long Island College Hospital, and there his arm was successfully treated. An X-ray was taken, which indicated an overlapping of the bone. This necessitated an operation. The surgeon who performed this operation was not called as a witness. The only help afforded the District Judge was the X-ray plate, which was received in evidence. The court below found that a small portion of the bone was removed in order to set the arm as well as it might be. The fracture was entirely healed and good union secured, and the respondent was found to have recovered muscular strength, power, and motion of the wrist and forearm, with the exception of slight inability to complete rotation of the hand at the wrist. This is due to some boney projection on one of the fractured surfaces.

The District Judge found that there was some slight muscular

atrophy, due to interference with the use of his forearm and to the muscular injuries relating directly back to the fracture and the operation. However, it was found to only slightly interfere with his muscular strength in general. Much of this information was obtained by the District Judge from the X-ray plate which was offered in evi-

dence against the objection of the appellant.

[1] The District Judge held that, even if the officers of the ship had known that the respondent's injury was a fracture of the arm, and had not erroneously diagnosed the case, the result to the arm would not have been different. The charge is that the respondent might have received treatment at the hospital in Cuba, which would have alleviated his suffering and secured him more sympathetic treatment on his voyage back to New York. The court further found that the condition of respondent's arm at the time of the trial, when viewed from statements of the witnesses as to its appearance during the period at Cuba and during the voyage back to New York, indicated that the operation at the Long Island College Hospital, after respondent's return to Brooklyn, was made necessary because of the fracture, not because of lack of treatment. He found, further, that the delay added little to the permanent injury found at the time of the trial, which, the court said, would have resulted in spite of the operation at any time. Indeed, it is asserted by the District Judge that, even if a careful examination had been made at Cuba, the operation itself would have been postponed until the vessel arrived in New York. Liability, however, was imposed upon the theory that the officers of the ship did not give the respondent considerate treatment, and this for the reason that they concluded he was shamming, looking upon the injury as a mere bruise or laceration of the flesh. In this we think he was in error.

The ship had no physician, and the officers did the best that could be expected of laymen. They treated the bruise and cut and prevented infection. When the ship reached quarantine at Cuba, a doctor examined the injury and reported that no other treatment was necessary. This was an error of diagnosis of the condition of the arm. The officers of the ship owed to respondent the exercise of reasonable care to furnish such aid as ordinarily prudent persons would under similar circumstances. The swelling of the arm may well have misled the examining doctor at quarantine, Cuba. He did not report a fracture, or any unusual or serious condition of the arm, and therefore it cannot be said that in the exercise of reasonable care it was incumbent upon the officers of the vessel to take the patient to a hospital On the return voyage to New York, the chief officer continued the treatment as directed by the doctor. When the vessel arrived in New York, the captain ordered a doctor for respondent; but respondent did not return to the ship. His disappearance is accounted for by his going to the hospital in Brooklyn. The hospital bills and incidental expenses were paid by the shipowner.

[2] There is testimony by the respondent that the ship officers accused him of shamming on the return voyage. There is contra evidence that he was well treated and permitted to walk on deck, smok-

ing and doing the best he could to alleviate his pain and patience. We see nothing in the conduct of the officers of the ship which warrants condemnation, or upon which there may be fixed a liability for the shipowner. The requirement of a ship is to give reasonable medical treatment under all circumstances. There must be reasonable ground to believe that consequences more serious than the swelling, pain, and suffering which ordinarily attend a fracture or a severe laceration resulted, before liability be imposed. Medical advice received and followed, as was done by the officers of the ship, is all that could reasonably be expected from the officers here under the circumstances disclosed by this record. The Cuzco, 154 Fed. 177, 83 C. C. A. 181. It was said in The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955:

"A seafaring life is a dangerous one, accidents of this kind are particularly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

Liability was denied in The Drumelton (D. C.) 158 Fed. 454, where there was a leg fracture of one of the small bones only, and where the master did not obtain medical assistance at a nearby port. As was said in The Kenilworth, 144 Fed. 376, 75 C. C. A. 314, 4 L. R. A. (N. S.) 49, 7 Ann. Cas. 202:

"In considering whether he [the master] was or was not duly careful, we are bound, so far as possible, to put ourselves in his place. He was not required to have the skill or discernment of a surgeon, and the opinion which he formed, if viewed in no clearer light than was afforded by such limited knowledge as may be justly attributed to him, does not appear to have been an unreasonable one, and the treatment which he adopted, when considered in connection and conformity with that opinion, was neither negligent nor improper."

The ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to conditions existing at the time. It is only where the external extent of the injury in question should have moved them to ascertain its real nature, when they could do so without serious diversion of the course, and at comparatively trivial expense, that the courts have permitted liability to attach to the vessel. The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; The Governor (D. C.) 230 Fed. 857; The Scotland (D. C.) 42 Fed. 925; The Eva B. Hall (D. C.) 114 Fed. 755.

We do not think that error of judgment of the officers of the ship, or the surgeon who was employed, and the lapse of time before the respondent received competent medical aid, are sufficient upon which to base liability. The court below is directed to allow the respondent such sums of money, if any, as he paid for medical care, and as may be due him for unpaid wages.

Decree reversed.

DESCALZI et al. v. VAN DYKE J. LINDSAY, Inc., et al. (Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 36.

Account, action on \$\iff 20(2)\$—Suit for accounting under contract.

Statement by a special master of mutual accounts under a contract between produce dealers for pooling business reviewed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Joseph F. Descalzi and others, copartners as the Descalzi Bros. Company, against Van Dyke J. Lindsay, Incorporated, and Dujardin & Lodwick, Incorporated. From the decree, both parties appeal. Reversed.

Maurice B. Gluck, of New York City, for plaintiffs.

Wood, Cooke & Seitz, of New York City (William G. Cooke and Howard O. Wood, both of New York City, of counsel), for defendants.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. We shall refer to the parties herein as plaintiffs and defendants, as in the court below. The plaintiffs sought to recover \$14,930.16 damages for breach of contract. The answer interposed a counterclaim, in which an accounting was sought of the business had between the plaintiffs and the defendants, and that the defendants be awarded such sums as were found to be due them.

On the 31st of January, 1913, the plaintiffs and defendants entered into a business arrangement dealing in produce, and also as importers and dealers in foreign produce, pursuant to a written contract. After carrying on the business for some time, an account was had between The defendants prepared a statement of profits and expenses, showing that the plaintiffs were entitled to \$2,562.69. The claim of the complaint is that the auditors, in preparing the statement, did, under instructions from the defendants, and with intent to defraud the plaintiffs, falsify the accounts, depriving the plaintiffs of the sum of \$438.40; also that there was improperly charged in the auditor's account, the sum of \$650, that the defendants gave false accounts of their expenses, and that the account of the sales were fraudulent. The case was referred to a special master, who awarded the plaintiffs a judgment of \$759.33. This report was confirmed by the District Judge. The fees of the special master, amounting to \$1,000, together with two-thirds of the stenographer's bill of \$281, were charged against the defendants. Dissatisfaction with the special master's report and the confirmation thereof by the District Judge has resulted in these appeals.

The contract under which the parties engaged in this business provides that, of the profits made by the three concerns the defendants should take 85 per cent. and the plaintiffs 15 per cent. The special master reached his conclusions by taking the gross sales and inventory at the end of the term, adding that together, and then deducting the inventory at the beginning, the purchaser's duty, freight, and all ex-

penses, except those referred to in the eighth clause of the contract. The eighth clause provides:

"It is agreed that expenses for heat, light, rent, telephone, salary, ice, postage, stationery, and printing are to be divided by the parties hereto in equal proportions."

These items the special master divided equally between the plaintiffs and defendants. The evidence discloses it was so intended by the eighth clause, because the plaintiffs were at that time carrying on, at the same place of business, what is referred to as a domestic business, which consisted of dealings in California fruits and chestnuts. This was a larger and more profitable business than that carried on under the contract in question.

The first assignment of error has to do with an allowance as a credit to plaintiffs of \$1,093.30, which sum the plaintiffs claim they had just discovered during the course of the trial that they owed to one Booth, of England, for goods consigned to him, and sold by them on commission. Tosca, who made the explanation as to this discovery and to the mistake which had been made in plaintiffs' books, said one Booth shipped quantities of fruits to them from South America, to be sold on his account, and that they sent to Booth account sales bills covering these goods, and further he said:

"I find upon investigation of the gross sales of his goods, as taken from sales slips and the gross sales, as shown on the account sales (which account sales, by the way, were made up by my clerks), that there is a discrepancy in those sales of \$1,865.37. In other words, this account of \$1,865.27 the girls overlooked, the clerks overlooked, in making up their account sales to Mr. Booth. I found this figure by taking down all of the sales, beginning from the day Mr. Booth's goods were received, and going through those sales until I found the deficiency. Then I took the account sales, and added up the gross sales, and I found that out.

"There was only one conclusion for me to draw, and that was that Mr. Booth was entitled to that, less the commission of 10 per cent., \$186.53, making the net debit of \$1,678.84. That covered the period from March 1 up to and including June 15, 1913. I made this discovery when the auditors were in my office examining the books. I devoted the time, also, to examining the books. The volume of business done with Mr. Booth during that period was \$7,937.27. That is the amount of sales. He has complained several times that he did not think the account sales rendered were correct. I replied, and told him that so far as I know they were correct, in not having made the account sales personally. I thought they were correct. Every time a sale was made of South American fruit, it would go on the sales record. This discrepancy did not all occur in the case of one consignment, or one return to Mr. Booth. It applied to about ten consignments. He was the only consignor we had at that time that I recollect. I cannot tell anything about the discrepancy on any one sale; only on the grand total."

The special master allowed this claim, commenting that he did so "as there was no apparent reason why they should charge themselves with that sum, unless they owed it to him," and concluded that "they did not credit Booth with all the goods he shipped them, and have adjusted the matter by allowing him the additional sum of \$1,093.30." There is no competent evidence upon which to sustain the plaintiffs in charging themselves with this amount. It does not appear, by competent proof, that they actually owed this sum, but by admitting this indebtedness, or charging themselves with this sum, 85 per cent. of it,

or \$929.30, would be charged against the defendants, and as a result, if erroneous, it will change the judgment in favor of the defendants. These goods were consigned to the plaintiffs by Booth for sale on commission. They were perishable, and the evidence of this transaction as to whether they were actually sold pursuant to this employment, or whether the money was transmitted and the amount thereof is wanting. It is not shown that the records, books, and papers were substantially correct, and they cannot be used as a basis for any judicial determination. Indeed the special master criticizes the careless and haphazard way in which the accounts of the plaintiffs were kept. The proofs as to the receipt of these goods, and sale and indebtedness to Booth, is meager and indefinite and not sufficiently proven. Considering all the evidence, it is sufficient to say that we are not satisfied with the proof as to this item, and it must be disallowed.

The second assignment of error relates to allowance to plaintiffs as a disbursement under clause "8" of \$5,640 of the \$9,500 which they paid to themselves as salaries. It appears that, before the contract between the parties hereto was made, the two defendant corporations and the plaintiffs' firm were three competing concerns engaged in the sale of fruit. The salaries paid to the plaintiffs' firm during the five years preceding this time, as compared with that paid during the plaintiffs' and defendants' copartnership period, is not out of proportion, nor can we say that it was excessive or fraudulent. We think that the court be-

low was correct in making these allowances.

The plaintiffs complain of the allowance to defendants for bad debts. The District Court was justified in the conclusion reached as to this item and the allowance of these disputed claims. Sufficient provision is made in the decree that, if any collections are made, they will be divid-

ed between the parties pursuant to the terms of the contract.

The plaintiffs further assign as error the division made of the expenses under clause "8" of the contract. We believe that the correct conclusion was reached below. It was intended by this clause to divide the items therein referred to in equal portions between the plaintiffs and defendants, and not in the proportions designated for sharing the profits under the "third" clause.

Since we disallow the item of \$1,093.30, the allowance to the defendants will be increased \$929.20; the difference between this sum and that awarded by the court below to the plaintiffs gives a balance due to the defendants as against the plaintiffs, of \$169.97. The defendants are therefore the successful litigants, and the award of fees to the special master, plus the stenographer's charges, must follow the judgment.

Judgment will therefore be reversed, and the defendants recover from the plaintiffs the sum of \$169.97, together with the allowance of \$1,000 to the special master and the stenographer's fees.

Judgment reversed.

In re MALKAN.

Petition of BOORUM & PEASE CO.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)
No. 45.

1. BANKRUPTCY \$\infty\$ 100(1)—ADJUDICATION IS FINAL AND BINDING, IF UNAPPEALED FROM.

A decree of adjudication is a final decree, and, if unappealed from, is binding, not only on the bankrupt, but upon the petitioning creditors and all other creditors, who became parties to the proceeding and interested in the estate, which is res in the hands of the court.

2. BANKRUPTCY \$\infty\$ 100(1)—Adjudication vests all creditors with rights in estate.

An adjudication vests all creditors of the bankrupt with rights in his estate, of which they can only be deprived by orderly and lawful proceedings in its administration.

3. BANKRUPTCY \$\infty\$100(2)—COURT CANNOT VACATE ADJUDICATION OVER OBJECTION ON OUTSIDE SETTLEMENT WITH SOME CREDITORS.

After adjudication a bankrupt's estate can be wound up in but two ways: First, by distribution in bankruptcy; and, second, by distribution in composition in conformity with the requirements of Bankruptcy Act, § 12 (Comp. St. § 9596), and the court is without power, over the objection of a creditor, to vacate the decree of adjudication on a settlement with other creditors outside the proceedings; there being no statute providing for such an informal composition.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Henry Malkan, bankrupt. On petition of the Boorum & Pease Company to revise an order vacating the order of adjudication and discharging the receiver. Reversed.

Otto A. Samuels, of New York City, for respondent.

Zalkin & Cohen, of New York City, for Henry Malkan, Inc., and for petitioning creditors for receiver.

Hastings & Gleason, of New York City (Mervyn Mackenzie, of New York City, of counsel), for objecting creditors.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The order here sought to be revised provided that the involuntary petition in bankruptcy, filed on the 24th of December, 1918, be dismissed, and that the order of adjudication entered herein on the 7th of January, 1919, and the order dated December 24, 1918, appointing a receiver, be vacated. This order further provided that, after paying the expenses of administration as fixed by the court, the receiver turn over all the property and moneys in his possession to Henry Malkan, Incorporated, a corporation organized under the laws of the state of New York, the assignee of the bankrupt, and, after fulfillment of such decree, the receiver be discharged and his bond canceled.

This order resulted from an attempted composition of the bank-ruptcy proceedings. The petitioner, a creditor to the extent of \$8,000, appeared in opposition to the order sought to be reviewed; but it

was granted against its protest. The bankrupt's liabilities amounted to \$155,682.22, and creditors to the extent of \$143,927 are said to have consented to the plan resulting in the dismissal of the bankruptcy petition and the vacation of the order of adjudication, and also the order appointing the receiver. The petitioner is the sole objecting creditor.

[1] When, on the 7th of January, 1919, a decree was entered by the District Court adjudicating Henry Malkan a bankrupt, a final decree of the court, which was binding, not only upon the bankrupt, but upon the petitioning creditors, and the other creditors, was made. Acme Harvester Co. v. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897. The result of this proceeding made the proceeds a "res" in the hands of the court, and the creditors, including the petitioner, became interested in the res, and must be regarded as parties to the bankruptcy proceedings. Manson v. Williams, etc., 213 U. S. 453, 29

Sup. Ct. 519, 53 L. Ed. 869.

[2] This adjudication established, for all the creditors of the bankrupt, rights of which they could not be divested, except by orderly and lawful proceedings in the administration of the bankrupt's estate. It is not averred in this case that the adjudication was procured by fraud or mistake, and the only reason assigned for the vacation of the order is a desire to settle and obtain a composition for the creditors. The decree could not be vacated, and deprive the petitioning creditors of the right secured to it, unless there be some authority in the court to do so. Section 59g of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [Comp. St. § 9643]) provides that a proceeding once begun must result either in an adjudication or a dismissal. Subdivision "g" provides only for dismissals therein on the merits.

[3] It is the intendment of the act that a dismissal may not be had against the protest of a creditor, if he be deprived unjustly of the rights secured to him by the adjudication and the creation of the estate in the hands of the court for all the creditors. In re Rosenblatt & Co., 193 Fed. 638, 113 C. C. A. 506. Section 12 (Comp. St. § 9596) provides for compositions. It is not contended that the proceeding here was in conformity with the requirements of section 12 as to composition. The consideration for the composition was not deposited prior to the order. The form of the order and the recitals do not indicate that the parties were attempting a composition. At best, it was an informal composition, which should be condemned. The bankrupt's estate can be wound up in but two ways: First, by distribution in bankruptcy: and, second, by distribution in composition. An effort made to start a proceeding in bankruptcy, and then settle with creditors outside the proceeding, and then ask for the approval of the court, should not be encouraged, but should be discouraged.

In the case of Acme Harvester Co. v. Beekman Co., supra, it was

said:

"Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the act. These provisions, and others might be recited, show the policy and purpose of the Bankruptcy Act to hold the estate in the custody of the court for the benefit of creditors after

the filing of the petition and until the question of adjudication is determined. To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal distribution of the estate among all creditors of the same class, which is the policy of the law. The filing of the petition asserts the jurisdiction of the federal court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee."

In Re Lockwood (D. C.) 104 Fed. 794, it was said:

"The parties concerned in adopting this method of settlement took the risk of having its execution interfered with by any additional creditors who might appear within a year and before the provisions of the order were fully executed. Such creditors, proceeding regularly within the time limit of the act, are entitled to their day in court, and to their ratable share in any assets not already distributed."

A composition cannot be entirely successful until the majority of the creditors have accepted the settlement offered. An attempt to avoid the statutory requirements for the composition creates possibilities of wrong to creditors, of which this case is a good example, and when such wrong is called to the attention of the court it should be checked. The sale of the assets of the bankrupt should not be permitted after adjudication, until the sale takes place under the eye and protection of the court. Here the provisions of the order direct the disposition of the assets of the estate. It provides that the estate in possession of the receiver be turned over to a newly formed corporation, Henry Malkan, Incorporated. Thus the property of Henry Malkan passes from the custody of the court below into a newly created corporation, without regard to the rights of this protesting creditor. Thus providing for the disposition of the assets, they are placed by judicial sanction and decree beyond the reach of the protesting creditor. The order imposes no duty or burden upon Henry Malkan, Incorporated, to pay the creditors or to use the res therefor. This corporation may dispose of the bankrupt's property as it will. The property is disposed of to a third party. It is not sufficient answer that the petitioning creditor may proceed upon his claim after the dismissal of the proceedings and vacation of the decree, and then follow the assets in the possession of Henry Malkan, Incorporated. The petitioning creditor would be confronted, in such a litigation, with this order, which judicially determines that the assets be transferred to Henry Malkan, Incorporated, without any provision of trust or otherwise, except in absolute ownership. The power to make and approve compositions is statutory. There is no statute providing that the assets may be disposed of as was done here, or that such an informal composition may be had.

We are therefore of the opinion that the order below was improvidently granted, and must be reversed, and the application denied.

Order reversed.

THE ICE KING.

Appeal of CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 16.

- SHIPPING €=208—OWNER OF TUG ENTITLED TO LIMITATION OF LIABILITY. Owner of a tug, under time charter for towage purposes, but manned and navigated by the owner, where the tug was seaworthy and manned by a competent crew at the time of the charter, held entitled to limitation of liability for loss of tows, resulting from the going ashore of the master, contrary to the rules and without knowledge of the owner, leaving the navigation in charge of the pilot, who was competent and had previously been reliable, but who became intoxicated and went to sleep at the wheel at night, allowing the tug to become stranded.
- 2. Towage 🖘 4—No implied personal warranty by owner of seaworthi-NESS OF TUG.

There is no personal liability of the owner on an implied warranty that a tug under time charter for towage purposes shall remain seaworthy and properly manned and equipped at all times during the charter term.

3. Towage -4-Duty of tug to tow that of ordinary care and skill. A contract of towage imposes, not the duty of an insurer, but only the duty of exercising ordinary care and skill.

Appeal from the District Court of the United States for the Southern District of New York.

Petition in admiralty of the Cornell Steamboat Company, as owner of the tug Ice King, for limitation of liability. Decree denying limitation, and petitioner appeals. Reversed.

For opinion below, see 256 Fed. 895.

Kirlin, Woolsey & Hickox, of New York City (J. P. Kirlin, of

New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey and Everett, Clark & Benedict, all of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. [1] This is a petition of the Cornell Steamboat Company, owner of the tug Ice King, to limit its liability for damage to scows M47 and M48, owned by the Morris & Cummings Dredging Company, and their cargoes, in tow of the tug on a trip from New York City to the dumping grounds and return. The tug was under time charter from the Steamboat Company to the Dredging Company, but was manned and navigated by the Steamboat Company. She had a double crew, and it is proved that just before starting from New York, December 24, 1913, about 7 p. m., the master and assistant engineer went ashore for the purpose of keeping Christmas Eve at home, in pursuance of an arrangement each had made with the pilot and chief engineer, respectively, that they would do double duty on the trip. This was in flat violation of the company's

rule that no master, pilot, or engineer should leave a boat under any circumstances without first reporting at the office.

The pilot went on duty at 6 p. m. of December 24th and at about 12:30 a. m. of the 25th, when asleep at the wheel, was awakened by a jar apparently caused by collision with can buoy No. 1 of the Oil Spot, which lies eastward of False Hook Channel and about a mile from Sandy Hook beach. He instantly stopped and reversed his engines, and in this way fouled his hawser in the propeller. Finding it impossible to clear the propeller, he let his anchor go, ordered the scows to do the same, and says he saw them do it. Notwithstanding this the flotilla drifted in wind and tide upon the beach about 5 a. m. of the 25th, and the wind increased in the afternoon into a gale. No. 48 was towed off the same day by salvors, to whom salvage in the sum of \$1,000 has been awarded, and the owners three weeks later salved No. 47; the tug being a total loss.

There is evidence that the pilot had drunk beer before the tug started and whisky when at the wheel. We concur in the finding of the District Judge that the accident and damage were due entirely to his misconduct and negligence. In this court the owners contended that the proximate cause of the damage was the failure of the scows either to have or to use anchors. The Sunnyside, 251 Fed. 271, 163 C. C. A. 427. There was no such charge made in the petition or at the trial. On the contrary, the petition alleged that the scows dragged their anchors and the only testimony at the trial was made by the pilot and a witness from the scows, who said in the course of their narratives that the scows did anchor. Under these

circumstances we pay no attention to this argument.

The sole question in the case is whether the owners of the tug are entitled to limit their liability. The District Judge found that the owners had exercised due diligence and furnished a seaworthy tug, with a competent, skillful, and sufficient crew at the time of the commencement of the charter, and that the master and assistant engineer left the tug, and the pilot became intoxicated on the voyage, without the owners' privity or knowledge. The pilot was employed November 20, 1913, by Broad, the general manager of the company's fleet of over 60 tugs. It was his duty to employ the licensed officers. and theirs to employ the unlicensed men. He had a personal interview with the pilot, was well impressed by him, called up over the telephone the officers of former employers, viz. the Moran Towing & Transportation Company and Peter Cahill, who both recommended him. For over a month before the accident his conduct was entirely satisfactory. It is true that Broad made no specific inquiry as to the pilot's habits about drink, and, though it is now evident that he had been going down in this respect, we agree with the District Judge that the owners are not chargeable with any lack of care and diligence in employing him.

[2] Notwithstanding the foregoing, the District Judge held that the owners were under a continuing personal warranty that the boat should remain seaworthy and properly manned and equipped during the term of the charter. He relied upon decisions in this circuit, af-

firmed in the Supreme Court, which were personal contracts of the owners. Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349; Id., 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770; Luckenbach v. McCahan Co., 235 Fed. 388, 148 C. C. A. 650; Id., 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522. If there was a warranty in this case, it was implied, and of course, if it is to be given the same effect as an express warranty, the owners are liable, whether at fault or not, and whether exercising due diligence or not.

[3] We know of only one decision as to such implied warranty in proceedings to limit liability, and that related to a contract for the carriage of goods. The Loyal, 204 Fed. 930, 123 C. C. A. 252. A contract of towage imposes, not the duty of an insurer, but only the duty of exercising ordinary care and skill. Assuming, however, that such an implied warranty does exist in a contract of towage; how far does it extend? Are the owners, having furnished a sufficient and competent crew, with officers duly licensed as required by law, to be held liable for such subsequent arrangements as were made in this case, and for the subsequent intoxication of the pilot while on the trip? To extend such a warranty in this way would go far to nullify the wholesome purposes of the law. We are not willing to do so, in view of the language of the Supreme Court in the latest decision on the subject (Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 335, 39 Sup. Ct. 292, 63 L. Ed. 631), in which Mr. Justice Holmes says:

"We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. But in this case, in addition to the finding of the owner's privity to the unseaworthiness, was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided. Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 149 [39 Sup. Ct. 53 (63 L. Ed. 170, 1 A. L. R. 1522)]."

The decree is reversed, and the court below directed to enter the usual decree in favor of the libelants for their damages, with an allowance for salvage to the Merritt & Chapman Derrick & Wrecking Company of \$1,000, but limiting the petitioner's liability. Costs of this court to the appellant.

THE SARNIA. THE ROBERT PALMER. THE E. T. DALZELL.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 7.

1. Towage ६-4—Tug not liable for errors of master in docking steam-

A tug, employed to assist in docking a steamship moved under her own steam, is not liable for errors of tug's captain in directing movements of the steamship while on board of her in charge of the operation.

2. Collision &== 116—Effect of bringing in third parties on liability of petitioner,

Apart from endeavors to fix secondary liability or responsibility over, the object of admiralty rule 59 (29 Sup. Ct. xlvii) is to bring in parties to answer the exigency of the libel in collision cases, not of the petition, and that allegations of the petition are not sustained affords no ground for holding petitioner liable upon the libel.

3. Collision ⊕ 71(2)—Between steamship and barge moored in slip due to fault of steamship.

Collision between a steamship being warped into a slip and a barge moored therein *held* due solely to fault of the steamship, in that her engineers failed to obey orders of the tug master in charge of the operation to go astern.

Appeal from the District Court, of the United States for the Eastern District of New York.

Suit in admiralty for collision by the Wright & Cobb Lighterage Company against the steamship Sarnia, the Sarnia Steamship Corporation, claimant, with the tugs Robert Palmer and E. T. Dalzell and their claimants, Richard J. Barrett and Fred B. Dalzell & Co., Incorporated, respectively, impleaded. Decree for libelant against the Sarnia and the Robert Palmer, and their claimants appeal. Modified.

For opinion below, see 251 Fed. 668.

The owners of the steamship Sarnia employed Barrett, owner of the tug Palmer, to take their steamer (in daylight and calm weather) from an anchorage in New York Harbor and dock her on the south side of Pier 4, Brooklyn. In the customary way Barrett (or some agent of his) procured the assistance of another tug (the Dalzell) and Slauer, master of the Palmer, went upon the bridge of the Sarnia and assumed command of the operation. The steamship had her own steam; the two tugs were only to help turn her from the stream into the slip.

At Brooklyn Bridge (a little above Pier 4) the Palmer was on the Sarnia's starboard bow, and the Dalzell on her port quarter, and in these proper positions they remained. Capt. Slauer intended to and did land the port side of the steamer on the southerly corner of Pier 4, putting out the usual bow and spring lines, and winding around the pier edge or corner. The tide was flood, but did not materially affect the maneuver, its force at and near the pier end being slight, if there is not at that point a backset or eddy.

As the Sarnia was 351 feet long, the width of the slip between Piers 4 and 5 only 170 feet, and there were vessels lying on the upper or northerly side of Pier 5, it was plain that considerably less than half the steamer's length could project from Pier 4 as her swing began. When, however, at an angle of about 45 degrees with the face or end of the pier, the Sarnia was permitted to run too much of her length into the slip, and, as she swung, struck (with a glancing blow) libelant's barge lying alongside Pier 5.

Admittedly the Sarnia overreached, and the barge was without fault. The steamer should have checked headway by going astern, and the question

raised here and below is whether the order astern was given too late, or given timely and not obeyed. In the first case, the personal fault would be that of Capt. Slauer, who was navigating and himself handling the telegraph; in

the second, that of the Sarnia's engineers.

The District Court held Capt. Slauer, and therefore his tug and her owner, at fault for a variety of reasons, amounting to an accusation of bad navigation, and further declared that the Sarnia, after bringing Barrett and the tugs into the case by petition under rule 59 (29 Sup. Ct. xivii), had not borne "the burden of proof in support of her petition," and therefore (semble) must share the blame. The Dalzell was discharged. Both Barrett and the Sarnia appealed.

Chauncey I. Clark, of New York City, for appellant Barrett.

Foley & Martin, of New York City (William J. Martin and Geo. V. A. McCloskey, both of New York City, of counsel), for appellee Wright & Cobb Lighterage Co.

Hunt, Hill & Betts, of New York City (George Whitefield Betts and Robert McLeod Jackson, both of New York City, of counsel), for the

Sarnia.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The form of this decree is wrong. The tug Palmer committed no fault, and when Barrett furnished the Sarnia with a pilot in the person of Capt. Slauer, he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on the Sarnia's bridge and managing that steamer with her own steam. The Palmer was as innocent as the Dalzell, and for the same reasons.

[2] Nor is it a reason for holding the Sarnia that she did not bear the burden of proving her own petition; indeed, that would seem more reason for absolving those parties brought in by said petition. Apart from endeavors to fix secondary liability or "responsibility over," the object of the fifty-ninth rule in admiralty is to bring in parties to answer the exigency of the libel, not of the petition; and the sole question in this case is whether on the whole evidence the Sarnia overreached by fault on the bridge, or in the engine room, or both. It is agreed that libelant has complied with the rule of The L. P. Dayton, 120 U. S. 337, 7 Sup. Ct. 568, 30 L. Ed. 669; after that, no question of proof burden is here relevant.

[3] As the Sarnia's bow entered the slip, the pilot, third officer, and a quartermaster were on the bridge, and the first officer on the forecastle head. It is plain that the ship's bow slowly approached the barge's side, until when "20 or 30 feet distant," the first officer "hol-

lered" to the "tugboat captain he was getting close."

But Capt. Slauer testifies that when distant "60 to 75 feet" from the barge he ordered the engines half astern; they went ahead instead, and thereupon he three times rang them full astern before collision, and before the first officer "hollered"; but there was no stern movement until after contact.

The deck log, written by Sarnia's third officer, thus records this

performance:

[&]quot;1:59 p. m. Anchor away slow astern. "2:03. Stop and half speed ahead.

"2:30. Stop off end of Pier 4.

"3:15. Alongside of dock, warping ship into berth, slow speed ahead."3:18. Half speed astern, and then full speed astern. Telegraph answering astern, but engines going ahead.

"Telegraph run astern three times successively, and answered from engine room, but no change in engines."

Much testimony has been taken in the endeavor to show that this story from the bridge, in the making of which record Slauer had no hand, is untrue. It is certainly not refuted by the engine room, whose methods are open to criticism, into the details of which we do not think it profitable to go. We accept the deck's explanation of collision.

It is finally suggested, in support of the result below, that, admitting errors in the engine room, the pilot's order astern was too late, and his repetition of signals evidence rather of his own trepidation than persistent disregard by the engineers of orders given. This explanation lacks testimony to support it, and does require belief in an agreement between Capt. Slauer and the third officer of the Sarnia (a stranger to him) to falsify the deck log-not to speak of the quartermaster. Such a conspiracy is improbable and unproven.

In our opinion, the sole cause of this collision was the failure of the Sarnia's engineers to obey orders; and the decree appealed from is modified, by dismissing the libel against all parties except the Sarnia, against which vessel Barrett and the libelant will severally recover one bill of costs in this court.

EVANS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 24, 1919.)

No. 22.

1. Intoxicating liquors \$\iftharpoonup 162-Prohibition camp zone determined by STRAIGHT LINE MEASUREMENT.

In a prosecution for selling liquor within the five-mile zone around a military camp, created by presidential proclamation made under Selective Draft Act May 18, 1917. § 12 (Comp. St. 1918. § 2019a), whether the place of sale was within the prohibited zone is determined by measurement in a straight line.

2. WORDS AND PHRASES-"DISTANCE."

"Distance" is a straight line along a horizontal plane from point to point and is measured from the nearest point of one place to the nearest point of another.

3. Intoxicating liquors \$\infty\$130—Extent of prohibition zone around mil-ITARY CAMP STATED.

The presidential proclamation issued under Selective Draft Act May 18, 1917, § 12 (Comp. St. 1918, § 2019a), prohibiting sale of liquor within a five-mile zone around a military camp, except that within the limits of a city or town where such sale is not prohibited the zone shall not include any territory more than one-half mile from the camp creates a single zone, and where the camp is within a city, and the zone includes part of the city and also outside territory, the exception does not extend to the latter.

In Error to the District Court of the United States for the Eastern District of New York.

Criminal prosecution by the United States against Albert Evans. Judgment of conviction, and defendant brings error. Affirmed.

Henry F. Keith and Lamar Hardy, both of New York City, for

plaintiff in error.

James D. Bell, U. S. Atty., of Brooklyn, N. Y. (Charles J. Buchner, Sp. Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the

Before WARD, ROGERS, and HOUGH, Circuit Judges.

United States.

ROGERS, Circuit Judge. The plaintiff in error, hereinafter called the defendant, has been convicted under an indictment which charged him with unlawfully selling intoxicating liquor, to wit, whisky, on January 20, 1919, at the village of Great Neck, county of Nassau, state of New York, to one Jackson Stockdale.

The sale is alleged to have been by defendant at his hotel in Great Neck, which it is stated is within a "dry" zone five miles wide established around Ft. Totten, New York City, pursuant to a regulation made by the President of the United States under authority of the act of Congress approved May 18, 1917. 40 Stat. 76, c. 15. The particular portion of that act which applies to the case at bar, reads as follows:

"Sec. 12. That the President of the United States, as commander-in-chief of the army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the army as he may from time to time deem necessary or advisable.

* * Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000 or imprisonment for not more than twelve months, or both." Comp. St. 1918, § 2019a.

In accordance with the authority delegated under the section of the act set out above the President of the United States on the 27th day of June, 1918, issued a proclamation. The portion of that regulation, which is material to this case, reads as follows:

"I. Around every military camp at which officers and enlisted men, not less than two hundred and fifty in number, have been or shall be stationed for more than thirty consecutive days, there shall be for the purposes set forth in this regulation a zone five miles wide, except that within the existing limits of an incorporated city or town, within which the sale of alcoholic liquors shall not be prohibited by the state or local law, the zone shall not include any territory more than one-half mile from the nearest boundary of such camp. Alcoholic liquor, including beer, ale, and wine, either alone or with any other article, shall not, directly or indirectly, be sold, bartered, given, served or knowingly delivered by one person to another within any such zone, or sent, shipped, transmitted, carried or transported to any place within any such zone."

The evidence in the record that a sale of the liquor was made, at the time and place alleged, is undisputed. It is also undisputed that Great Neck, where defendant's hotel and saloon are established, and where the sale took place, is not an incorporated city, town, or village.

The uncontradicted evidence is that for more than 30 days prior to the sale there were at Ft. Totten more than 250 enlisted men and officers of the United States army. The evidence is undisputed that defendant's saloon is less than five miles in an air line from Ft. Totten.

[1] The only proof offered on the part of the defendant was that the speedometer of a motor car traveling the shortest route registered more than five miles, traveled by driving from Ft. Totten to the defendant's place of business. But the distance is to be ascertained not by measuring the distance an automobile would travel in

going from Ft. Totten to the saloon.

[2] Distance is to be measured in a straight line in a horizontal plane, unless there is a clear indication that another mode of measurement is to be adopted. 9 Am. & Eng. Encyc. of Law, p. 614. Distance is a straight line along the horizontal plane from point to point. It is measured from the nearest point of the one place to the nearest point of the other. 18 C. J. 1287.

In Leigh v. Hind, 9 C. & C. 774, 779, Parke, J., referring to the measurement of distance, said that he thought the proper mode of admeasuring distance "would be to take a straight line from house to house—in common parlance as the crow flies." The question came up where the assignor of a public house in London had covenanted that he would not keep a public house within the distance of

half a mile from the premises assigned.

The defendant contends that a half-mile zone within an incorporated city is all that can be read out of the statute and regulation above cited. His argument fails, because it is without support in the physical facts. There is no half mile of city between his saloon and Ft. Totten. In an air line between Ft. Totten and Great Neck no part of the city of New York is found. The fort runs to the lowwater mark on the land, and the New York City line ends at the low-water mark.

[3] The language of the statute and of the regulation creates one zone, and one zone only, around Ft. Totten, and defendant's place of business is within that territory. The attempt to read into the statute two zones is without any support in reason and cannot prevail. The statute provides for a zone five miles wide around every military camp, and if any such zone takes in any portion of an incorporated city or town within which the sale of alcoholic liquor is not prohibited by state or local law, then only so much of the territory of such city or town can be included in the prohibited zone as lies within one-half mile from the nearest boundary of the camp.

Judgment affirmed.

LACKEY v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. December 3, 1919.)

No. 3399.

RAILROADS 5332—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED AT PRIVATE CROSSING.

An employe of a foundry company, using a private roadway across a service track, which was kept clear of cars except during switching operations, who, on finding a car on the crossing, attempted to go through a narrow space between that and another car and was killed, held chargeable with contributory negligence; the engine, with cars attached, being in plain sight from the roadway as he approached, until close to the track.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by Ollie Lackey, administratrix, against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

G. R. Harsh, of Birmingham, Ala., for plaintiff in error. Neil P. Sterne, of Anniston, Ala., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and EVANS, District Judges.

WALKER, Circuit Judge. Troupe B. Lackey, the intestate of the plaintiff in error, received fatal injuries while he was attempting to go sideways through a narrow opening between the drawheads of two freight cars on a service track of the defendant in error, which extended from its main line into the fenced inclosure of the plant of the Central Foundry Company, the intestate's employer. In the performance of his duties he was required to go from his employer's machine shop to its storeroom, which was north and outside of the inclosure, and across the service track and the main track; there being a roadway leading from the one place to the other through the opening for a gatein the fence inclosing the plant. That roadway was for the use of the Foundry Company's employés and its carts and wagons, and was soused frequently. When Lackey was approaching the crossing, it was completely blocked by a car standing on the service track, the eastern end of which was 6 or 8 feet east of the eastern edge of the roadway. The opening through which he attempted to pass was between that car and the westernmost of several cars on the service track, which were coupled together and to the easternmost one of which an engine with steam on was attached. When Lackey was immediately beside the car obstructing the crossing, he could not see the engine, because of a pile of iron alongside the service track east of the crossing in the direction of the engine. When he was approaching the crossing, and about 25 feet from it, he could have seen the engine; there being nothing to obstruct his view when that far from the crossing. Except when switching operations were in progress, cars on the service track were so placed as to leave the roadway unobstructed. The injury received

was a result of a slight movement of the engine, and the cars attached to it, just as Lackey was attempting to pass through the narrow opening. The judgment in favor of the defendant in error followed a verdict which the court directed. The defense of contributory negligence was duly made.

If the evidence without conflict showed that the deceased was guilty of negligence which proximately contributed to the injury and death complained of, it will not be necessary to determine whether there was evidence to maintain any of the charges of negligence made in the complaint. The situation at the crossing, when it came within the view of the deceased as he approached it, was such as to suggest that it then was in use for switching operations; there then being on the track cars and an engine with steam on and apparently ready to move at any time, one of the cars completely blocking the crossing. A witness for the plaintiff testifies that he was following right behind Mr. Lackey as they were going towards the crossing, and that he (the witness), when about 25 feet from the track, saw the engine with steam on and To one approaching the track, as attached to cars on that track. Lackey did, it was obvious that the view eastwardly of one immediately beside the track would be obstructed by the iron piled or stacked alongside the track in that direction. If he did not see the engine with steam on and apparently ready to move at any time, it was because he did not look when he was where it was obvious one had to look to discover the existing conditions on the service track east of the crossing.

There was nothing in what was disclosed to Lackey, when he got so near to the track that his view along it towards the east was obstructed by the pile of iron, to suggest that the track could be crossed with safety. There were cars on it, one of them completely blocking the crossing, the only opening being between that car and the one immediately east of it, and being at such a place and of such width as distinctly to negative an inference that it was left for use as a passageway by persons desiring to cross the track. What Lackey saw, or must have seen but for a failure to make a reasonable use of his sense of sight, was a situation such as would apprise any reasonable person that bodily peril was involved in attempting to get from one side of the track to the other by squeezing through the narrow opening left between the drawheads of two of the cars on the track, so placed with reference to a live engine thereon as to suggest the probability of a movement at any time. In taking a risk which, under the circumstances, was an obvious one, he was guilty of negligence proximately contributing to the injury inflicted. Memphis & Charlotte R. R. Co. v. Copeland, 61 Ala. 376; Pannell, Adm'r, v. Nashville, Florence & Sheffield R. R. Co., 97 Ala. 298, 12 South. 236; Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Central of Ga. Ry. Co. v. Chambers, 183 Ala. 155, 62 South. 724.

The just-stated conclusion is not inconsistent with anything said in the opinion in the last-cited case touching the demurrer to the complaint in that case on the ground that its averments showed that the plaintiff was guilty contributory negligence. The situation disclosed by the complaint then under consideration was unlike that disclosed by

the evidence in the instant case in that the averments of that complaint did not show that the situation at the time the plaintiff therein attempted to cross the track was such as to indicate that a movement of the train was likely to occur at any time.

The judgment is affirmed.

HAMM v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920. Rehearing Denied February 9, 1920.)

1. Indictment and information €==61—In indictment for obstructing recruiting, allegation of state of war unnecessary.

Indictment for obstructing the recruiting service need not allege that at the time of the alleged violation of the law the United States was at war.

2. Army and navy \$\infty 40\$—Obstructing recruiting by circulating seditious literature criminal, if probably reaching persons subject to conscription.

In prosecution for obstructing the recruiting service by selling a seditious book, it need not be alleged or proved that the book ever reached or came to the attention of persons subject to the recruiting or enlistment service; it being sufficient if the objectionable matter was disseminated in such a way as to reach persons who were subject to conscription or qualified to enlist.

3. Army and navy \$\iff 40\$—Conviction of obstructing recruiting by seditious literature sustained by evidence,

Evidence *held* to sustain conviction of obstructing recruiting by selling a seditious book.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Edward Hamm was convicted of obstructing the recruiting and enlistment service of the United States, and brings error. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and Gordon Lawson and W. Fleet Palmer, Asst. U. S. Attys., all of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1] The plaintiff in error was convicted and sentenced under the second count of an indictment which charged that he did on a date named "knowingly, willfully, unlawfully, and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, by then and there peddling, issuing, selling, and offering for sale to various and divers persons, among others M. J. Meeker, the certain book entitled "The Finished Mystery," and containing the seditious and inflammatory statements and language which are set forth in the indictment. An indictment charging the dissemination of copies of the same book was recently discussed by this court in Stephens v. United States, 261 Fed.

590, — C. C. A. —, and it is unnecessary here to repeat the printed matter the distribution of which was held obnoxious to the statute. In that case we considered the objection to the indictment which is made in this—that it is defective for failure to allege that at the time when the plaintiff in error is alleged to have violated the law the United States was at war. Nothing further needs to be said on that branch of the case.

[2] The principal contention here is that it is neither alleged nor shown that the book which the plaintiff in error sold and offered for sale ever reached or came to the attention of those who were subject to the recruiting or enlistment service of the United States. But this court has held that it was not necessary to prove or allege those facts, and that it is sufficient if the objectionable matter was disseminated in such a way as to reach persons who were subject to conscription or qualified to enlist. Goldstein v. United States, 258 Fed. 908, — C. C. A. —; Stephens v. United States, 261 Fed. 590, — C. C. A. —; Rhuberg v. United States, 255 Fed. 865, — C. C. A. —. See, also, United States v. Eastman (D. C.) 252 Fed. 232. Said Mr. Justice Holmes in Schenck v. United States, 249 U. S. 47, 63 L. Ed. 470, 39 Sup. Ct. 247:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Reliance is placed upon the decision of this court in Shilter v. United States, 257 Fed. 724, — C. C. A. —; but that case is clearly distinguishable from this. In that case there was no allegation in the indictment that the statements made by the accused were made to or in the presence or hearing of any person or persons, or that the spoken words were ever conveyed to the human ear. In the present case the indictment charged that the books were sold to various and divers persons, one of whom was named.

[3] It is contended that the proof is not sufficient to sustain the indictment, and the circumstance is adverted to that, before the book was sold to Meeker, the plaintiff in error, owing to the fact that it had come to his notice that objection was made on the part of officers of the government to certain pages of the book, cut out those pages. But the fact remains that the excised leaves were left in the book when Meeker received it, and no attempt was made to show that the leaves were cut out from any other of the several books proven to have been sold by the plaintiff in error.

We find no error in the instructions given, or in the rulings of the court below.

The judgment is affirmed.

FRENCH et al. v. CUNNINGHAM. *

(Circuit Court of Appeals, Eighth Circuit. December 24, 1919.)

No. 5324.

BANKRUPTCY \$\infty\$ 303(3)—EVIDENCE SUFFICIENT TO SHOW CONVEYANCE IN FRAUD OF CREDITORS.

Evidence regarding the circumstances under which a bankrupt had conveyed sanitarium property for an ostensible consideration of ranch property, which, however, the bankrupt really owned, but had placed in the name of an agent, etc., held to sustain findings that the transfer was made for the purpose of hindering and delaying creditors, so as to authorize setting aside the transfer, under Bankruptcy Act July 1, 1898, § 70e (Comp. St. § 9654).

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by W. L. Cunningham, trustee in bankruptcy, against C. D. French and others. Decree for plaintiff, and defendants appeal. Affirmed.

George A. Neal, of Kansas City, Mo., for appellants.

E. J. Geittman, of Kansas City, Mo. (Charles S. Briggs, of Topeka, Kan., and S. J. McCulloch, of Kansas City, Mo., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This is a suit by Cunningham, as trustee in bankruptcy of Dr. Orrin Robertson, to set aside a transfer of real property under section 70e of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. § 9654]). The transfer was made to French more than two years prior to the filing of the petition in bankruptcy. It can therefore be assailed only on the ground that it was made for the purpose of hindering, delaying, and defrauding creditors. Under the Bankruptcy Act the trustee may assert every right as against a transfer which a creditor might have asserted, and the chief question in the case is whether the transfer was fraudulent or made in good faith.

If we tear away the staging of fraud made by transfers to the dummies of Robertson and one Goodwin, who had been for years Robertson's agent, for concealing from his creditors the large earnings of a sanitarium operated by Robertson at Arkansas City, Kan., the case really comes to this: Robertson, through Goodwin, placed \$5,000 in the hands of French, with which to purchase a ranch in New Mexico. As part of the scheme of deception, and possibly for the purpose of having the sanitarium property further safeguarded by a mortgage, a mortgage was given to Goodwin for the \$5,000 by an agent of Robertson and Goodwin, in whose name the legal title to the property then stood. The \$5,000, however, was Robertson's money. French used

this money in acquiring the ranch, and had the title placed in a secret agent of Robertson's. On the same date the agent holding the title to the sanitarium property conveyed it to French, and French swears that that conveyance was in consideration for the transfer of the ranch. The fraud is clearly established. The ranch was purchased with Robertson's money, and belonged to Robertson all the time; so the placing of the title of it in the name of covert agents of Robertson could not make French a purchaser of the sanitarium in any other capacity than that of an agent for Robertson. His taking title to the property was only another shift to place it beyond the reach of Robertson's creditors. French's testimony on the subject of the transaction of the \$5,000 is sinuous and evasive. When the transaction is considered in the light of the previous shifting about of the sanitarium property, the record establishes fraud in the most convincing manner.

The evidence is plenary in quantity and convincing in quality that Goodwin had been for years receiving, in clandestine ways, the large earnings which had been coming to Robertson from the sanitarium. The fabulous rent of \$625 a month, paid promptly from month to month to Goodwin, and after him to French, was simply one of the subterranean conduits through which Robertson was concealing money from his creditors.

The case was made dark and confusing at the argument by the number of person concerned in Robertson's fraud, and the numerous transfers and shifts of the sanitarium property. The only way to understand the matter is, first, get a clear grip on the fact that all these transfers were by and to dummies of Robertson and Goodwin, and sweep these dummies out of the way, and get back to the principals, who were the real parties behind the scenes. These were Robertson and Goodwin, and afterwards French came in simply to help out these two prime movers by one more dodge of the property.

There are some assignments of error on amendments of pleadings and rulings on evidence, but these are not of sufficient merit to require discussion. As to the evidence, the rulings were proper in the trial before a chancellor investigating a question of fraud, and the amendment of the bill was amply justified for the purpose of conforming it to the proof.

The decree is affirmed.

GORDNIER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920. Rehearing Denied February 9, 1920.)

No. 3334.

ORIMINAL LAW \$\iff 409\top That defendant who failed to register was within draft ages not established by affidavits previously made.

The willful failure and refusal of defendant to submit himself to registration according to the President's proclamation and Selective Draft Act May 18, 1917, § 5 (Comp. St. 1918, § 2044e), cannot be established solely by affidavits of defendant as to his age made long before the act

went into effect, even though they would undoubtedly be admissible, if there was proof that defendant was in fact of the age which he represented himself to be at the time the affidavits were made.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet,

Judge.

Thomas H. Gordnier was convicted of willful failure and refusal to present himself or to submit to registration according to the requirements of the President's proclamation and the Selective Draft Act, § 5, and he brings error. Reversed.

Geo. E. Downing, of Los Angeles, Cal., for plaintiff in error. Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted under an indictment which charged him with willful failure and refusal to present himself for or to submit to registration, according to the requirements of the President's proclamation and of section 5 of the Selective Draft Act (Act May 18, 1917, c. 15, 40 Stat. 80 [Comp. St. 1918, § 2044e]). On the trial proof was made of certain statements made by the plaintiff in error shortly before he was accused of the offense, the purport of which was that he did not know whether he was then 45 or 46 years of age, that he was born at Coudersport, Pa., on August 19, 1872, or 1873, that he was opposed to war and that he would not register unless compelled to do so. In addition to these statements, evidence was introduced of two affidavits which he had made when registering as a voter, one of date March 12, 1906, in which he stated, "My age is 32 years [omitting fractions of years]," and one of April 9, 1908, in which he said, "My age is 34 years [omitting fractions of years]." There was also introduced an affidavit found in the official files of the county clerk's office of Los Angeles county, which was part of a petition under the Torrens Law, sworn to on December 1, 1915, in which the plaintiff in error stated that he was 42 years of age. Objection to these affidavits was interposed on the ground that the prosecution had failed to show the corpus delicti. At the close of the trial, on the ground that no competent proof had been offered to sustain the charge, the plaintiff in error requested that the jury be instructed to return a verdict of not guilty.

The plaintiff in error contends that no corpus delicti was shown, and that it was error to admit the affidavits in evidence whether they be regarded as admissions or confessions, and relies upon the rule which has been recognized in the courts of the United States, that to sustain a conviction, some sort of corroboration of a confession or admission is necessary. United States v. Boese (D. C.) 46 Fed. 917; United States v. Mayfield (C. C.) 59 Fed. 118; Flower v. United States, 116 Fed. 241, 53 C. C. A. 271; Naftzger v. United States, 200 Fed. 494, 118 C. C. A. 598; Rosenfeld v. United States, 202 Fed. 469, 120 C. C. A. 599; Breitmayer v. United States, 249 Fed. 929, 162 C. C. A. 127; Daeche v. United States, 250 Fed. 566, 162 C. C. A. 582; Goff

v. United States, 257 Fed. 294, — C. C. A. —. The affidavits which were introduced in evidence against the plaintiff in error were not confessions, and they can hardly be said to be admissions, not having been against interest at the time when they were made. Nor are they judicial admissions. They stand only as declarations of the accused made under oath at a time long prior to the enactment of the law under which he is here prosecuted. They would undoubtedly have been admissible in evidence, if there had been some proof tending to show that the plaintiff in error was in fact of the age which he represented himself to be at the time when they were made. In brief, the whole case against the plaintiff in error rests upon his affidavits. Unless he was within the prescribed age, he committed no crime by failing to register. The fact that he was subject to registration cannot be established beyond a reasonable doubt by the contents of the affidavits.

The judgment is reversed, and the cause is remanded for a new trial.

FIRST NAT. BANK OF CASSELTON V. NATIONAL CITY BANK OF CHICAGO. *

(Circuit Court of Appeals, Eighth Circuit. December 2, 1919.)
No. 5388.

Appeal and error \Longleftrightarrow 209 (1)—Finding of fact by judge not reviewed where no requests for findings were made.

In view of Rev. St. §§ 649, 700, 1011 (Comp. St. §§ 1587, 1668, 1672), where, in an action at law tried to the court by stipulation, no findings were requested the findings made have the effect of the verdict of a jury, and where there are no assignments of error covering rulings made during the trial, or the sufficiency of the special findings to support the judgment, there is nothing which the appellate court may review.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action at law by the National City Bank of Chicago against the First National Bank of Casselton. Judgment for plaintiff, and defendant brings error. Affirmed.

M. W. Murphy, of Fargo, N. D. (Aubrey Lawrence, of Fargo, N. D., on the brief), for plaintiff in error.

G. L. Wire, of Chicago, Ill., and A. W. Cupler, of Fargo, N. D. (Ed. Pierce and B. G. Tenneson, both of Fargo, N. D., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. This is an action at law tried by the court, a jury being waived in writing. The evidence was closed March 14, 1918, and the case taken under advisement. May 4, 1918, the court filed its findings of facts and conclusions of law upon which judgment was entered for the plaintiff on the same date. Prior to the decision of the court and the entry of judgment no request for findings of facts

or declarations of law had been made by the defendant. We find in the record, but not incorporated in the bill of exceptions, findings of fact and conclusions of law stated to have been requested by the defendant. These findings and conclusions, however, were not filed in the court, and therefore, so far as the record shows, were not presented to the court until February 19, 1919, nearly a year after the case was decided.

This situation leaves the record the same as if the case had been tried to a jury, and no motion for a directed verdice or request to charge had been made by the defendant. The findings of the court being like the verdict of a jury, there is nothing for us to review, except errors in the admission or rejection of evidence, and in this case, the findings being special, whether such findings support the judgment. There is no assignment of error covering these points; therefore there is nothing for us to review. Sections 649, 700, and 1011, Rev. Stat. (Comp. St. §§ 1587, 1668, 1673); U. S. v. U. S. Fidelity Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696; Mason et al. v. U. S., 219 Fed. 547, 135 C. C. A. 315, and cases cited; U. S. F. Co. v. Woodson County, 145 Fed. 144, 76 C. C. A. 114; Barnsdall v. Waltemeyer, 142 Fed. 415, 73 C. C. A. 515; Mason City v. Boynton, 158 Fed. 599, 85 C. C. A. 421; C. G. W. Ry. Co. v. Minneapolis, 176 Fed. 237, 100 C. C. A. 41, 20 Ann. Cas. 1200; Chicago, etc., v. Frye, 184 Fed. 15, 106 C. C. A. 217; Chicago, etc., v. Barrett, 190 Fed. 118, 111 C. C. A. 158; Humphreys v. Cincinnati, 75 Fed. 852, 21 C. C. A. 538; Phoenix v. Dittmar, 224 Fed. 892, 140 C. C. A. 336. Judgment affirmed.

SODINI V. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1919.)
No. 3280.

INTERNAL BEVENUE 5-47-EVIDENCE OF CARRYING ON BUSINESS OF BETAIL LIQUOR DEALER SUFFICIENT.

To sustain a conviction for carrying on the business of a retail liquor dealer without having first paid the special tax therefor, it is not indispensable that the evidence should show more than a single sale, where supported by surrounding circumstances.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

District of Tennessee; John E. McCall, Judge.

Criminal prosecution by the United States against Fritz Sodini.

Judgment of conviction, and defendant brings error. Affirmed.

Chas. M. Bryan, of Memphis, Tenn., for plaintiff in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before KNAPPEN and DENISON, Circuit Judges, and KILLITS, District Judge.

PER CURIAM. Plaintiff in error was indicted, jointly with one Petty, on a charge of carrying on the business of retail liquor dealer without having paid the special tax required by law. This writ is

brought to review the judgment entered upon conviction.

On careful consideration of the record and of the briefs and arguments of counsel, we are of opinion that there was ample testimony to sustain the conviction, and that the motion for directed verdict was thus properly denied. There was substantial testimony tending to show that plaintiff in error, either alone or in association with another, owned a considerable quantity of intoxicating liquor; that he had the liquor on hand at the place of its alleged sale, with the purpose of selling it to such persons as he might conclude to accept as customers; and that plaintiff in error himself participated in the sale which culminated in his arrest. In these circumstances, the rules of law do not imperatively make proof of more than one sale necessary to conviction. Bailey v. United States (C. C. A. 6) 259 Fed. 88, 92, — C. C. A. -There was no error in the rulings upon the trial of which plaintiff in error is entitled to complain. The charge was not excepted to. It was not error to deny motion for new trial. The case does not call for further discussion.

The judgment is affirmed.

MILLER v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. December 3, 1919.)
No. 3418.

Post office 50—Instructions in prosecution for using mails to defraud.

Instructions in a prosecution for using the mails to defraud held full and fair, and not prejudicial to defendant.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Criminal prosecution by the United States against V. F. Miller. Judgment of conviction, and defendant brings error. Affirmed.

Dave Watson, of San Antonio, Tex. (Chambers, Watson & Wilson, of San Antonio, Tex., on the brief), for plaintiff in error.

Hugh R. Robertson, U. S. Atty., and Claud J. Carter, Asst. U. S. Atty., both of San Antonio, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

PER CURIAM. In this case the plaintiff in error was convicted of using the mails in furtherance of a scheme to defraud. Error is assigned to portions of the court's charge to the jury and to the failure to give a special charge as requested. The special charge refused is substantially covered in the general charge. The court charged the jury fully and fairly on the law applicable to the case; in fact, very favorably to the defendant.

We find no error in the record. The judgment is affirmed.

UNITED STATES LIGHT & HEAT CORPORATION v. SAFETY CAR HEATING & LIGHTING CO.

(Circuit Court of Appeals, Second Circuit. November 18, 1919.)

No. 27.

1. PATENTS 5-165-EXTENT OF PATENT MUST BE MEASURED BY CLAIM.

The object of the patent law is to secure to the inventor all to which he is entitled, also to apprise the public as to what is still left open to them; so the claim of the patent must be the measure of the patentee's rights.

2. PATENTS \$\infty\$167(2)\$\top Claims cannot be extended by reference to specification.

The specifications of a patent may be referred to, to limit the claim, but are not available to extend it.

3. PATENTS \$\infty 328-Patent for car lighting not infringed.

The McElroy, patent, No. 983,158, claims 5, 7, 8, and 9, for a method of car lighting, which used a belt-driven dynamo, held not infringed by a device manufactured pursuant to the Thomas patent, No. 1,154,671; the McElroy patent, which provided a method for maintaining constant belt tension, being limited by the prior art, and, as limited, not infringed.

Appeal from the District Court of the United States for the Southern District of New York,

Suit by the United States Light & Heat Corporation against the Safety Car Heating & Lighting Company. From a decree for defendant, plaintiff appeals. Affirmed.

Everett N. Curtis, of New York City (W. Clyde Jones and Arthur B. Seibold, both of Chicago, Ill., and Raymond H. Van Nest, of Niagara Falls, N. Y., of counsel), for appellant.

Emery, Booth, Janney & Varney, of New York City (T. J. Johnston and Robert S. Blair, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This is a suit for infringement of patent. United States letters patent No. 983,158 were granted on July 31, 1911, to James F. McElroy. The invention concerns the method of car lighting, and has to do with the mounting of dynamos upon railway vehicles, and particularly to such mounting of the dynamo that it may be driven from one of the car axles by means of a belt. It involves the suspension of a generator from a railway passenger car; the generator being used in the art of electric train lighting upon cars propelled by steam and which do not have some traveling connection with a stationary source of electric supply. The problem involved relates to the constant connection between the generator and the axle pulley. The desire is that the belt connection shall have adequate tension, to enable it to rotate the generator at all proper speeds, and that for this purpose the tension upon the belt under all the varying circumstances of use shall be as nearly as possible uniform. It is intended to provide against the stretching of the belt, which is an inevitable incident of the transmission of power by the belt method, and the varying distance between the pulley on the axle and that upon the generator shaft. The stretching is due to the shifting of the relative position of the pulleys from irregularities in the track and from the passage of the car around curves.

One method of suspension is to place the generator directly upon the truck of the car. This is done by supporting devices within the beams of the truck between the axles or adjacent to one of them, sometimes by such devices projecting beyond the truck toward the middle of the car. The distances between the axle pulley and the dynamo do not vary greatly, and the variations are practically due to the lost motion in the device and the stretching of the belt. This method has its disadvantages. A second method of suspension is referred to as a body-hung generator. Here the generator is fixed, by suitable supporting devices, to the body of the car at a distance from the truck and height above it which make the belt longer than with the truck suspension, and which consequently give a greater arc of contact with the small pulley under the generator axle tending to diminish the slip.

Claims 5, 7, 8, and 9 are involved, and read as follows:

"5. The combination with an axle, of a dynamo belted thereto, an adjustable support for the dynamo upon which the dynamo is rotatably mounted, and a self-adjusting spring for imposing a substantially constant tension on the belt."

"7. The combination with an axle, of a dynamo belted thereto, a support for the dynamo upon which it is rotatably mounted, and a spring tending to rotate the dynamo on its support and acting along a line eccentric with respect to the axis of the rotation of the dynamo but changeable in position with respect to such axis, whereby the leverage of the spring varies substantially inversely as its tension.

"8. The combination with an axle, of a dynamo belted thereto, a support for the dynamo upon which it is rotatably mounted, a spring tending to rotate the dynamo around its axis of rotation in a direction away from the axle, and a pivotal mounting for the spring whereby the line of action of the spring varies as the dynamo is rotated on its axis to increase its leverage as the dynamo receded from the axle.

"9. The combination with an axle, of a dynamo belted thereto, a support for the dynamo upon which it is rotatably mounted, a spring tending to rotate the dynamo on its axis, and connections for the spring permitting it to act upon the dynamo on a changing leverage increasing as the belt slackens as the dynamo is drawn farther from the axle."

The belt-driven dynamo in the car-lighting art has been fraught with difficulties. By stretching, it would loosen and finally would have insufficient contact, so that it would fail to drive the generator. In practice, this difficulty was overcome by suspending the generator on a pivot and swinging it on an angle, so as to permit the weight of the dynamo to assist in keeping the belt tight. As the belt stretched, there would result a rotation of the dynamo away from the car axle until the dynamo hung vertical, and this resulted in a lack of pressure by its weight upon the belt. To obviate this, there was a manual adjustment provided for, and this required frequent attention at stations along the line the railroad cars traveled. Later a spring was employed to hold the dynamo in such a position so that the shaft of the

dynamo would bear upon the belt and the generator could not slip. As an improvement in the art, the appellant claims that it has so located the spring relative to the pivot of the dynamo that, as the weight moment decreased by the swinging of the dynamo away from the car axle, the spring effect increased by the lengthening of the lever arm upon which the spring operated, claiming that an automatic belt tension resulted from the equalization of forces. Thus it is said, manual adjustment is eliminated.

The patent provides, as means for neutralizing weight variations:

"I also mount the dynamo upon a pivotal support, the axis of rotation of the dynamo being within the body of the dynamo itself, whereby the aforesaid tension device may take up slack in the belt and at the same time the tendency of the dynamo to swing upon its supports under sudden shocks is practically eliminated. * *

"It should be observed at this point that this axis of rotation is within the body of the dynamo and is as close to the center of gravity thereof as is consistent with the tensioning of the belt by means to be hereinafter described. The purpose of this is to reduce the tendency of the machine to swing to and fro under the impulse given by the sudden starting of the cars in one direction or the other and the bumping against other cars, and similar causes. Or course, if the dynamo were suspended exactly at the center of gravity, such shocks would have no effect toward causing the dynamo to rotate on its supports—in other words, its suspension would be neutral with respect to shocks of that kind. It is my object to approximate as closely as possible to this neutral support by mounting the pivots upon which the dynamo hangs as nearly to the center as may be permissible under the circumstances. * *

"It will be manifest that the result of my construction as thus far described is to relieve the belt from all unequal strains. For example, the above described hanging of the dynamo upon the axis of the rotation lying within the body of the dynamo relieves the belt from the sudden and excessive strains which would result if the dynamo were pivoted at a point either above or below it. In such case a shock tending to swing the dynamo away from the truck would produce a sudden and abnormal strain on the belt, whereas a shock tending to swing the dynamo toward the truck would first slacken up the belt, but the rebound to the action of the spring would produce a heavy blow on the belt tending to snap it in two."

Claim 11 of the patent referred to the axis of rotation of the dynamo on its support upon which the dynamo swings being within the body of the dynamo and approximately at its center of gravity. Claim 11 makes use of this expression:

"An adjustable support upon which the dynamo swings upon an axis lying within the body of the dynamo approximating in position to the center of gravity thereof."

We think the patent was intended to eliminate, as far as possible, the weight factor, and that the spring was the only tension device within the scope of the patentee's invention. The spring was not allowed to vary in its effect on the belt and the component of tension, due to the spring, was maintained constant intentionally by an arrangement of the spring and lever. If there were present in this structure a variation of weight effect, then there were three variables, and not two, and the sum of two of these variables was maintained constant; so that if the weight effect did vary, as claimed by the appellant, it was known to the inventor, and he seems to have entirely overlooked or ignored the idea, for he employed the spring

and lever to obtain a constant spring tension. He speaks, in his description of the spring, as providing "a self-adjusting tension device by means of which the tension on the belt is maintained constantly uniform in spite of variations in the length of the belt by stretching or other causes," and again (page 2, line 72, of the patent):

"Moreover, by means of self-adjusting tension device above described, the belt is kept equally taut."

He expresses the same ideas in the claims, and speaks of the constant spring tension. All of the expressions of the patent indicate the thought of the patentee that the entire effect of the belt tension was due to the spring, and it is the spring and lever which form the self-adjusting tension device; it is the spring which exerts the same tension upon the belt. The patent discloses the combination of three instrumentalities, one of them being the pivot dynamo so arranged as to have substantially no weight effect and no variation therein; the others being the spring and the lever and inverse relation to the spring so that the spring moment upon the belt would be constant. There is nothing in the patent indicating that the patentee wishes to employ a weight effect. Indeed, it is thought that so far as it may exist, it will be minimized as far as possible. There is provided in the specification, an elimination of the weight to prevent strain from swinging and the patentee places the claims to the invention upon the constant spring effect alone.

[1, 2] The specifications and claims must be read to mean what they say, and the device which they specify must be shown to be the one which produces the effect which they specify. The object of the patent law is to secure to the inventor all to which he is entitled, and it is also intended to apprise the public of what is still left open to them. The claim must be the measure of the patentee's right to relief. The specification may be referred to limit the claim, but it can never be available to expand it. McClain v. Ortmayer, 141 U. S.

419. 12 Sup. Ct. 76, 35 L. Ed. 800.

[3] Nowhere in the patent is the weight or weight moment referred to, nor is it provided that the weight tension shall play a part in the accomplishment of the idea; nor does the patentee make use of an expression indicating that the belt tension may be due to weight. Nor is there anything which indicates a spring tension plus weight. Thus, we must conclude that there is nothing indicating that the patentee considered that there was any variability due to changes in the weight moment. What he does provide is for a leverage arrangement expressly designed to eliminate this variation and to render the spring effect as nearly as possible constant. His intentions must be obtained from the language employed, and we cannot read into the patent some modification to aid the claim of invention or infringement. Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23.

The appellee makes its device pursuant to the Thomson patent No. 1,154,671. In this device, the dynamo is hung as nearly vertical as possible. The generator is tilted toward the axle, and this is due to the

particular necessities rather than an idea of an ideal arrangement, as claimed to be disclosed in the patent. The appellant's device takes fully into consideration the variation of the moment of the weight of the generator upon the belt tension. There is no limitation upon the variations of the weight moment. It is an inevitable consequence of the appellant's mounting that the weight moment shall vary over a very wide range. The generator is hung on an arm and swings back and forth like a pendulum, except as it is restrained by its weight and the tension of the belt. As it approached the axle to which the belt is connected, the weight effect enormously increased because the generator begins to swing up horizontally. As it recedes from the axle, the weight effect diminishes. To compensate for this variation, there is provided a spring and lever like the instruments of the patent in suit. Thomson so apportioned his lever and spring and so arranged his connection to the generator that he obtained an inconstant spring generator, which is widely varied and which from the nature of the problem must vary as widely as does the weight moment of the generator upon the belt, but in the opposite direction. He did not obtain a constant spring pressure as was the appellant's inventor's idea. If he had, his device would have been inoperative. He provides that his weight moment and his spring moment shall be inverse functions with one another. As we have observed, the specifications and claims of the appellant cannot be so read as to cover the ideas disclosed by the Thomson patent.

But appellant's claim of what the Thomson patent discloses is fully presented in the specifications and claims as written for the Thomson patent. The specifications provide:

"From the operative position indicated in dotted lines it will be seen that the weight acts as a factor in tending to maintain the belt in the desired taut condition. The effect of the weight, however, is auxiliary to that of a spring 21 which is stretched between a pin 24 secured within a bracket 25 which is bolted to the depending lug 26 on the supporting easting 9. This spring tends to swing the generator in a direction away from the car truck and is so positioned with respect to the axis of pin 12 that its effect varies as the generator swings downward toward its lowermost position and increases due to the increase of its effective arm. This will be understood by considering the position of the arm 23 indicated in dotted lines at 27 on Fig. 1 of the drawing in which extreme position the spring has small effect as it pulls almost through the axis about which the generator swings. The various parts are so proportioned that the total retractive effect of the weight of the generator and of the spring 21 is substantially constant for all operative positions of the generator and hence when the position of the latter changes, as upon the truck swinging in rounding curves or for other reason, there is no material alteration in the belt tension."

"That is, the total effect of the weight and the spring is substantially constant for all operative positions, of the generator."

"9. In car-lighting apparatus, in combination, a car truck; a generator mounted to move toward and away from said truck; means adapted to drive said generator from an axle of said truck; a spring mounted to urge said generator away from said axle and coacting with the weight of said generator in exerting a substantially constant force upon said driving means in all operative positions of said generator; and means adapted to prevent the return of said spring to undistorted condition irrespective of the position of said generator."

The Kennedy and Newbold patents of the prior art show the generator supported from the bottom, and therefore show that the weight effect increases as the generator tilts away from the axle; the spring effect in consequence decreasing so as to make at least some proximation to a balance without any use of levers, straight or belt crank. The idea of using the spring and weight of the generator in connection with the car axle and a belt connection in such a way as to maintain a tension upon the belt is disclosed by these patents to be old, and it is only some novel combination of these elements which might be the subject of new letters patent. A constant belt tension was obtained by such devices of the prior art, as is in the Thomson devices. These devices had inherently a compensation by which the spring partially collapsed as the weight function increased.

The eccentric location of the spring with reference to the point of suspension of the dynamo, shown in the dynamo, indicates nothing except to obtain a constant belt tension while eliminating the weight factor as far as possible. If the decrease in the weight tension was equalized by the increasing spring tension, it could not be, as claimed by the appellant, that the mechanism is "one whereby the leverage of

the spring varies substantially inversely as its tension."

Claim 8 differs from claim 7 only in pivotal mounting for the spring. It is necessary to use some form of flexible attachment to the spring to support the dynamo. This is provided for in claim 7. It is a mechanical necessity. The difference, thus mounting pivotally, does not involve invention. Undoubtedly, it was the idea of the inventor of appellant's device to eliminate as much as possible the weight effect. The center of oscillation was within the dynamo. We are of the opinion that the appellee's device does not infringe, and that there is this difference between the appellant's and appellee's devices; the former is based upon compensation of spring and weight effect, while the latter upon constant spring effect alone and with the axis of rotation within the dynamo. The appellee's axis of rotation is not within the dynamo. Indeed, we are forced to the conclusion that, considering the art, the appellant has not contributed to the art.

The decree will be affirmed.

MUNGER v. FIRESTONE TIRE & RUBBER CO.* SAME v. B. E. GOODRICH CO.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

Nos. 18, 19.

1. DISCOVERY & MATTERS AS TO WHICH DISCOVERY MAY BE OBTAINED

Equity grants discovery in aid of a plaintiff's right or cause of action, or in aid of a defendant's defense, as defined by the issues in the case, but not in relation to the amount of damages recoverable, which is not an issue, but a consequence of the issues.

2. PATENTS &==292—DISCOVERY AS TO SALES AND PROFITS NOT PERMITTED IN ACTION FOR INFRINGEMENT.

Plaintiff, in an action at law for infringement of a patent, cannot maintain a bill of discovery to require defendant to disclose the number of sales made of the alleged infringing article, and its profits thereon, in advance of trial.

Appeals from the District Court of the United States for the Southern District of New York.

Bills of discovery by Louis De F. Munger against the Firestone Tire & Rubber Company and against the B. F. Goodrich Company. Decrees dismissing bills, and complainant appeals. Affirmed.

Redding, Greeley & Goodlett, of New York City, for appellant.

Charles Neave and William G. McKnight, both of New York City (Edward Rector, of Chicago, Ill., of counsel), for appellee Firestone Tire & Rubber Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. Louis De F. Munger is the owner of letters patent of the United States dated December 5, 1899, for an improvement in pneumatic tires. After the patent had expired, he brought an action at law to recover damages for infringement against the Firestone Tire & Rubber Company and another against the B. F. Goodrich Company. In aid of these actions at law, he filed this bill of discovery in equity, praying that the defendants might be required to state the quantity of demountable rims they had sold during the existence of the patent and within six years prior to bringing the action at law; the names of the purchasers and the selling price; to produce all books, invoices, records, vouchers, agreements, correspondence, papers, documents and other data relating thereto; and to state the gains, profits, savings, and advantages which had accrued in the premises to the defendant. Judge Augustus N. Hand dismissed the bill, saying:

"I do not think it can be said in advance of the trial that the information which is sought upon this bill for discovery will not be proper matter for the consideration of the jury. I can see no sufficient reason, however, at this time to sustain the bill for discovery. There is nothing in this case which makes such a remedy peculiarly necessary. All the facts which can be elicited by a bill for discovery can be presented at the trial upon a subpena duces

tecum. Before it is possible to determine whether there has been any infringement or not, I am asked to allow an examination into the defendant's books and private affairs. This is something which should not be imposed upon the defendant, if any other reasonable mode of eliciting the desired evidence is possible. It cannot, I think, be determined, until the rest of the plaintiff's case is heard, whether he should be allowed to offer evidence of the defendant's profits. Certainly he must establish first a prima facie case of infringement."

Both cases involved exactly the same question, and were tried in the court below and argued in this court together. Inasmuch as the plaintiff has not manufactured or sold his patented tire, and has established no license therefor, the evidence asked for will be admissible to assist the jury in determining what will be a reasonable royalty, if they find the patent valid and infringed. Dowagiac Co. v. Minnesota Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398.

Doubtless the plaintiff sued at law because his patent had expired, and no injunction could have been granted, under the general rule laid down in Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975, that a bill for a naked account of profits and damages against the infringer of a patent cannot be sustained. But at least since the decision in Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842, an action at law cannot be regarded as adequate a remedy as a suit in equity, because it is difficult and inconvenient to go through a mass of books and papers produced for the first time at the trial. To exclude the jurisdiction of equity under section 267 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. § 1244]), the remedy at law must be as complete and efficient, both as to final remedy and the mode of obtaining it, as the remedy in equity. Kilbourn v. Sunderland, 130 U. S. 514. 9 Sup. Ct. 594, 32 L. Ed. 1005. It may be, therefore, that this case fell within the exception to the general rule mentioned by Mr. Justice Matthews in Root v. Railway Co., 105 U. S. at page 215 (26 L. Ed. 975):

"Our conclusion is that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule."

[1] However, the plaintiff, having gone to law, and having applied to equity solely for discovery, without other relief, can have only such discovery as equity grants. While the inconvenience of the remedy at law may authorize a suit in equity, that fact cannot in any way ex-

tend the jurisdiction of courts of equity in respect to discovery. Mr. Justice Lurton, in Carpenter v. Winn, supra, said (221 U. S. at page 540, 31 Sup. Ct. 685, 55 L. Ed. 842):

"(c) Another consideration leading to the same conclusion is found in the fact that a bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called a 'fishing bill,' and will be dismissed. Story, Eq. Pl. §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated. The principle is stated by a great authority upon equity thus: 'Nor has a party a right to any discovery except of fact and deeds and writings necessary to his own title under which he claims; for he is not at liberty to pry into the title of the adverse party.' Story, Eq. Juris. § 1490; Kettlewell v. Barstow, 7 Ch. App. Cas. 686, 694. In Ingilby v. Shafto, 33 Beav. 31, it was said: 'The province of discovery in equity is not to compel a defendant, who is a plaintiff in a suit at law, to disclose in what manner he intends to make out his case at law. The plaintiff in equity is entitled only to the discovery of such matters in the knowledge, or possession, of the defendant in equity, as will enable him to make out his own case at law; and exceptions to an answer, omitting to respond to inquiries touching the mode in which the defendant purposed to make out his case at law, and as to documents "relating to matters in the bill mentioned," were overruled.' 'fundamental rule,' as it is called by Judge Story in his work upon Equity Pleading, § 317, in view of the express limitation of the section, 'to cases and under circumstances' when discovery might be obtained in equity, implies that production of an adversary's documents should not be required before trial, that one party may examine and inspect in search of evidence which he may or may not use in the trial."

In other words, equity grants discovery in aid of a plaintiff's right or cause of action or in aid of a defendant's defense. These are defined by the issues of the case; whereas the amount of damages is never at issue. If a plaintiff prevail upon the issues upon his cause of action, he will be entitled to nominal damages, though he prove no damage at all, and of course, if a defendant prevail upon the issues as to his defenses, no damages will be recoverable. The amount of damages is not an issue, but follows the determination of the issues in the case, and discovery is granted only in aid of the issues.

[2] This undoubtedly puts the plaintiff in this particular case in a very embarrassing situation. The trial judge will have to determine when he shall have made out a sufficient case to justify an examination of the defendant's books, papers, etc. A contrary conclusion would introduce a dangerous practice. All a patentee would have to do in order to completely ventilate a competitor's business would be to bring an action at law for infringement and then apply to a court of equity for discovery in aid of it. We speak of the possibility of this danger generally, because no such purpose appears in this case.

No decision upon this precise question has been called to our attention, though it was raised, but not decided, in Colgate v. Compagnie Francaise du Télégraphe de Paris à N. Y. (C. C.) 23 Fed. 82.

The decree is affirmed.

Petition of TUBULAR WOVEN FABRIC CO.

NATIONAL METAL MOLDING CO. v. TUBULAR WOVEN FABRIC CO.

(Circuit Court of Appeals, First Circuit. December 16, 1919.)
No. 1421.

PATENTS 328—FOR FLEXIBLE ELECTRIC CONDUIT VALID.

The validity of the Osburn patent, No. 652,806, for a flexible electric conduit, is reafirmed.

Petition for Leave to Apply to the District Court of the United States for Permission to File a Supplemental Bill in the Nature of a Bill of Review.

Suit by the National Metal Molding Company against the Tubular Woven Fabric Company. A decree for defendant was reversed (227 Fed. 884, 142 C. C. A. 408), and the defendant files an original petition for leave to apply to the District Court for permission to file a supplemental bill in the nature of a bill of review. Petition denied.

Livingston Gifford, of New York City, and William Quinby, of Boston, Mass., for petitioner.

Charles F. Perkins and W. M. Richardson, both of Boston, Mass., for respondent.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. The petitioner (defendant below) now seeks to have this court reverse its decision as to the Osburn patent, held valid by this court, Putnam, Dodge and Bingham, JJ. (opinion by Bingham, J.), in 227 Fed. 884, 142 C. C. A. 408, decided on November 20, 1915. A petition for rehearing was denied by this court. The defendant's application to the Supreme Court for certiorari was denied by that court. 241 U. S. 663, 36 Sup. Ct. 450, 60 L. Ed. 1227. This patent was, by necessary implication, again sustained by this court, Dodge, Bingham and Aldrich, JJ. (opinion by Aldrich, J.), in 254 Fed. 304, 166 C. C. A. 44. The court, as now constituted, remains content with those decisions and opinions.

We cannot adopt the view of petitioner's counsel as to the meaning, and application to the issue in this case, of the decision and opinion of the Supreme Court in Werk v. Parker, 249 U. S. 130, 39 Sup. Ct. 197, 63 L. Ed. 514. We see nothing in that case which would have led this court to any different conclusion as to the validity of the Osburn patent, or which would now warrant this court in reconsidering a decision made four years ago.

Petition denied.

THE WILLIAM P. PALMER. THE SAN RICARDO.

(District Court, E. D. Virginia. December 15, 1919.)

Collision &==39—Liability of steamship for disobedience of passing rules.

A collision at sea, on a moonless, but clear, night, between two steamships navigating without lights and approaching nearly end on, held due solely to the fault of one in failing to sooner see the other, at least as soon as she flashed on her lights when half a mile distant, and to alter her course to starboard as required by international rule 18, and as was done by the other vessel.

In Admiralty. Suit for collision by P. Arentson, master of the steamship William P. Palmer, against the steamship San Ricardo, with cross-libel. Decree for libelant.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for the William P. Palmer.

Hughes, Little & Seawell, of Norfolk, Va., for the San Ricardo.

WADDILL, District Judge. The collision, the subject of this litigation, occurred off the North Carolina coast, 20 miles north of Hatteras, and some 16 miles out from Wimble Shoals buoy, about 9:15 o'clock on the night of September 1, 1918.

The William P. Palmer, an ocean-going American steamship, 2,-295 tons gross, 242 feet long, and 42 feet beam, bound from Hampton Roads for Cuba, loaded, came into collision with the San Ricardo, a large British steamship, 3,927 tons, 420 feet long, and 54 feet 7 inches beam, coming up the coast en route from Mexico to England, via Hampton Roads, loaded. Both vessels were being navigated with lights obscured; the Palmer making about 8½ knots, and the San Ricardo about 11½ knots an hour. The weather was good, no

moon, but starlight, and a good night for seeing.

The Palmer's case is: That while proceeding in a southwardly direction, on a course of south by west half west, and about a mile away, and some three minutes before the collision, the San Ricardo loomed up approximately dead ahead, bearing slightly on her port bow. At the time the ship could have been seen, had its whereabouts been known, two miles away. That upon observing the ship ahead, the Palmer immediately ported, to pass port to port, and flashed on her running lights, when the vessels were about three-quarters of a mile apart. That, the San Ricardo continuing to bear upon her port beam, she hard aported, and proceeded full speed ahead, with a view of avoiding the collision, and that the running lights of the San Ricardo were flashed on when the vessels were more than half a mile away, her white and red lights being first seen, and then the green light; and shortly thereafter the San Ricardo collided with the port quarter of the Palmer, about 15 feet forward of her stern.

The San Ricardo contends: That when on a course of north 12 degrees east the Palmer suddenly appeared on her starboard bow, ap-

parently very close, showing her green light, whereupon she immediately proceeded to place her wheel to starboard, and then hard astarboard, and that prior to the collision the white and red lights of the Palmer also showed, that vessel then seeming to be swinging to starboard under a port helm. About this time the San Ricardo's master came out, and before the course of his ship had been affected by the hard astarboard order he immediately countermanded it, placed the wheel to hard aport, sounded one blast of his whistle, put his engines full speed astern, and sounded three blasts of his whistle to indicate this maneuver. The distance at which the Palmer was first observed by those on the San Ricardo is variously estimated—by the third officer, in charge of navigation, at a few seconds apart; the wheelsman, at about three to four minutes apart; and the lookout, at about a minute apart.

It will be observed that the parties are directly at variance as to the happening of the collision and what brought it about. A careful review of the testimony, in the light of the law and rules of navigation governing parties in the positions in which they were, would seem to make reasonably clear whose fault caused the collision.

It is true that at the time both vessels were being navigated under existing war regulations, without showing their running lights, which tended somewhat to confuse the navigators on each vessel; but there is no doubt from the entire testimony that there was nothing to have prevented their seeing the loom of the vessels, on a bright, starry night, such as this was, a sufficient distance to avoid the collision, if those in charge of their navigation were competent, efficient, and properly discharging their duties. The San Ricardo was seen by the Palmer certainly in ample time to have avoided her, and the former ship could have seen the Palmer in the exercise of good seamanship on the part of her navigators. The third officer of the San Ricardo tries to minimize the distance at which he first observed the Palmer. He says, first, that it was only two or three seconds before the collision: but he admits that the ship's master came out on the bridge and took charge of the navigation some eight, nine, or ten seconds after the order to hard astarboard had been given.

Taking the entire testimony of that ship, it is clear that the presence of the Palmer was known when she was approximately half a mile away, after her lights were flashed on before the collision. Moreover, it would have been impossible for those navigating the San Ricardo to have done the things they claim to have done to avoid the collision in anything like the time claimed by the ship's navigator that the other vessel was seen. Certain it is, if the Palmer was not seen, it could have been from the loom of the ship alone, by the exercise of due care on the part of those whose duty it was to be on the lookout for her, when she was at least half a mile away. The San Ricardo's helmsman perhaps overestimated the distance, when he said he made the observation three or four minutes away, and the lookout was nearer correct when he fixed it at about a minute apart. The actual time was perhaps a minute and a half, when the ships were about half a mile apart.

It is likewise apparent, as well from the lick of the collision as the circumstances surrounding the same, that the vessels did not approach each other as claimed by the San Ricardo; that is, the starboard of the Palmer bearing upon the starboard bow of the San Ricardo, showing the Palmer's green light. Had this been so, the Palmer's porting and hard aporting would have earlier brought on the collision, and the San Ricardo's master, upon reaching the pilot house, would never have countermanded the order to hard astarboard, which was just the order which should have been in process of execution, had the green

light of the Palmer been showing.

The testimony sustains the Palmer's claim that the vessels approached each other end on, or nearly so; the San Ricardo bearing slightly on the Palmer's beam. The courses of the ships, one proceeding on a course south by west half west, and the other north 12 degrees east, shows this, and under International Rules of Navigation, art. 18 ("Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other"), the Palmer was required to do just what she did do, namely, alter her course to starboard, to the end that the vessels might pass on the port side of each other; and this rule, unlike Inland Rule, art. 18, rule 1 (Act June 7, 1897, c. 4, § 1, 30 Stat. 100 [Comp. St. § 7892]), did not require the sounding of one blast of the whistle, indicating her purpose to effect a passage of port to port.

The suggestion that the Palmer should have stopped and reversed, giving appropriate signals, instead of proceeding full speed ahead under a port helm, is likewise not well taken, as to have stopped and reversed in the position in which she was placed would have resulted in her being sooner collided with, and more dangerously injured. The Free State, 91 U. S. 201, 23 L. Ed. 299; The Republic (D. C.) 102

Fed. 997; The Attualita (D. C.) 241 Fed. 530, 534.

The navigators of the Palmer insist that the San Ricardo always bore on her (the Palmer's) port, and that the latter's green light could never have been seen, which is doubtless true, unless it be that, at the moment the Palmer flashed on her lights, for an instant the green light may have been seen; but if the Palmer immediately ported and hard aported, which was the proper maneuver for her to have made, upon observing the presence of the San Ricardo end on, or nearly so, bearing on her port bow, she did all that good seamanship required of her, and the collision inevitably occurred because the navigator of the San Ricardo improperly ordered his wheel hard astarboard instead of first to port, and then to hard aport. The physical evidences of the collision make plain that the Palmer bore and was on the port side of the San Ricardo as she claims, and not on the latter's starboard side, as contended by her, and the conduct of the master of the San Ricardo in immediately correcting the placing of the wheel to starboard, by promptly placing it to port and hard aport, shows that he quickly observed the mistake made by his navigator which brought about the disaster.

What has been said is upon the theory of the negligent navigation of those in charge of the San Ricardo, after the presence of the Palmer was seen and known to them. If they did not see the Palmer, they are equally liable for negligence in that respect. The fact that the ships were being navigated with lights obscured imposed upon them the obligation to exercise the utmost diligence to carefully look out, with a view of observing the presence of others lawfully navigating the sea.

It follows, from what has been said, that the collision was brought about solely by the negligence of the San Ricardo, and a decree so ascertaining will be entered on presentation.

SMALLS V. ATLANTIC COAST SHIPPING CO.

(District Court, E. D. Virginia. December 15, 1919.)

Admiralty $\Leftrightarrow 20$ —Suit for injury received on land not within maritime jurisdiction.

A suit for injuries to a longshoreman, received on the land while he was helping to unload a cargo of steel rails, and caused by a defective winch on the vessel, held not within the maritime jurisdiction.

In Admiralty. Suit by Wesley Smalls against the Atlantic Coast Shipping Company. On exceptions to libel. Exceptions sustained.

Libel to recover for personal injuries to the libelant, a longshoreman, received on the land, while assisting in unloading steel rails from a steamship lying at a pier, into railroad cars, by means of an alleged defective steam winch of the vessel.

Swink & Fentress, of Norfolk, Va. (Gilbert R. Swink, of Norfolk, Va., of counsel), for libelant.

Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. This cause is now before the court upon exceptions filed by the respondent to the libel, which present the question of whether the cause of action is one properly the subject of maritime jurisdiction; it appearing upon the face of the libel that the injury to the libelant occurred on land, and not on water.

The case is a very close one, of unusual interest, and was argued with much ability; the libelant's proctor especially presenting with much force the fact that the occurrence was so related to the water as under modern decisions to bring it within the admiralty jurisdiction.

The court, having given much thought to the question presented, and appreciating the force and reasonableness of the contentions made, has come to the conclusion that the exception is well taken, and that the cause of action sued for cannot be maintained under maritime law, under the great weight of authority relating to and controlling the same.

The libel will therefore be dismissed.

SOUTHERN SURETY CO. v. TOWN OF GREENEVILLE et al. (Circuit Court of Appeals, Sixth Circuit. January 6, 1920.)

No. 3288.

1. Principal and substy \$\sim 59\$—Intention of parties governs contract.

In determining the rights of a surety under an application for a surety bond, the intention of the parties must govern.

2. Insurance \$\igsim 59\$—Contract most strongly construed against surety company preparing it.

In case of ambiguity in an application on which surety company issued a bond, the application is to be most strongly construed against the surety company, which drew the same.

3. Contracts 🖘 156—Special terms control general terms.

It is the ordinary rule in construction of contracts and written instruments that special terms will control general terms.

4. Principal and substy & 175—Substy company cannot apply collateral received under application for one bond to other liabilities.

Where an application for a bond signed by a public contractor contained an agreement to indemnify the surety company against loss of every nature, not only by virtue of the bond applied for, but by reason of the surety company's execution of other bonds, and for better protection required the contractor to assign all interest in tools on the work and the money to be due on the contract, etc., but provided, in event the surety should be released from liability on account of the bond, the assignment should become null and void, held, that the surety could not, under the general provisions above and other similar ones following, apply the collateral to claims independent of the particular bond issued.

Appeal from the District Court of the United States for the East-

ern District of Tennessee; Edward T. Sanford, Judge.

Bill of interpleader by the Town of Greeneville against the Southern Surety Company and the Southern Asphalt & Construction Company. From a judgment in favor of the Southern Asphalt & Construction Company, the Southern Surety Company appeals. Affirmed.

John R. Aust, of Nashville, Tenn., for appellant.

Susong & Biddle and Shoun & Trim, all of Greeneville, Tenn., and Forney Johnston, of Birmingham, Ala., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and KIL-LITS, District Judge.

KNAPPEN, Circuit Judge. The surety company became surety upon the construction company's bond given to the town of Greene-ville under a contract for certain public work. The construction company's application to the surety company to sign the bond contained an assignment of certain personal property as security. The surety company contended that this security was intended to protect it from liability, not only on account of the bond given under this application, but on account of other bonds which it had given to other municipalities for the construction company's benefit, under at least one of which the surety company seems to have incurred liability through

the construction company's default. The construction company denied that the personal property was intended to secure its liability on account of other bonds. The surety company incurred no loss upon the bond given under the application, or on account of the Greeneville contract. The town accordingly paid to the construction company the amount owing the latter above that claimed by the surety company, and, upon issue joined under a bill of interpleader filed by the town, the court below awarded this surplus fund (\$5,500) to the construction company's trustee in bankruptcy. The surety company appeals. The question presented relates to the construction of the contract contained in the application, in the light of the conditions existing at the time.

The construction company's application to the surety company for bond to secure the Greeneville contract contained 11 covenants. By the second covenant the construction company agreed to indemnify the surety company against, and to save it harmless from, liability and loss of every nature which the surety company might at any "time sustain or incur," not only by virtue of the bond then and there applied for, but by reason of the surety company's execution for the construction company "of any and all other bonds" executed for the construction company at its "instance and request." By the fourth covenant the surety company (in case of the construction company's failure to comply with or perform "any covenant hereof, or of the contract which the [surety] company is hereby requested to guarantee") was authorized to take such steps as it might "deem necessary or proper to obtain due performance" of the contract referred to, "or its release from all liability under any and every such bond and contract, and to secure and further indemnify itself against loss." Then follows what is here called the second bracket or paragraph of this fourth covenant, by which the construction company in terms assigned, transferred, and conveyed to the surety company for its "better protection" all the former's interest in "all the tools, plant equipment, and materials of every nature and description that we may now or hereafter have upon said work, or in, on or about the site thereof, including as well materials purchased for or chargeable to said contract, which may be in process of construction, in storage elsewhere, or in transportation to said site," as well as "all payments. funds, moneys, or property due or to become due to the undersigned. as provided in said contract," together with all the construction company's rights in all subcontracts incident thereto and "all materials embraced therein," with authority in the surety company, in case the construction company should fail to complete "said work in accordance with the terms of the contract covered by such bond, or in event of any default on the part of [the construction company] under the said contract" to take possession of "said tools, plant equipment, materials, and subcontracts, and enforce, use, and employ such possession." The concluding sentence of this fourth covenant reads thus: "In the event the [surety] company be released from liability on account of said bond and suffer no loss thereunder, then this assignment shall become at once null and void." 1 The seventh covenant reads as follows:

"Seventh. That these covenants and also all collateral security, if any, at any time deposited with the company concerning the said bond, or any other former or subsequent bonds executed for us or at our instance, shall, at the option of the company, be available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request."

If the seventh covenant controls, the surety company was entitled to the \$5,500 in question, and the decree must be reversed. If, however, the concluding sentence of the second paragraph or bracket of the fourth covenant dominates, the decree is right, and must be affirmed. The two provisions are plainly inconsistent.

It will be seen that the second covenant, while containing an agreement of indemnity cove ing, not only the bond then being applied for, but others as well, contains no provision for security by way of pledge or mortgage; also that the first paragraph of the fourth covenant, while authorizing the surety company (on the construction company's failure to perform "any covenant hereof" or of the construction contract) to "secure and further indemnify itself against loss," likewise omits any mention of property pledged or mortgaged. And the second paragraph of the fourth covenant, which contains the assignment of the "tools, plant equipment, and materials" relating to the Greeneville contract, and of the proceeds derivable therefrom, nowhere suggests that the security thereby created shall extend to any other obligation; while, on the contrary, as already shown, its concluding paragraph expressly makes the assignment void if the surety company shall sustain no loss on the specific bond then being applied for, viz. that relating to the Greeneville contract.

The District Judge based his construction of the meaning of the contract upon this reasoning:

"However, the assignment clause, commencing with the words and for the better protection' and ending with the words 'null and void' although inserted as a separate paragraph between the fourth and fifth covenants in the application, is not, in itself, in any sense a covenant, but purports to be a present assignment taking effect, as specified, without more, and not containing the word 'covenant' or any equivalent thereof. The application contains various specific covenants, which are in the form of future agreements preceded by the word 'that.' The language of the seventh covenant making all covenants of the stipulation available at the option of the surety company in case of the asphalt company's default under other bonds, is fully satisfied by this rendering applicable, according to its own terminology, the several specific covenants contained in the application, without more. To construe the seventh covenant, as also rendering available to the surety company not merely the covenants contained in the application, but also the assignment clause contained in a separate paragraph, not in any way referred to or constituting a covenant would not only be to go beyond the letter of the seventh covenant, but would also be in direct conflict with the concluding clause of the assignment clause itself, reading: 'In the event the [surety] company be released from liability on account of said bond and suffer no loss thereunder, then this assignment shall become at once null and void.

¹ All italics in this opinion are ours.

"As the construction of the seventh covenant for which the surety company contends, would [not (?)] only be direct conflict with this provision in the assignment clause and render the same nugatory, but as the application is executed on a printed blank of the surety company itself, and must hence, under well-settled rules, be construed in case of doubt most strongly against it, I hence conclude that it did not operate to render available to the surety company the assignment of the payments under the Greeneville contract for the purpose of securing any liability to it from the asphalt company by reason of the execution of bonds in reference to contracts at other places."

[1-4] The question is, of course, one of intention of the parties. Although there is much to be said in favor of a contrary view, that taken by the District Court seems to us the better one (whether or not the assignment clause contained in the second bracket of the fourth covenant may itself be called a covenant), supported, as it is, by the prominent considerations (a) that the surety company drafted the contract, which must therefore be construed most strongly against it; (b) that the language of the second bracket of the fourth paragraph in express terms confines the security to the suretyship then and there applied for, viz. with respect to the Greeneville contract; (c) that the property assigned as security for the suretyship contract then applied for manifestly related only to property or supplies to be used in connection with the Greeneville contract, and presumably with the idea that it should be used by the surety company in the completion of that work, there being, indeed, no provision for enforcing that security, except in case of default under the Greeneville contract; and (d) that the remaining provisions relating to protection of the surety refer to bonds or undertakings, as distinguished from pledges of personal property, notwithstanding the fact that no such personal bond or undertaking was given by the construction company in connection with the Greeneville surety bond. As against these considerations, the broad and general language of the seventh paragraph, which makes no specific mention of the assignment in question, seems not enough to overcome the evidence of a contrary intent, otherwise so expressly declared. To hold otherwise would be to make the general prevail over the particular and specific, thus contravening the usual rule of construction.

We find nothing in the action of the town, following the service upon it by the surety company of the notice of assignment, which could give the surety company a prior lien for its protection from losses under other bonds.

The decree of the District Court is affirmed.

PRESIDIO MINING CO. et al. v. OVERTON et al. *

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3253.

1. Courts \$\infty\$ 99(2)-Dismissal of bill as law of the case.

Where the court sustains a motion to dismiss a bill for want of equity, with leave to amend, and the order is not appealed from, the insufficiency of the original bill is res judicata in subsequent proceedings in the case.

CORPORATIONS \$\infty\$ 190—STOCKHOLDER'S SUIT AGAINST MAJORITY STOCKHOLDERS.

While a minority stockholder is entitled to the protection of a court of equity against illegal and fraudulent acts of the majority, the misconduct of the majority must be clearly established to justify the court in such interference, and the fact that, in a suit by a minority stockholder for such relief on behalf of himself and all others desiring to join, no other minority stockholders come in, may properly be considered.

3. Corporations €=320(11)—Fraud of majority stockholders.

Allegations of the bill of minority stockholders of a mining company that transactions by which a stockholder and director acquired ore land adjoining that of the company, which was leased to the company, were pursuant to a fraudulent agreement between the majority stockholders, and created a constructive trust in favor of the company, held not sustained by the evidence, which showed, on the contrary, that the transactions were legitimate and beneficial to the company.

4. Corporations \$320(11)—Fraud of majority stockholders.

Allegations of minority stockholders of a mining company that salaries of officers and directors, who constituted the majority stockholders, were excessive, and so maintained pursuant to a fraudulent agreement, held not sustained by evidence showing that salaries had been the same for many years prior to the alleged fraudulent agreement, and had subsequently been reduced.

5. CORPORATIONS €==316(2) — FRAUDULENT ACTS OF OFFICERS BAISING CONSTRUCTIVE TRUST.

The general manager of a mining company, who was also a director, in acquiring adjoining ore land, which he leased to the company, held not to have acted fraudulently, so as to create a constructive trust in favor of the company, but openly and fairly, by offering the company the benefit of his purchase, and by his purchase and lease enabling the company to continue its operation at a profit.

Appeal from the District Court of the United States for the Southern Division of the Northern District of California.

Suit by W. S. Overton and another, on behalf of themselves and other minority stockholders, against the Presidio Mining Company and others. Decree for complainants, and defendants appeal. Affirmed in part, and reversed in part.

The parties will be designated as in the court below.

This is an action brought in the lower court by W. S. Overton and Carl A. Martin, on behalf of themselves and other minority stockholders of the Presidio Mining Company, against the Presidio Mining Company and Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat, and L. M. Doherty, holding the majority of the stock of the corporation, to recover for the corporation:

(1) Certain mining property, known as section 5, block 8, containing 640 acres, more or less, located in Presidio county, state of Texas, acquired by

Wm. S. Noyes, one of the defendants herein.

em For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes *For opinion on application for diminution of record, see 261 Fed. 1023, — C. C. A. —. Rehearing granted April 5, 1920.

(2) Moneys paid on account of said section 5.

(3) Moneys alleged to have been stolen from the corporation by L. Osborn, one of the defendants.

(4) The return of excessive salaries paid officers of the corporation.

(5) Any and all other illegal profits made by Wm. S. Noyes and the other individual defendants from or through business with the corporation, directly or indirectly.

(6) For an accounting and judgment according to the equities thereupon ap-

pearing.

(7) For injunctive relief and a receivership.

R. T. Harding, Henry E. Monroe, and Harding & Monroe, all of San Francisco, Cal. (I. J. Dunne, of San Francisco, Cal., of counsel), for appellants.

Wm. F. Rose, of San Francisco, Cal. (Charles Clyde Spicer, of Los

Angeles, Cal., of counsel), for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The Presidio Mining Company, named as one of the defendants herein, is a California corporation, incorporated under the laws of the state of California, with a capital of \$150,000, divided into 150,000 shares of stock, of the par value of \$1 each. The corporation has its home office in San Francisco. It owns and operates a lead-silver mine, comprising section 8, in Shafter, Presidio county, Tex.

The board of directors of the Presidio Mining Company, at the time of the commencement of this action, July 26, 1915, consisted of the defendants Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat. and L. M. Doherty. B. S. Noyes was president; Wm. S. Noyes, vice president and general manager; L. Osborn, secretary and treasurer.

Two of the defendants, Wm. S. Noyes and L. Osborn, have been connected with the corporation defendant since its organization in 1883; Noyes having sole charge of the mining operations of said corporation at Shafter, Tex., residing there until 1901, since which time he has resided in Oakland, Cal., and Osborn, as secretary of the corporation, having charge of the San Francisco office of the company until 1913. John W. F. Peat was president of said corporation from 1907 to 1913, and then assistant secretary, and later treasurer.

In December, 1912, Wm. S. Noyes owned 1,382 shares of stock standing in his name on the books of the corporation. L. Osborn was the largest stockholder, with 57,2131/3 shares in his own name and 2,-331½ shares as trustee. L. M. Doherty had, as agent of one India Scott Willis, 36,956\% shares, standing in her name. B. S. Noyes first became a stockholder in the early part of 1913. John W. F. Peat had

10 shares.

W. S. Overton, one of the plaintiffs herein, resides in Silver Spring, Md., and Carl A. Martin is a resident of the state of Kansas. Plaintiffs are the owners, respectively of 11,353 shares and 2,500 shares of the capital stock of the corporation.

The jurisdiction of the federal court is invoked on the ground of diverse citizenship. The original complaint was filed in the District Court July 26, 1915. It was there alleged that the plaintiff Wm. S.

Overton owned 11,353 shares of the capital stock of the corporation; that Carl A. Martin, the other plaintiff, owned 2,500 shares; that certain other minority stockholders, named and alleged to be represented by the plaintiffs, owned 8,900 shares; but it does not appear that either Martin or the other minority stockholders has or have appeared or signified any wish to be made parties to the action. It was alleged that the defendants own and control 97,933½ shares of stock of the corporation; that the stock held by Wm. S. Noyes and L. M. Doherty, consisting of 87,833½ shares, has been pooled for voting purposes; that Noyes was elected a director, vice president, and general manager of the corporation January 31, 1913; that the majority interest represented by said stockholders had wholly dominated the affairs of the corporation at all meetings of the stockholders and board of directors thereof continuously for more than 2 years then last past; that Noyes was the principal single individual dominating said majority interest.

It was further alleged that the Presidio Mining Company was the owner of certain mining property situated in Presidio county, state of Tevas, designated as section 8, containing 640 acres, together with certain appurtenances and improvements, including shafts, drifts, crosscuts, stopes, tramways, tracks, cars, mill milling machinery, and reduction works for the mining, milling, handling, and treatment of ores, etc.; that the defendant Wm. S. Noyes had been continuously for approximately 2 years then last past the record owner of section 5, containing 640 acres, more or less, adjoining and adjacent to section 8,

owned by the defendant the Presidio Mining Company.

It was alleged in substance that plaintiffs had been informed within two years then last past by the officers of the Presidio Mining Company that the company's mine in section 8 was almost worked out and could not produce enough ore of sufficient high grade to successfully operate the reduction plant on said section 8 at a profit; that it was necessary that section 5 be operated in connection with section 8, and by and through said defendant Wm. S. Noyes, for the purpose of producing high-grade ore to mix with the ores mined from section 8, and thereby keep the reduction works and cyanide plant in operation at a profit to

the company.

The plaintiffs alleged on information and belief that without said section 5 and the ores produced therefrom said mine and mill of the Presidio Mining Company would have had to cease operations; that said section 5 was the only property sufficiently near and accessible to section 8 from which to obtain a sufficient quantity of high-grade ore; that, well knowing all the foregoing facts, the directors of the corporation expended for improvements on the mill and milling plant of the corporation the sum of approximately \$100,000 within the 2½ years then last past without attempting to secure said section 5, and said directors willfully allowed, in derogation of the rights of the plaintiffs and the minority interest in said corporation, said Wm. S. Noyes to obtain the same from the Silver Hill Mill & Mining Company in the manner and for the purposes set forth in the complaint; that said Noyes had personally for his own interest, and in derogation of the rights of plaintiffs, made large sums of money from his transactions

in connection with said section 5 and otherwise with the Presidio Mining Company, while conducting its affairs as its manager and director thereof; that he had secured to himself the said section 5, well knowing that in equity and good conscience the said section 5 should have been purchased by and transferred to the Presidio Mining Company.

It is alleged that said Wm. S. Noyes had been the record owner of said section 5 for more than 2 years prior to the commencement of the suit; that said ownership had been acquired by him by means of certain transactions between the said Noyes and the Presidio Mining Company, involving, among other things, the leasing of said sec-

tion 5 to the Presidio Mining Company.

The transactions set forth in the complaint include, among other things, an agreement dated January 25, 1913, wherein the Silver Hill Mill & Mining Company leased to the Presidio Mining Company for the term of one year the tract of land described as section 5, with the right to enter upon said land for the purpose of working, mining, and extracting silver-bearing ores and other minerals that might be found therein. The consideration for this lease was the payment by the lessee to the lessor of 50 cents per ton for all ores taken from the mine. It was provided that the lease should terminate on 30 days' notice in writing, given by either party to the other party to the contract.

At a meeting of the board of directors of the Presidio Mining Company held February 15, 1913, all of the directors of the company named as defendants in this action being present, the following resolution was adopted:

"Whereas, at the request of this corporation, Wm. S. Noyes has expended large sums of money and has rendered valuable services to this corporation outside the lines of his employment, in negotiating and securing for this corporation that certain lease from the Silver Hill Mill & Mining Company to this corporation dated January 25, 1913, and set forth in these minutes on pages 28, 29, and 30, and will render further valuable services to this corporation by securing to this corporation a continuation of said lease, thereby securing large profits to this corporation: Be it therefore resolved that this corporation do pay said Wm. S. Noyes, as compensation for said services heretofore rendered and hereafter to be rendered, the sum of forty-five thousand (\$45,000) dollars in the manner following, to wit: Eleven thousand (\$11,000) dollars forthwith, the further sum of ten thousand (\$10,000) dollars ninety days from this date, the further sum of twelve thousand (\$12,000) dollars five months from date, and the further sum of twelve thousand (\$12,000) dollars six months from date: Provided that, if the earnings of this corporation shall not be sufficient to make said deferred payments at the respective times above provided, then said deferred payments shall be made to said Noyes as fast as the earnings of this company will permit. The president and secretary are hereby authorized and directed to make the payments herein provided and to take receipts therefor as made.'

The foregoing resolution is hereafter referred to as the "bonus resolution."

At a meeting of the board of directors of the corporation held November 19, 1913, the following resolution was adopted:

"Whereas, this corporation made and entered into a contract of lease with the Silver Hill Mill & Mining Company, bearing date the 25th day of January. 1913, and set forth in these minutes on pages 28 and 30; and whereas, by resolution adopted on the 15th day of February, 1913, and set forth in these minutes, pages 32 and 33, this board resolved to pay W. S. Noyes the sum of fortyfive thousand (\$45,000) dollars in the manner therein specified as a bonus or compensation for procuring said lease; and whereas, it was the intention of this board that by the arrangements above recited this corporation should make a large profit from the ores to be taken by it from the mine of said Silver Hill Mill & Mining Company, and that from such profit, and not from its other resources, this corporation should pay said bonus or compensation to said Noyes; and whereas, said Noyes offered to this corporation the opportunity to purchase said Silver Hill mine at the cost thereof, but this company was unable to purchase the same and declined to do so because of its financial inability, and in order to secure to this company the opportunity to make a profit from said mine the said Noyes thereafter purchased the entire capital stock of said Silver Hill Mill & Mining Company, and has caused said corporation to be dissolved and the said mine to be conveyed to him, but said Noyes declined to continue said lease, for the reason that the profit made by this company out of ores taken from said mine up to this date has been unduly large and unfair to said Noyes, and he now offers to enter into the lease set forth

In the lease referred to in the foregoing resolution it was provided that the Presidio Mining Company would at once enter upon section 5 for the purpose of working and extracting therefrom all silver-bearing ores and other minerals that might be found therein, and would pay to William S. Noves one-half of the net value of any and all ores that had been or might be taken from said mine by the Presidio Mining Company and reducing in its mill, said net value to be determined as in the agreement provided, viz.: A record should be kept of the number of tons of ore taken by the Presidio Mining Company from section 5 and the average assays thereof in the stopes from which it is taken; a similar record should be kept of the ores taken by the Presidio Mining Company during the same period from its own mine (section 8), and from the two records so obtained and kept the average stope assays of all the ores milled from both of said mines for a given period should be reduced. After the ores had been milled the average extraction in fine ounces of silver should be ascertained, and the percentage of the average stope assays actually extracted should be calculated and determined, and the gross value of the ore taken during such period from section 5 should be deemed to be the average stope assay multiplied by the percentage of extraction. From such gross value the actual cost of mining and milling, less the sum of \$1 per ton for the small cost of mining in section 5, as compared with the mine of the Presidio Mining Company (section 8), should be deducted, and the difference should constitute the net value of the ores taken during the period by the Presidio Mining Company from section 5. Freight, expressage, insurance, and refinery charges upon the bullion obtained from all such ores was to be treated as a part of the cost of reduction.

It was further provided that, in view of the large profit already made by the Presidio Mining Company from the ores theretofore taken from section 5, it was agreed that such sums as had been paid to Wm. S. Noyes under and by virtue of the resolution of February 15, 1913 (the bonus resolution), and all royalties (50 cents per ton) theretofore paid on account of the lease of January 25, 1913, from the Silver Hill Mill & Mining Company, should be retained by the

parties to whom they had been paid, and should be treated as a payment to Wm. S. Noyes on account of the proportion of net profits from said mine agreed to be paid by the Presidio Mining Company; it being the true intent of the agreement that an equal division of the net profits in the agreement specified would be a fair and just price to be paid Noyes for the ores so bought of him, the said Noyes furnishing the ores and the Presidio Mining Company reducing the same without the investment of any capital.

It was further agreed that the Presidio Mining Company would monthly render to Wm. S. Noyes a true and exact account of all ores extracted from said mine (section 5) during the preceding calendar month and a statement of the profit derived therefrom, and within 10 days after said account had been rendered would pay to Noyes the amount due him under the provisions of the agreement for the

month for which the account had been rendered.

It was further agreed that all ores that had been taken out of the Silver Hill mine (section 5) by the Presidio Mining Company should be deemed to have been taken out under the provisions of the agreement then being made, and should be settled for by the Presidio Mining Company as provided in the contract, and the contract of lease by and between the Silver Hill Mill & Mining Company and the Presidio Mining Company, dated January 25, 1913, should be and the same was declared canceled, annulled, abrogated, and set aside. It was further provided that the agreement then being made should terminate on 30 days' notice given in writing from either party to the contract.

It was alleged upon information and belief that the corporation and its stockholders had been defrauded out of said section 5, and in addition thereto had suffered the loss of and had been pillaged in the sum of upwards of \$150,000. The complainants asked for an injunction restraining and preventing the directors and officers of the corporation defendant from the commission of any or similar acts as in the complaint alleged, and from further carrying on the business of the corporation; that the salaries of the directors and officers be cut off, and they be restrained from collecting their salaries, pending the determination of the action, and from paying out money of the corporation on any account whatsoever; the defendants be restrained from selling their stock in the corporation; that the directors and officers of the corporation be removed from office; that Wm. S. Noves be restrained from transferring title to section 5 to any person whatsoever, and that he be compelled to transfer said section 5 to the defendant, the Presidio Mining Company, upon such terms as equity might require; that an accounting be had and a receiver appointed to take charge of the property and affairs of the corporation and for restitution in the sum of \$150,000.

Upon the filing of this complaint an application was made to the court by the plaintiffs for the appointment of a receiver of the corporation and for an injunction pendente lite. These motions were met by the defendants by a motion to dismiss the bill of complaint. Upon the hearing of these motions before Judge Dooling, the court denied

the application for a receiver and for an injunction pendente lite; the court holding that the bill did not show that the property bought by the defendant Noyes was so bought with the money of the defendant Presidio Mining Company. Nor did it show that the lease between said defendants was not a profitable one for the mining company. Nor did it show that defendant Noyes was not the owner of the leased property, or that the defendant company had any legal or equitable interest therein. "The most that can be said of this bill," said the court, "is that it avers the payment of extravagant salaries to its officers."

[1] The motion to dismiss the bill was granted unless the plaintiffs within 20 days filed an amended bill stating a case for granting equitable relief. No application was made for a rehearing, and no appeal was taken from the decision. The insufficiency of the original complaint thereupon became res judicata in the subsequent proceedings before Judge Van Fleet. Cole Silver Mining Co. v. Virginia & Gold Hill Water Co., 1 Sawy. 685, 689, Fed. Cas. No. 2,990; Giant Powder Co. v. Cal. Vigotit Powder Co. (C. C.) 5 Fed. 198, 202; Preston v. Walsh (C. C.) 10 Fed. 316; Oglesby v. Attrill (C. C.) 14 Fed. 215; Reynolds v. Iron Silver Mining Co. (C. C.) 33 Fed. 354, 356; Shreve v. Cheesman, 69 Fed. 785, 790, 16 C. C. A. 413; Taylor v. Decatur M. & L. Co. (C. C.) 112 Fed. 449; Plattner Implement Co. v. International Harvester Co., 133 Fed. 376, 378, 66 C. C. A. 438; United States v. Rizzinelli (D. C.) 182 Fed. 675, 678; Aurora City v. West, 7 Wall. 82, 89, 19 L. Ed. 42. As said by Judge Field in the first-cited case:

"It would lead to unseemly conflicts, if the rulings of one judge upon a question of law should be disregarded, or be open to review by the other judge in the same case."

The questions involved in this appeal will, however, be determined upon their merits as they appear in the whole case, and not upon any technical rule of procedure. But we may properly inquire how far the insufficiency of the original complaint has been overcome by amendments, supplemental allegations, and proof. By this method we shall come to a clear understanding of the present controversy and

how it has developed from the original complaint.

In an amended complaint filed September 25, 1915, it is alleged that the minority stockholders, specifically set forth in an exhibit attached to the complaint, were not made parties to the action stated in the amended complaint, for the reason that many of them were out of the jurisdiction of the court; that the redress and relief demanded by the plaintiffs were of common interest to the minority stockholders of the corporation; that the suit was brought by the plaintiffs for the benefit of the minority stockholders and for any who might desire to unite therein. The minority stockholders mentioned in the exhibit are represented as owning 29,313½ shares of stock, but as before stated they have not signified any wish to be made parties to the action or any desire to unite therein, and they are not named in the title of the amended complaint. We must therefore assume that they, together with the minority stockholders representing the 8,900 shares

mentioned in the body of the original complaint, have declined to be parties to the action or unite therein. Whether Carl A. Martin is properly a plaintiff on his own behalf we do not know. Nothing appears in the record from him to support such a claim, but for the present purpose it may be assumed that he is properly named as a plaintiff in the case.

The arrangement of the stockholders of the corporation may then be classified as follows: The plaintiffs, W. S. Overton, holding 11,353 shares and Carl A. Martin holding 2,500 shares. The defendant stockholders are Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat, and L. M. Doherty, holding, it is alleged, 97,933½ shares of the stock of the corporation. This leaves holdings amounting to 38,213½ shares not represented by any active participation in this action.

[2] We then have the plaintiffs holding 13,853 shares, the defendants holding 97,933½ shares, and certain minority stockholders, representing 38,213½ shares, who have not intervened in support of plaintiffs' cause of action, leaving the inference that they are not in accord with plaintiffs' complaint. Carson v. Allegany Window Glass Co. (C. C.) 189 Fed. 791, 804. As said by the Court of Chancery of New Jersey in Stokes v. Knickerbocker Ins. Co., 70 N. J. Eq. 518, 523, 61 Atl. 736, 738:

"This important fact [the nonintervention of a large number of stockholders] cannot be overlooked in determining the question whether the dissensions in the company have reached the point demanding interference. Such a contest as this, provoked by a minority of stockholders, would constantly arise if the court should say that the protest of every dissatisfied stockholder was a basis for such internal dissensions as to warrant a receivership."

The minority stockholder is entitled to the protection of a court of equity against the illegal and fraudulent acts of the majority; but the misconduct of the majority must be clearly established to justify the court in such interference. Here, as elsewhere, fraud is not presumed, but must be proved. Lewisohn v. Anaconda Copper Min. Co., 26 Misc. Rep. 613, 56 N. Y. Supp. 807, 818.

[3] The original complaint failed to state a case for granting equitable relief, first, because it did not appear that the property bought by the defendant Noyes (section 5) was bought with the money of the defendant Presidio Mining Company. In the amended complaint the transactions set out in the original complaint are restated, including the lease of January 25, 1913, wherein the Silver Hill Mill & Mining Company leased to the Presidio Mining Company section 5 for the term of one year, the so-called bonus resolution of February 15, 1913, and the lease of November 13, 1913. In the original complaint it was alleged that the majority interest had wholly dominated the affairs of the corporation, and that Noyes was the principal single individual dominating said majority interest. In the amended complaint it is alleged that the majority interest does not wholly dominate and control the officers of the corporation, but that Wm. S. Noves is the principal single individual dominating said majority interest, and has at all times from about the middle of December, 1912, continuously controlled, and still controls and dominates, the action of the majority stockholders. In a supplemental bill to the amended complaint, filed March 16, 1916, the purchase of section 5 by Noyes is set forth in the following terms:

"That in the latter part of 1912 defendant Wm. S. Noyes negotiated for and secured an option on all except four (4) shares of the 1,500 shares of capital stock of the Silver Hill Mill & Mining Company in Texas. That said Noves, after securing the option to purchase said capital stock controlling section 5, and before paying anything therefor, went on and into said section 5 with E. M. Gleim, assistant to Wm. S. Noyes, and ascertained that there were from 10,000 to 20,000 tons of rich silver-lead ore immediately available, worth over \$100,000. That, after computing the value of said ore, said Wm. S. Noyes borrowed the money to pay for the stock of the Silver Hill Mill & Mining Company then held by him under option. That he borrowed \$10,000 from the Marfa National Bank, and gave as collateral security his stock of the Presidio Mining Company. That he borrowed \$10,000 from one Benton Bowers, residing in Oregon, and gave his promissory note for \$5,000 to Harry B. Young in the premises. That said Benton Bowers, although a resident of Oregon, sold at that time and does now sell supplies to the Presidio Mining Company, receiving \$600 to \$1,200 each month from said corporation therefor. (Complainants further aver that all supplies purchased at the mine are purchased without open competition.) That said Wm. S. Noyes, immediately on securing said stock of the Silver Hill Mill & Mining Company and the control of section 5, made a lease with the Presidio Mining Company, dated January 25, 1913, as set forth in the amended bill, marked Exhibit B.

In the course of the trial Wm. S. Noyes, testifying on behalf of the defendants, referred to the "bonus resolution," providing that the Presidio Mining Company pay him \$45,000 for negotiating and securing leases for section 5, when the following proceedings took place:

"Mr. Harding (counsel for defendants): It may be stipulated that the total cost of section 5 to the defendant Wm. S. Noyes was \$24,009.33?

"Mr. Rose (counsel for the plaintiffs): Yes.

"The Court: Does your stipulation go to the extent that Mr. Noyes paid that money out of his own pocket? Your claim is that it was the money of the corporation.

"Mr. Rose: Our claim is this—our whole contention is this: That Mr. Noyes borrowed the money and gave his personal notes, for instance, one for \$10,000, another for \$10,000, and another one for \$5,000, and with that money he paid to the stockholders of the Silver Hill Mill & Mining Company the sum of \$24,000; but that the notes themselves which he gave, from which these moneys were paid, were not paid until a year or a year and a half thereafter that particular period, and the moneys were taken from the corporation."

Were the moneys used to pay these Noyes notes taken from the treasury of the corporation? The evidence in the record is that it was not so taken. Mr. Noyes testified on this subject as follows:

"In the purchase of this stock [stock of the Silver Hill Mill & Mining Company] I borrowed \$10,000 from Benton Bowers on January 7, 1913, and \$10,000 from the Marfa National Bank. I gave my note in part payment to Henry Young for \$5,000. I repaid the money that Benton Bowers loaned me on October 1, 1913, by drawing \$6,000 from an account I had in New York, through J. Barth & Co. here, and drew my check out of my bank account here for the balance, with interest, \$4,584.15. The loan from the Marfa National Bank of January 25th, I paid on the 19th of August, 1913, by a draft on the Anglo-London & Paris National Bank, on New York, to the order of B. S. Noyes, and indorsed to me. That was a loan I made from my brother, and I paid the Marfa National Bank loan. The note to Harry B. Young I paid by draft on Ashland, Or., for \$5,000. It was another loan I made from Mr. Bow-

ers. The second loan from the Marfa National Bank I paid October 4th, by a telegraphic transfer from a sister of mine in New York, who had sold some property for me, and drafts for the balance from the Anglo here. Then those renewals of my brother I paid November 16, 1915. The one from Mr. Bowers, borrowed November 26, 1913, I repaid September 25, 1915.

The court, prosecuting further inquiry upon this subject, asked the witness Noves:

"What note was that you paid with the funds you got from New York? A. The Benton Bowers note. In paying that note I got \$6,000 of the funds from my banking house in New York, Herzog & Glacier. I went to J. Barth & Co. here, and asked them to get a telegraphic transfer from Herzog & Glacier; they got the telegraphic transfer from them and gave me a check on their bank here, which I have here-showing the source of that money-on the Bank of California. That telegraphic transfer was sent over their private wire; it was not the ordinary form of transfer.

"Mr. Harding: I offer this check in evidence.

"Mr. Rose: No objection.

"(Check introduced in evidence.)

"Mr. Harding: We will bring a witness from J. Barth & Co. here to show the transaction.

"Mr. Rose: We do not question this transaction. We admit the fact of this transfer of money in this manner."

This testimony stands uncontradicted, and shows beyond question that Noves gave his notes in the first instance to secure the money and credit to buy the stock of the Silver Hill Mill & Mining Company, owning section 5, and that he subsequently paid these notes, not out of the funds of the corporation, but out of his own pocket, and this fact is finally and conclusively found by the court in the interlocutory decree, which, while it determines that Wm. S. Noyes is a trustee for said section 5 for the benefit of the Presidio Mining Company, provides that such title is-

"subject, however, to the payment of its purchase price of \$24,009.33, and taxes or assessments paid by him on section 5, or other moneys properly paid by him on account of section 5, and that he be allowed interest on all of said sums from the date of payments made by him at the rate of 7 per cent. per annum."

If the money paid by Noyes for section 5 is to be refunded to him as directed by the interlocutory decree, it follows as a matter of course that the money was paid by Noyes out of his own funds, and not out of the funds of the corporation, nor out of any funds received from the corporation in any other than in a legitimate and proper business way. As we shall see later, he did receive payments for ores taken from section 5 and sold to the Presidio Mining Company, but no trust can be founded upon such transaction.

The second particular in which the original complaint failed to state a cause for equitable relief was the failure to show that the lease of section 5 by the Presidio Mining Company was not profitable for the company. In the amended complaint it is alleged that the leases of January 25, 1913, and November 19, 1913, were of no value to the Presidio Mining Company, and that the payment to Noyes of \$45,000 under the "bonus resolution" was exorbitant, excessive, illegal,

and without any consideration whatever.

As the royalties paid to Noyes by the Presidio Mining Company under the lease of January 25, 1913, and all the payments made to him by the corporation under the so-called "bonus resolution" of February 15, 1913, were all taken up, merged, and accounted for in the lease of November 19, 1913, it follows that the questions to be determined must find their final solution under the terms of the lease of November 19, 1913, and not under the terms of the lease of January 25, 1913, or the terms of the so-called "bonus resolution" of February 15, 1913; that is to say, we must in the end measure the transactions of the parties for the whole period by the terms of the lease of November 19, 1913, and in view of all the surrounding circumstances. It therefore becomes necessary to inquire: What were the circumstances attending the dealings of the parties prior to November 19, 1913? Upon what terms did Noves deliver ores from section 5 to the Presidio Mining Company during this time, as shown by the books of account kept by the company? The answer to this, and other questions of like character, was properly the work of an expert accountant, and it so appeared to the trial court, for during the hearing, and when the testimony on behalf of the defendants was approaching a conclusion, the court, of its own motion announced its purpose to designate a public accountant to examine the books of the company from 1906 down to the date of the hearing.

The court thereupon designated George T. Klink, of Klink, Bean & Co., certified public accountants of San Francisco, to make such an examination. The court stated that Mr. Klink was a very fair-minded man, and his results had always been satisfactory to the court, and as far as the observation of the court had gone such results were very close and very correct. The designation of Mr. Klink was accepted by the parties to the action, and the court thereupon directed that the accountant should be furnished with everything in the way of data that would enable him to determine as to the computation—the method and system of computation—under which payments had been made to Noyes for ore taken from section 5, whether such computation had been upon proper principles and calculated to produce correct results; that the accountant should examine the books, records, files, and vouchers of the Presidio Mining Company, and make a general audit of the same, commencing with April 18, 1906, to date, and report to the court the results of such examination. The court further directed that Mr. Klink should be notified that his appointment was by the direction of the court, and not by either side. In the order of the appointment the court directed that counsel for either of the parties to the action might direct the attention of the accountant to any special matters for examination they might desire. Accordingly, under the stipulation of the parties, more than 30 questions were submitted to the accountant by way of memoranda for investigation.

The accountant made the examination and reported as directed under the name of Klink, Bean & Co. To this report no exceptions were taken by either party. The report is in full in the record. It responds to all the directions of the court, and answers all the questions submitted to these official accountants by the stipulation of the parties.

It appears from this report that the following question was submitted to the accountants by the stipulation of the parties:

"The operating profit on ore taken from section 5 from January 1, 1913, to December 31, 1915."

In answer to this question the accountant reported:

"The operating profit on ore taken from section 5 from January 1, 1913, to December 31, 1915, is as follows (Schedule 5):

1913		78,837.82

1915		75,004.18

\$226,231.72"

By reference to Schedule 5 attached to the report, we find that it is a monthly detailed account, commencing with January and ending December 31, 1913, made to owners of section 5 under agreement of November, 1913. For the period immediately under consideration, commencing January 1, 1913, and ending October 31, 1913, the tons of ore mined from section 5 aggregated 5,030 tons, and the profit on that ore was \$58,232.84. Under the terms of the lease of January 25, 1913, Noyes would have been entitled to receive for that ore only 50 cents per ton, or \$2,515 on the 5,030 tons delivered from section 5, while the Presidio Mining Company was entitled to retain the entire profit, or \$55,717.84 less \$2,515 due Noyes, or a net of \$53,502.84. The schedule, however, credits section 5, beginning with February, 1913, and ending October 31, 1913, with a 50 per cent. royalty, amounting to \$29,889.20, on the net receipts, as provided in the lease of November 19, 1913, instead of 50 cents per ton, or \$2,515, as provided in the lease of January 25, 1913; but if we add to this latter sum the amounts paid to Noyes under the "bonus resolution" of February 15, 1913, for ore delivered, amounting to \$24,500, the total sum paid to Noyes was \$27,-015, showing that the payments made to Noyes for ore delivered from section 5 from February, 1913, to October 31, 1913, was in accordance with the understanding subsequently incorporated into the lease of November 19, 1913.

But the point to be noted in this connection is not merely that the payments were so made, but that the payment of 50 cents per ton to Noyes for ore delivered from section 5, if he was to receive no other payments, was manifestly unfair and unjust to him, first, because it did not express the real agreement of the parties; and, second, because it had no just or proper relation to the actual value of the ore delivered. It follows that the recitals in the lease of November 19, 1913, concerning the terms of the lease of January 25, 1913, "that the profit made by the Presidio Mining Company out of the ores taken from section 5 up to that date had been unduly large and unfair to Noyes," were absolutely correct, if limited to the terms of that lease, and justified Noyes in terminating that lease, and the Presidio Mining Company in entering into a new lease, that would state the actual facts and correctly represent the rights of the parties thereto.

Turning again to the report of the official accountants, we find, in Schedule 4 attached to that report, that during the same period the

Presidio Mining Company took from its own mine (section 8) 8,987 tons of ore. The average net value per ton of all the ore mined by the Presidio Mining Company (section 8 and section 5) for the year 1913 is given as \$11.156 per ton; that from section 8 is given as \$7.7048 per ton, while that from section 5 is given as \$18.574 per ton. The average operating cost per ton for all the ore milled by the Presidio Mining Company during that year is given as \$8.952. The average value of a ton of ore taken from section 8 during the year was therefore \$1.207 less per ton than the operating cost, while the average value of the ore taken from section 5 was \$9.622 per ton in excess of the operating cost per ton. These values for the whole of the year 1913 may be applied approximately and for the present purpose to the period from January 25, 1913, to October 31, 1913. From these productions of ores and their values we are authorized to draw the following conclusions:

It was the mixing of the ores from section 5 with the ores from section 8 that made the mining and milling operations of the Presidio Mining Company profitable. Without such ores the operations of the company would have been unprofitable. The latter had a mill, but no ore in section 8 of sufficient value to make the working of the plant under the pan-amalgamation process profitable. Noves had ore in section 5 of sufficient value, but he had no mill to reduce the ore, and the evidence was that the building of an independent mill for section 5 alone was not justified by the amount of ore in sight. The installation of the cyanide process in the Presidio plant, completed in July, 1913, made the operation of the plant more profitable after that time, but did not affect the comparative values of the ores taken from the two sections. What, then, could be more practicable and profitable than to bring these two properties together, by an arrangement or agreement such, as we find in the lease of November 19, 1913, wherein it was agreed that the Presidio Mining Company would pay Noyes one-half of the net value of all the ores taken from section 5? The advisability of bringing these two properties together is admitted by the plaintiffs, and is made the basis of this suit.

The failure in the second particular mentioned by Judge Dooling on the part of the plaintiffs to show a case for granting equitable relief under the original bill was because it did not appear that the lease of November 19, 1913, was not profitable. This defect in the amended complaint was overcome by allegations in the amended complaint that it was not profitable for the company, but it appears from the evidence that section 5 was so profitable, necessary, and advantageous to the company in working section 8 that it is claimed by plaintiffs and alleged in the amended complaint that Noyes was charged with the duties of purchasing section 5 for the company, and his failure to do so is alleged as fraud upon the company. As this alleged fraudulent feature of the transaction is the controlling question in issue in this case, and is mainly a question of fact, we will defer its consideration as a question of law until we have passed upon certain questions of fact relating to the good faith of Noyes in his dealings with the company.

The third ground of failure of the original bill to state a case for

equitable relief was that it did not show that Noyes was not the owner of section 5. That question has already been disposed of by the finding of the interlocutory decree and the proof that Noyes is and has been the owner of section 5 since May 26, 1913.

The fourth ground of failure of the original bill to state a cause for equitable relief was that it did not appear that the Presidio Mining

Company had any legal or equitable interest in section 5.

The object of this suit is to establish a constructive trust in Noves for the ownership of section 5 for the benefit of the Presidio Mining Company. The court below in its interlocutory decree found that Noves purchased section 5 with his own money. We concur in that finding, to which we add a finding that the purchase was made after the Presidio Mining Company had refused to make the purchase because of its financial inability, as recited in the lease of November 19, 1913. But the plaintiffs charge Noves with having acted in a fiduciary capacity in the purchase, because of his relation to the company as an officer and director, and that his action was fraudulent. It is further charged that he obtained the title in his own name through fraud, misrepresentation, and concealment, and that this fraud and concealment was participated in by the other officers and directors of the company and its majority stockholders. These allegations are denied by the defendants under oath. The court below found this charge to be true, and based its decree upon this finding.

The first matter to be considered in connection with this charge is the so-called "bonus resolution" of February 15, 1913, with respect to which the plaintiffs charge that the payment of the sum of \$45,000 was exorbitant, excessive, illegal, and without any consideration whatever. The first observation to be made in considering this charge is that it is not true as to the amount or in a lack of consideration. The sum of \$45,000 was never paid to Noves under the resolution, and was never claimed by him, either directly or indirectly. There was paid to him, on account of ores delivered by him to the Presidio Mining Company, the following sums: February 24, 1913, \$6,000; February 28, \$5,000; March 18, \$5,000; May 15, \$1,000; September 6, \$3,500; October 1, \$3,000; October 14, \$1,000—making a total of \$24,500. The resolution specifically provided that these payments should be made out of the earnings of the corporation; but, if such earnings should not be sufficient, then they should be paid as fast as the earnings of the company would permit. As the immediate prospective earnings of the company were to be from ore taken from section 5, to be delivered to the company by Noyes, he was to be paid the moneys specified in the resolution only out of the receipts of the Presidio Mining Company from ores to be delivered to the company by him. No other source of payment was provided or available. B. S. Noyes, the president of the Presidio Mining Company from January 29, 1913, testified concerning this transaction as follows: He was asked by counsel:

"Q. I will direct your attention, Mr. Noyes, to the meeting of the board of directors, February 15, 1913, at which meeting there was a resolution passed authorizing a payment, for services rendered to William S. Noyes, of the sum of \$45,000, \$11,000 immediately, and other sums thereafter. I will ask you whether you can tell us the circumstances and facts leading up to the passage

of that resolution. A. There had been a discussion between William S. Noyes, Mr. Osborn, Mrs. Willis, Miss Doherty, and myself, stockholders of the company, as to the putting in of a cyanide plant, whether it could be done or not, and what disposition would be made of section 5, which Mr. William S. Noyes had bought. Mr. Noyes stated that the company could have section 5 at cost then or thereafter, and it was informally decided prior to the date of that meeting that the company could not take it, and the suggestion had been made and assented to by all parties that, as long as Mr. Noyes carried it, the company would work the ore and settle with him on a basis of one-half of the net. At that time, now coming to February 15th, the company had been in possession, and the terms provided for in that resolution of February 15 were a sort of guess at what one-half of the net would amount to during the period covered by the dates given in that resolution."

William S. Noyes testified, among other things, concerning the passage of the resolution, as follows:

"The company had agreed—that is, the directors of the company had agreed—with me that we should divide the net equally. We all thought it was better that they should have some authority for paying me. The conversations led up to that directors' meeting. We had conversations on several occasions; these conversations led up to the passing of the resolution.

"Q. On what basis, if any, was that basis of \$45,000 arrived at? A. It was as close an estimate—it was an estimate of what the half of the net would probably amount to during the few succeeding months that it was intended to be in force,"

In view of this and other evidence to the same effect of an understanding between Noyes and the directors of the Presidio Mining Company, had prior to February 15, 1913, that the net proceeds of the ore taken from section 5 should be divided equally between Noyes and the company, why was it the terms of the lease of January 25, 1913, were not then changed and made to conform to that understanding? The explanation is given in the evidence relating to the situation of affairs at that time of the Silver Hill Mill & Mining Company, the owner of section 5. That corporation had no mill; the mine had been shut down since 1897. Noyes was familiar with the mine, and had been its superintendent. In November, 1912, he learned that section 5 was for sale. The engineers for Lewisohn Bros., a firm of New York operators, had turned it down after some work of exploration, mainly because the corporation had no mill. Noves visited the mine with E. M. Gleim, the superintendent of the Presidio mine, in the last days of December, 1912. They examined the ore body, and found that the engineers for the New York people had run two drifts and opened up an ore deposit that was not known when Noyes was last in the mine. The ore exposure was about 80 feet in the drifts, 50 or 60 feet in a crosscut, and 30 feet in a winze.

Noyes made a rough guess that this deposit might contain 10,000 or 20,000 tons of ore. By the pan-amalgamation process then in operation at the Presidio mine, he estimated a profit of \$10,000. But by the cyanide process, which he proposed to install at that mine, he estimated the profit from that ore at \$50,000. He immediately took up options which he had previously secured on 1,244 shares of the Silver Hill Mill & Mining Company stock and purchased the same. The corporation had outstanding 1,500 shares of stock. This purchase by Noyes left 256 shares outstanding in other parties. One W.

L. Lane, of Houston, Tex., owned 188 shares, and friends of Lane owned 64 other shares, making 252 shares, leaving 4 shares which Noyes at that time had not located. Noyes secured a verbal agreement with Lane for the purchase of the 252 shares standing in his own name and in the name of his friends.

Lane had also an interest in the ore of section 5, other than his stock interest. This interest was a reservation of 5 per cent. of all the ore, oil, or mineral that might be taken from section 5. It was Noyes' purpose to secure all the shares of stock of the company, the Lane 5 per cent. interest in the ore of the mine, and discharge all obligations of the company—secure a transfer of section 5 to himself, including the Lane 5 per cent. interest in the ore, and dissolve the corporation. His explanation of this transaction is given in his testimony as follows:

"At that time I had bought and paid for 1,244 shares of the stock. I had a verbal promise from Mr. Lane to trade with me for 252 shares more, 188 of which belonged to him, and 64 to some of his friends; but I had nothing but this verbal promise. There were also 4 shares out that I could not find, and without them all I could not dissolve the corporation. I did not want to make a contract which might induce these people to go back on their word with me, or put the price to an unreasonable figure. I knew that whatever they asked me I would have to pay, so I told the directors I could not deal with them in an individual capacity, and to let the other stand until I should be able to dissolve the corporation. These other parties had given me a verbal assurance to deal with me upon a certain price at that time—all but 4 shares. Mr. Lane had said: 'I will trade with you the next time I come up here; I cannot do it now, as I have to leave.' They had not named any price. I made an offer, the same as I made the others, \$13 and some cents a share."

The corporation had five directors. Lane was a director. Noyes put in the other four, and the mine was operated in accordance with the understanding with the directors of the Presidio Mining Company. Noyes finally secured the Lane stock and that of his friends, also Lane's 5 per cent. interest in the ore in section 5 and the four other shares of the outstanding stock of the company. The obligations of the corporation were thereupon discharged, section 5 transferred to Noyes, and the corporation dissolved; but this was not fully accomplished until May 26, 1913. It was to bridge this period required to secure all the stock and outstanding interests in the Silver Hill Mill & Mining Company, and the necessary change in the legal ownership of section 5, that the resolution of February 15, 1913, was adopted.

The testimony of Wm. S. Noyes upon this feature of the transaction was as follows:

"The bonus resolution of February 15th was drawn by Mr. McLeod, an attorney in the Mills Building. My brother overlooked it; I think it was at the suggestion of the board members. I had told them that I would like to draw more money under that verbal understanding than I was; that I ought to have one-half of the net; that as I could not make the contract individually—that is, I could not lease section 5 to them until I could dissolve the corporation—there would have to be some means devised. I put that in the hands of counsel, and that was their product."

As stated elsewhere in the evidence, it was a temporary arrangement to accomplish a temporary purpose. That the ore exposed in section 5 was a sufficient security for the payments to be made to Noyes un-

der the resolution appears from the testimony of E. M. Gleim, the superintendent of the Presidio Mining Company. He testified:

That he had charge of section 5 on behalf of the Presidio Mining Company during "January, February, March, and April, 1913; * * * that the gross value of the ore according to the assays delivered to the Presidio Mining Company at the end of February, 1913, was \$41,474.92"; that they "recovered about 59 per cent. of the amount of the assays," making a "gross value of \$24,470," from which should be deducted the "operating expenses," which he did not state; but he did state that the "ore body contained a considerable amount of lead sulphide, some of which could be sorted out, all that they could, and kept it on hand waiting for the cyanide plant to start, rather than ship it to the smelter at El Paso. It was finally worked by the cyanide plant; * * * it would have paid to ship it to El Paso; * * * it was a very high grade sulphide."

He testified further that section 5 "furnished the high grade ore with which to grade up the low grade ore from section 8." This testimony establishes beyond question that the acquisition of ore from section 5 was highly advantageous to the Presidio Mining Company; that the situation called for prompt action, and that it was the object of the resolution of February 15, 1913, to secure this high grade ore without waiting for the delay and possible complications incident to the purchase of all the stock and interests in the corporation and a change of title from a corporation to an individual. In other words, under the terms of this resolution Noves gave the Presidio Mining Company the immediate benefit of his ownership of nearly all the stock of the corporation owning section 5. The security of the Presidio Mining Company for the agreement was ample, and rested in the fact that the payments were to be made out of the earnings of the company, and from no other source; that the ore already exposed and broken down was of a high grade, was in sight and available for delivery, to enable the company to make the payments at the dates mentioned in the resolution.

But there appears to have been a still further consideration for the resolution. In the fall of 1912 the Presidio Mining Company had a large reserve of ore running 14 to 16 ounces, but that ore could not be worked by the pan-amalgamation process, and the company faced the situation of putting in a cyanide plant or being compelled to abandon the mine. Noves consulted the other owners and holders of the 97,000 shares of stock of the company in regard to the installation of a cyanide plant. They said they would like to see him do it, but without an assessment; that they were unable to pay an assessment. They suggested that Noves make an estimate of the cost, and then see if he could not borrow the money from his friends. He went down to the mine, to look over the situation and see what could be done. He supposed there was \$15,000 or \$17,000 in the treasury of the company in San Francisco, which, with the bullion in transit, he estimated the assets of the company would be about \$27,000. Deducting the December bills, amounting to about \$16,000, he estimated that there was a balance in the treasury of about \$11,000 or \$12,000; but to make certain in making up his estimates he telegraphed from the mine in Texas to his brother, B. S. Noyes, in San Francisco, to ascertain the actual available cash in the treasury of the company. Mr. Osborn, the secretary

and treasurer of the company, reported that there was about \$5,000 in the treasury. This report was sent to Wm. S. Noyes, who suspected at once that there was something wrong in Osborn's accounts. Further investigation resulted in the discovery that there was a shortage, amounting to \$10,689.75. Wm. S. Noyes was so notified, and he returned to San Francisco. He notified one of the principal stockholders that he could not go on with the business unless this shortage was made good.

As a result of conferences with the directors and principal stockholders, Noyes agreed to loan Osborn the money to make good his shortage, and this he subsequently did out of the first two payments received from the company under the resolution of February 15, 1913. The result was that \$10,689.75 of the \$11,000 first paid to Noyes for ore from section 5 went immediately back into the treasury of the company, and Noyes proceeded with the work of installing the cyanide plant for the company. The effect of these transactions upon the affairs of the company was involved in a suggestion submitted to the official accountants, Klink, Bean & Co., as follows:

"State whether, in your opinion, a contract in the terms of the contract dated November 19, 1913 (Exhibit A), was or was not a fair and judicious contract for the board of directors of said Presidio Mining Company to make in January or February, 1913.

"State whether the arrangement that was made between the defendant William S. Noyes and the Presidio Mining Company in that regard has resulted in benefit or detriment to said Presidio Mining Company, and to what extent."

To these questions the accountants replied as follows:

"Assuming that the company could not avail itself of the opportunity to acquire the property now known as section 5, the contract of November 19, 1913, was fair enough. Should its operation have proven unprofitable, it could have been terminated on 30 days' notice. * * * We * * * are under the impression that the undertaking by the company to pay \$45,000 for securing the lease was neither judicious nor equitable. * *

"Although the payment of \$45,000 appears to us as excessive, the arrangement has, on the whole, resulted in a benefit to the company. There has been a steady reduction in average yield per ton from section 8, at which yield it would have been impossible to continue operations for any great length of time, and the mixture of high grade ore from section 5 has been essential and necessary."

Harry J. Cooper, in the employ of Klink, Bean & Co., as the principal of the auditing department of the accountants, testified that he made the computations and tabulations in their report. He was asked, if in answering the question No. 26 he had in mind that the \$45,000 was ultimately paid out of the profits of section 5. His answer was:

"I took the bare facts that at the meeting of the board of directors this \$45,000 was voted. Whether or not it was paid, I did not take into consideration at the time; but I did state that the undertaking of the company to pay it, at the time the resolution appropriating this \$45,000 was passed, this contract for the 50 per cent, division was not in existence.

"Q. What did you find to be the facts with regard to whether or not that \$45,000 was paid? How much of it, if any, was paid? A. Eventually, I guess, it was all paid out of the division of the 50 per cent. to each party; but I think that of that the sum of \$24,800 was paid before this agreement for the 50 per cent. division; that is just my recollection.

(261 F.)

"Q. The figures I will correct: \$26,800 was paid, actually paid to Novem-

ber, and then the November lease made.

"Mr. Rose: It seems to me \$24,800 and \$2,000 was paid on the 50 cents a ton royalty under the lease of January 25th. That is where the \$26,000 comes from; there was \$24,000 on the \$45,000 bonus, and \$2,000 on the lease at 50 cents a ton.

"Mr. Harding: You are correct."

Further on, in answer to that same question, the report says:

"'Although the payment of \$45,000 appears to us as excessive, the arrangement has, on the whole, resulted in a benefit to the company.' Have you summarized anywhere, Mr. Cooper, the total amount of profit that has been made by the Presidio Mining Company out of section 5? A. The total amount of money that was made by the Presidio Mining Company out of section 5 would be the same amount that was made by section 5, with perhaps the differential deducted; in other words, the profits are divided 50 per cent. each. I think there is a computation there on page 3 of the report.

"Q. Showing the total profits, \$226,231,72? A. That is operating profit taken

from section 5—the total operating profit. *

In suggestion No. 11, submitted to the accountants, they were asked: What were the total bullion sales of the Presidio Mining Company from ores taken from sections 5 and 8 during the years 1913, 1914, and 1915? The answer was for each year, the totals of which were: For section 5, \$502,956.10; section 8, \$320,898.51.

In answer to suggestions 17 and 18, submitted to the accountants, as to the tonnage of ore taken from sections 5 and 8 during the years 1913 to 1915, the total yield of silver produced therefrom, and the average value per ton, the answer was: From section 5, tons mined, 54.7489; silver yield, \$502,956.10; average value per ton, \$9,-187. Section 8, tons mined, 61.7468; silver yield, \$320,898.51; average value per ton, \$5,197. The net selling price of silver per ounce in September and October, 1912 was \$0.6126, and in November and December it was \$0.6110. In January and February the price commenced to drop, and fell to \$0.5746. In July, 1915, it had fallen to \$0.4499.

In answer to suggestions 13 and 14, submitted to the accountants, as to the total shrinkage in the income of the company, caused by the drop in the selling price of silver below 60 cents per ounce, the accountants replied that for the years 1913, 1914, and 1915 the shrinkage for sections 5 and 8 amounted to the sum of \$136,948.47. Had the average selling price of silver remained at say 60 cents per ounce during the three years, this large sum of \$136,948.47 would have been available in the treasury of the company for dividends, and if such a sum could have been divided with the stockholders, it is safe to say this controversy would never have arisen. The cyanide plant, completely installed by Noyes in July, 1913, saved the company from bankruptcy, in saving a larger percentage of the silver contents of the ore; but it did not entirely overcome the loss caused by the fall in the price of silver.

The previous operations of the company under the pan-amalgamating process upon ore falling from a high to a low grade of silver contents illustrates very clearly this feature of one of the difficulties in securing profitable returns from a mine of this character. It appears from the evidence that from 1888 to 1905 the Presidio Mining Company paid dividends amounting in the aggregate to \$760,000, besides paying for

its plant equipment. During this period the yield of silver per ton of ore had been as high as 29.83 ounces in 1890. From this point the yield fell to 19.82 ounces in 1904. In 1905 dividends ceased. The average ore yield had been 17.95 ounces per ton. During 1906 the operating loss was \$3,235.17. The plant was being operated with the pan-

amalgamating process, which had been in use since 1883.

On February 16, 1907, Wm. S. Noyes, the superintendent of the mine, made a report to John F. Boyd, the president of the company, upon the then condition of the mine and its future prospects. He reported that the yield of silver from the ore of the mine had fallen to about 16 ounces per ton. It had in fact fallen to 14.62 ounces per ton for the previous year, as appears from the records. The lowest point before that was for the year 1905, when the yield was 17.95 ounces per He reported that the cost of operation was entirely too high to hope for a profit from working such ore; that there had been an unprecedented advance in the price of many of their supplies and chemicals required at the mine, and that the cost of operation for the then fiscal year would undoubtedly be much higher than for the preceding year. He submitted the reports of two independent metallurgists, whose services he had secured, upon the advantages of the cyanide process over the pan-amalgamating process. They reported that the alterations in the mill necessary to install the cyanide plant would cost about \$40,000; but upon the ore which the mine could then furnish, yielding on an average of 14.2 ounces per ton, the profit would be \$3.05 per ton. For a conservative estimate Noves reduced this margin of profit to \$2.50 per ton. Mr. Boyd submitted this report to the stockholders for their consideration with the statement:

"If the proposed changes are made (and from the present outlook we must do that or stop work and abandon the mine), an assessment on the stock of about 10 cents per share will be necessary; therefore I request the stockholders to signify their wishes in the premises to the directors of the company."

He recommended the installation of the cyanide process in a circular letter accompanying the report. The Eastern stockholders objected. Anson Mills, the predecessor of the plaintiffs in the ownership of the stock held by them, in a letter dated July 2, 1908, stated:

"I have lost confidence in it [the Presidio mine], however, and hardly expect to receive anything further; but I want to ask you this question: Am I in any way personally responsible for future assessments, should it run into debt?"

In answer to this question Mills was informed that as a stockholder of the Presidio Mining Company he was responsible in the proportion that the stock held by him bore to the capital stock for all debts and obligations incurred by it while he was such a stockholder. In September following, Mills transferred 10,000 shares of a 15,000-share certificate to the plaintiff, W. S. Overton, 2,500 shares to the plaintiff Carl A. Martin, and 2,500 shares to Kathlein C. Kline. For the year 1907 the mine was operated at a loss, as Noyes had predicted. The loss amounted to \$4,122.31.

At a meeting of the board of directors of the company on December 13, 1907, a resolution was adopted ordering and directing that the

mining and milling properties of the company "be closed immediately, and all employés discharged, and the expense of operating the same discontinued." Upon the adoption of this resolution John F. Boyd, who had been president of the company since its organization in 1883, resigned as president and director, and on the same day Boyd and his wife transferred all the stock of the corporation standing in their names amounting to 57,213½ shares to L. Osborn, the secretary of the corporation, with specific direction that Wm. S. Noyes should receive one-half of the shares, if he so desired. It is stated that the price of the stock to Osborn and Noyes was nominal. It was in fact a gift, because of the long service of both Osborn and Noyes to the company.

About this time Noves discovered ore of a better grade in the mine, and he obtained permission from the board of directors to continue operations, and this he did, making a profit of \$24,614.28 for 1908, but in 1909 the loss was \$3,395.20, and for 1910 the loss was \$8,140.24. In 1911 the profit was \$20,881.96, and 1912 the profit was \$22,919.24. But at the end of the year 1912 the grade of the ore had again fallen so low that the company faced the situation that it must put in a cyanide plant or abandon the mine. The ore exposed in the mine could not be worked by the pan-amalgamating process. Upon this situation being presented to the directors and principal stockholders, they stated, as has been previously mentioned, that they would like to see a cyanide plant installed, if it could be done without an assessment, but they were unable to pay an assessment. They suggested that Noyes should make an estimate of the cost of such a plant and see if he could not borrow the money from his friends. This he did, securing credit and borrowing money sufficient to pay for the putting in of the cyanide plant and making other improvements necessary in the mill and mine to operate both successfully. The total cost amounted to \$79,359.03. This new plant was completed July 7, 1913, and finally paid for in 1916.

The tonnage of ore milled during the calendar years 1913, 1914, and

1915 (Klink, Bean & Co.'s report) was for:

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The average cost of operating per ton during the years 1907 to 1912 (pan-amalgamating process) was \$9.2331: "If" (says the report) "we apply against the tonnage above mentioned this average cost, it would produce an expense of \$1,072,913. The sales of bullion for the same period amounted to \$823,854.61. The consequent loss under these conditions for 1913, 1914, and 1915 would have been \$249,058.-39." But, instead of a loss for those years, the operating profit (Klink, Bean & Co.'s report) was \$145,508.26, making a difference of \$394,566.65 in favor of the operations of the plant with the cyanide process during the years 1913, 1914, and 1915 as compared with the method of operating the plant with the pan-amalgamating process from 1907 to 1912.

We have already noticed the fact, appearing in Klink, Bean & Co.'s

report, that the profit on the ore taken from section 5 by the Presidic Mining Company from January 1, 1913, to December 31, 1915, was the sum of \$226,231.72. Under the terms of the lease of November 19, 1913, one half of the net value of all ore taken from section 5 was to be paid to Wm. S. Noves as the owner of that section; the other half was to be retained by the Presidio Mining Company as its compensation for the mining and milling of the ore. The share of each party was therefore \$113,115.86. During these three years Noyes was paid \$63,336.20, leaving \$49,553.40 due him on December 31, 1915. (It appears from the company's books that the share retained by the company was \$112,889.60, instead of \$113,115.86, as stated in the report of Klink, Bean & Co. The difference is immaterial to the question under consideration.) The plaintiffs point to the fact that as stockholders of the Presidio Mining Company they received no dividends from the company during these three years, while Noves was paid \$63,-336.20 and claims \$49.553.40 as still due him on an original expenditure by him of approximately \$25,000 for the purchase of section 5.

We have here disclosed the moving cause of this whole controversy. The division was in accordance with the terms of the lease of November 19, 1913, but it appears that the share of the profits retained by the Presidio Mining Company, instead of being divided among the stockholders, was used by the company largely in making necessary improvements in the plant, improvements absolutely necessary to an economical and efficient working of the plant with the cyanide process; that these improvements accomplished all that was expected; that the average reduction in cost per ton at the mine, as shown by the Klink, Bean & Co. report, was from \$10.52 per ton for the fiscal year ending June 30, 1913, with the pan-amalgamating process, to \$6.21 for the 16 months ending December 31, 1914, and then to \$4.53 for the calendar year ending December 31, 1915, with the cyanide process, and that without such reduction the Presidio mining plant would have had to be abandoned and the mine closed. It appears, further, that the working of the ore from section 8 was at a loss from 1913 to 1915, so that the share of the company's profits in the section 5 ore was the only profit it had, and that was all absorbed, or nearly so, by the necessary improvements in the company's plant and in making up the loss from section 8 ore.

But the plaintiffs, to meet this aspect of the case, complain that the lease of November 19, 1913, was not fair; that it provided that from the actual cost of mining and milling section 5 ore there should be deducted the sum of \$1 per ton for the small cost of mining and milling such ore as compared with the milling and mining of section 8 ore. It is charged that this differential was worked to the disadvantage of section 8. It was voluntarily discontinued by Noyes in August, 1914. It had not been in operation for nearly a year when this suit was commenced. Whether during the time it was in operation it worked to the disadvantage of section 8 is not clear. The weight of evidence is apparently the other way, but in any point of view it was insufficient to establish the differential as part of an alleged fraudulent scheme on

the part of Noves to defraud the stockholders of the Presidio Mining Company.

The plaintiffs also complain that the method provided by the lease of November 19, 1913, for delivering the net value of the ores from sections 5 and 8 for apportionment of bullion as between the two sections was unfair and unjust to section 8, and was part of the scheme to defraud the stockholders of the Presidio Mining Company. This was the first question submitted to the official accountants by the court's direction. The direction was that the accountants should make an-

"examination of original sources of information relative to tonnage of ores mined, and assay values thereof, from which apportionment of bullion yield is ascertained, with costs of operation apportioned to both production from section 8 and section 5.

"(a) Investigate the figures as to record of tonnage produced from different faces of ore from the same stope, with assay values from corresponding faces, in connection with forms 10 and 11.

"(b) Examination as to accuracy of system by which bullion apportionment is figured, both as to section 8 and section 5."

To this direction the accountants made reply:

"There is no record of the tonnage produced from the different faces of ore from the same stope to apply against the assay values from the corresponding faces. The system by which the bullion apportionment is figured as between section 8 and section 5 is not accurate. Under the existing conditions, however, it is as nearly so as can be made. In this connection, we submit the following conclusions and comments, based upon observations of existing conditions and from information elicited at the property:

"That the sampling is carried out in a systematic and practical manner

and conforms to the terms of the contract.

"That the tonnage estimates from No. 5 are being kept in the usual mine

fashion, where no weighing apparatus exists.

"The sampling for both mines is done in the same manner and method, and the adjustments made to both properties according to the mine assay percentage. Over a long period the law of averages should tend to equalize the results.

"To change these methods for the purpose of obtaining more accurate results of assays, weights, and reconciling, it would be necessary to adopt

either of the following plans:

"(1) To maintain an engineering and sampling force at a cost of \$5,000 to \$6,000 per year, and increase the cost of mining by reason of separate han-

"(2) The building of an automatic sampling and weighing plant at an approximate cost of \$25,000."

Then follows a statement of the method adopted by the accountants to correct the mine assays, where they appeared to be abnormally high as compared with general averages. The result showed that the method of apportionment used was slightly in favor of section 8, and not to its disadvantage, as charged by the plaintiffs. The oral examination of Mr. Klink and Mr. Cooper, the accountants, upon this feature of their report, confirms its correctness, and establishes the fact that the sampling of the ores from the two mines had been carried out in a systematic and practical manner and conformed to the terms of the contract; that the sampling for both mines had been done in the same manner, and the adjustment made to both properties according to the

mine assay percentage; and that over a long period the law of averages should tend to equalize results.

In further answer to questions submitted to the accountants, they make the following replies:

"The terms of the contract of November 19, 1913, between William S. Noyes and the Presidio Mining Company, have, in our opinion, been fairly carried out. "The books of the Presidio Mining Company at the present time are being properly kept and transactions correctly recorded. This was not wholly true of the San Francisco office during the incumbency of Mr. Osborn. The company prepares elaborate tables, showing details of its mining and milling operations. These details are sufficiently clear for the information of all concerned. We might possibly add thereto a more extended form of annual report showing the financial results for each year.

"No separate records are kept as to mining and milling ore from sections 8 and 5, although separate mine assay records are kept for each section.

"The methods used for estimating tonnage are in accord with mining practice at small mines. The sampling is done in a systematic and practical manner, and conforms to the terms of the contract. The assaying apparatus is good, and the assaying is conducted in a regular, competent, and systematic manner."

It is next contended that the acquisition of the control of the Presidio Mining Company by the defendants was by means of a fraudulent manipulation of the Osborn stock. This charge is also denied by all the defendants under oath.

In November, 1907, John F. Boyd, the president of the company, held 36,966% shares of the stock of the company in his own name and 20,265\% shares as trustee for his wife, Louise A. Boyd. W. S. Noyes had 1,382 shares, and L. Osborn 20 shares. In the previous February Noyes, as superintendent of the mine, had reported that the ore then exposed in the mine could not be worked profitably with the pan-amalgamating process. The installation of the cyanide process, with which the ores could be worked properly would involve an assessment upon the stock. The stockholders objected; the objection coming mainly from Anson Mills, owning 17,000 shares, and the predecessor in interest in the stock held by the plaintiffs. The board of directors directed the closing of the mining and milling properties of the company and the discharge of all employes. Boyd immediately resigned as president and director, and thereupon he and his wife transferred their stock to Osborn, with direction to transfer one-half to Wm. S. Noves, if he so desired.

The mine had paid dividends for 21 years in an amount more than five times the equivalent of the par value of the capital stock of the company. Boyd and his wife had been large shareholders, and had participated in the dividends. But the mine had reached the point where the high grade of silver contents appeared to have been exhausted. Noyes had been the superintendent of the mine ever since it was opened in 1883. Osborn had been the secretary since 1887. Both had been identified with the activities of the corporation during the days of the prosperity. Boyd was not a well man, and had been advised by his physician to retire from active business. When the stockholders determined not to levy an assessment to secure the funds for the installation of the cyanide plant, Boyd at once withdrew the entire interest

of himself and wife from the company, and transferred his stock to Osborn, but with the direction that Noyes should have one-half, if he so desired. Osborn, in San Francisco, notified Noyes at the mine in Texas by letter of the transfer of the Boyd stock, and the direc-

tion of Boyd as to the one-half of such stock for Noyes.

When Noves came to San Francisco, both Boyd and Osborn notified him of the conditions, and Noyes said he would be glad to accept the stock, but wished it to remain on the books of the corporation in the name of Osborn. At the annual meeting of the stockholders of the company, held October 15, 1908, Osborn held 57,2231/3 shares of the stock of the company and Wm. S. Noyes 1,382 shares. This stock remained on the books of the company in their names until December 13, 1912, when Noyes notified Osborn that, if any responsibility were to arise by reason of the ownership of his share of the Boyd stock, he was prepared to assume it and requested the transfer to him of that stock. Osborn accordingly on December 12, 1912, transferred to Wm. S. Noyes 28.607 shares of the Boyd stock in accordance with Boyd's direction. In other words, Noves placed in the records of the corporation the usual evidence of his rightful, legal ownership of that stock. Noves left San Francisco for the mine four days later, and he testified that on January 19th or 20th he first learned of the Osborn shortage by a telegram from his brother, B. S. Noyes, in San Francisco.

The plaintiffs claim that Noyes knew of this shortage before he left for the mine, and that he obtained the transfer of the stock from Osborn to himself under a threat to expose Osborn and bring him and his family to disgrace. Aside from the absurdity of charging Noves with extortion in securing the legal title to his own property, there is no evidence to support even the color of coercion in the transfer. But the plaintiffs seek to draw such an inference from a remote and wholly irrelevant circumstance. It appears that one J. W. Kniffin was employed by Noves to install the cyanide plant for the Presidio Mining Company. He went to the mine for that purpose about December 23, 1912. He testified that he was informed of the Osborn shortage some time in the early part of January, 1913; that he was told by either Gleim or Burcham. Gleim was the superintendent of the mine; Burcham's relation to Noyes, or the mine, we do not know. Kniffen testified that he was ready to proceed with the construction of the cyanide plant, when Gleim told him that money they had thought they had had been taken from the treasury, and they did not have it; that on the 19th of January Gleim gave orders to start the work, and the witness commenced work on the 20th.

On cross-examination the witness did not mention the Osborn shortage as the cause of the delay in going ahead with the cyanide plant, or that Gleim said anything about money having been taken from the treasury of the company; but he testified that Gleim had told him some time toward the 1st of the month that there would have to be a suspension of the work of some kind, because they did not have the money. He was asked to fix the time when Gleim made that statement to him, and he finally did fix it as on January 13, 1913. The statement made at that time was perfectly true, for Noyes did not then

have sufficient money and credit to go on with the work. When these were subsequently secured, Kniffen was ordered to proceed with the work. When, more than four years later, Kniffen was called upon to testify to this incident, he may, on the direct examination, have momentarily confused the knowledge of the Osborn shortage with the knowledge of a lack of funds to go on with the cyanide plant, a confusion which he in effect corrected on cross-examination by fixing the date of the Gleim statement as on January 13th, and that it related simply to a lack of money to go on with the work; that is to say, the money, which had to be borrowed or credit secured, had not then been obtained.

This testimony is plainly not a contradiction of Noyes' testimony that he first heard of the Osborn shortage on January 19th. Furthermore, the delay in going on with the work of installing the cyanide plant could not have been on account of the Osborn shortage, since that work was proceeded with on January 19th or 20th, and after Noves had obtained money and credit for that purpose, but before the Osborn shortage had been made good. The Osborn shortage was not made good until the last days of February, when the work on the cyanide plant had been going on for more than a month. If the delay had been on account of that shortage, the work could not have commenced before the last days of February, instead of the 19th or 20th of January. This uncontradicted fact alone appears to be sufficient to establish the truth of Noves' testimony. But, in any point of view, the burden of proof rests on the plaintiffs to prove their charge clearly and distinctly, and overcome the direct and positive testimony of B. S. Noves and Laura M. Doherty, confirming and corroborating the testimony of Wm. S. Noves upon this question.

Plaintiffs also charge that Noyes extorted from Osborn the stock he held in his own right, which he was requested to transfer and did transfer as security for the money loaned him to make good his shortage. There is no evidence or inference to support this charge, and we know of no law that makes such an act extortion.

In all of these transactions we find no evidence of fraud, or of unfair or inequitable conduct, on the part of Wm. S. Noyes in his dealings with the Presidio Mining Company, or any of its stockholders, and no assertion of a dominant sinister power or influence over the board of directors or any of the stockholders. The lease of January 25, 1913, was adopted by the board of directors of the company at a meeting of the board held on January 29, 1913. Wm. S. Noyes was not present at the meeting. He was elected a director at a meeting of the board held on January 31, 1913. On that date he was in Texas, and had been there since shortly after the middle of December, 1912, and he remained there until February 5 or 10, 1913. He was present when the so-called "bonus resolution" was passed on February 15, 1913, but he took no part in the proceedings. He was not present when the lease of November 19, 1913, was approved and signed. Upon the face of the record, and in view of all the evidence, we are of the opinion that the lease of January 25, 1913, the resolution of February 15, 1913, and the lease of November 19, 1913, were all legal, just, and equitable in their terms, and for a valuable consideration.

Judge Dooling, in his opinion, referred to the charge in the original bill that the officers of the company had been paid extravagant salaries; but he evidently did not consider that alone sufficient ground for equitable relief, for he denied the application for a receiver and for an injunction pendente lite, and granted the motion to dismiss the bill, with leave to file an amended bill, notwithstanding the charge was

fully stated in the original complaint.

[4] Plaintiffs charge in their amended bill of complaint that the salaries paid to the directors and San Francisco officers of the Presidio Mining Company were exorbitant, excessive, and wholly out of proportion to the services performed; that Wm. S. Noyes had caused at all times subsequent to December, 1912, and at the time of the filing of the complaint was causing, the said salaries to be paid, and had agreed that said salaries should continue to be paid to said directors and officers in consideration for their acting as dummy directors, and assisting in and complying with and becoming parties to his plans for defrauding and mulcting said company, and directing to his own use and profit moneys and property legally and equitably belonging to the company; that the salaries so paid to the defendants as directors and officers were part of the consideration with which Noves procured their assistance to and approval of the fraudulent, unfair, and inequitable leases, agreements, resolutions, and motions recited and referred to in the complaint. This charge is also denied by all the defendants under oath.

We have already discussed their alleged fraudulent acts in connection with the leases, agreements, resolutions, and motions set forth in the complaint, and we have found that the charge has not been sustained by evidence. It remains only to notice the charge and the finding of the interlocutory decree that the salaries of the directors and officers in San Francisco, and in the increases thereof and payments made thereunder from the treasury of the company to said defendants as directors and officers of the corporation, and all acts, resolutions, and proceedings relative thereto, are each and every and all illegal and fraudulent.

The salary of John F. Boyd as president of the company had been \$200 per month for 15 years prior to his resignation in December, 1907. John W. F. Peat was then elected president at the nominal salary of \$25 per month. This salary was continued, although not always paid, until January, 1913. Then B. S. Noyes became president, and his salary was fixed at \$150 per month, which was continued until November, 1914, when in common with other officers and employés of the company salaries were voluntarily reduced on account of the depreciation in the value of silver. When B. S. Noyes became president, Peat was made assistant secretary at \$25 per month. B. S. Noyes' salary was reduced in November to \$125 per month. Wm. S. Noyes was appointed superintendent of the mining and milling operations of the company in 1883. His salary for the first year was \$300 per month. It was then raised to \$450 per month, and had been continued at that

rate until November, 1914, when his salary was reduced to \$375 per month.

The salary of the secretary had always been \$300 per month until November, 1914, when it was reduced to \$270 per month. The salary of E. M. Gleim, who has been superintendent of the mine since February, 1913, has been \$450 per month. His first employment appears to have been in 1909 at \$90 per month. His salary was increased to \$125 per month, and then to \$250 per month; the increases corresponding to the increase in his duties and responsibilities. The last is the only increase of salary disclosed in the record; but as Gleim is employed at the mine, is not a defendant, or a director or officer in San Francisco, the charge does not apply to him.

The burden of proof was upon the plaintiffs to prove the illegal and fraudulent character of the salaries paid to the directors and officers in San Francisco. The presumption is that salaries paid for so many years to these officers prior to November, 1914, without protest or objection on the part of the minority or other stockholders, were reasonable and just, and the reduction of these salaries in November, 1914, eight months before the commencement of this suit, was clearly evidence of a just regard for the interest of the company and its stockholders, and is directly in contradiction of plaintiffs' claim, and the finding of the interlocutory decree, that the salaries were all illegal and fraudulent.

Counsel for plaintiffs in their brief virtually reduce this charge to a query. They say:

"We fail to see where it was necessary to have a general manager in San Francisco at \$450 per month, and likewise a second executive in the person of a president, drawing a large salary of \$150 per month, when the company was alleged to have had an efficient and able superintendent at the mine. We may likewise fail to see where it was necessary for Peat, a former dummy president, to have created for him the office of assistant secretary at \$25 a month, when the embezzler, Osborn, was continued at a monthly salary of \$300 for services worth not over \$75 a month."

Leaving out the epithets, there is but little substance to the query; but, as the burden of proof to show that such salaries were not necessary and were fraudulent in purpose was upon the plaintiffs, we cannot uphold the interlocutory decree, declaring them fraudulent, without such proof. That there is no such proof in the record is practically conceded by the decree itself in a subsequent provision "requiring the defendants," reversing the established order of proof, "to present evidence before the master, if any they have, to show that said salaries or increases thereof were and are reasonable and fair." Then, when the defendants have presented this evidence, the master is "also to take evidence on behalf of complainants, wherein said salaries or increases thereof were and are unreasonable or unfair; that said master also take and report like evidence in regard to the salary of E. M. Gleim, and any increase thereof."

The defendants had already produced evidence that the salaries were reasonable and just, partly by direct testimony, and partly by evidence of a continuance of salaries for a number of years, without protest or objection on the part of the minority or other stockholders, and by

evidence of a reduction of salaries prior to the commencement of this action, to meet the depreciation in the price of silver. This evidence was not contradicted, and certainly no inference of fraud or injustice can be drawn from this state of the evidence, which tends to show that the salaries were at all times just and reasonable.

There are a number of other minor charges against the defendants, which we do not think of sufficient importance to review. We have, however, examined the evidence relating to them, and we find them not

nroven

[5] We now recur to the question of law, whether the conduct of Wm. S. Noyes, either prior or subsequent to January 31, 1913, was such as to render him chargeable with a constructive trust in his dealings with the company, and particularly with respect to the purchase of section 5. For the purpose of this inquiry we accept Bispham's definition of a constructive trust, cited by plaintiffs:

"* * Certain kinds of constructive trusts are based upon fraud; in other words, equity considers that, in consequence of certain fraudulent conduct, the relationship of trustee and cestui que trust is called into being, and the rights of the parties are determined upon the footing of that relation.

The ground of relief, therefore, is both fraud and trust."

We also accept plaintiffs' citation from Taylor v. Taylor, 49 U. S. (8 How.) 183, 199, 12 L. Ed. 1040, wherein Mr. Justice Daniel quotes from Story's Equity Jurisprudence as follows:

"If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But, when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance."

Indeed, we might say generally that the authorities cited by plaintiffs in their brief may be accepted as stating correct principles of equity,

but they are not all applicable to the facts in this case.

In Cowell v. McMillen, 177 Fed. 25, 100 C. C. A. 443, this court was called upon to consider the facts in a controversy very similar to the facts in this case. Many of the questions involved in that case are present here, and among other things it was held that a director of a corporation is not precluded from making a contract with the corporation in which he is personally interested, where he has acted with that candor and fairness which equity requires in dealings between him and the corporation, and the transaction is open and fair. To the same effect are Barr v. Pittsburg Plate Glass Co. (C. C.) 51 Fed. 33; Id., 57 Fed. 86, 6 C. C. A. 260.

In the late case of Du Pont v. Du Pont, 256 Fed. 129, in the Circuit Court of Appeals for the Third Circuit, it was held that a court of equity is not warranted in interfering with the management and policy

of a corporation, as determined by a majority of its stockholders, unless it clearly appears that their action was not taken in good faith, in the interest of all its stockholders.

Assuming, now, as alleged in the amended bill of complaint, that Wm. S. Noves was the dominant force with the majority stockholders of the corporation, and that his conduct was the conduct of the majority; wherein does it appear that he has not acted in good faith with respect to the purchase of section 5? When did he fail to make a full, fair, and truthful discovery to the corporation and its stockholders of the advantage that would accrue to the corporation in the purchase of that section? And when at the time of its purchase by Noyes because it was beyond the financial reach of the corporation, did he fail to notify the corporation and its stockholders that the property was still open to purchase by the corporation at the cost it had been to him? It is true he does say distinctly and positively and under oath that he does not hold the title fraudulently and unfairly or unjustly to the rights of the corporation, and he does say that he is not liable to the charge of discreditable, illegal, and fraudulent conduct with respect to that title, or to suffer the penalties and consequences attending upon a fraudulently, acquired title. What is the evidence we find in the record upon the question?

E. M. Gleim, the superintendent of the Presidio mine, testified concerning the first move to acquire title to section 5:

"It was about the middle of December when I met Mr. Noyes at Marfa. I do not remember now the exact date. On his arrival I gave him my opinion as to section 5, and what had been done by the Lewisohn Bros. on the Silver Hill mine, and told him it was my opinion that we ought to get the property, if possible, some way. By 'we' I mean Mr. Noyes and myself as representatives of the Presidio Mining Company. After I had told him this, the first thing we did was to see if it was possible to arrange for any money with which to obtain the section. We went first to Mr. Wm. H. Cleveland, who was a personal friend of Mr. Noyes, and asked Mr. Cleveland if he could loan \$10,000. Mr. Cleveland said he could not, but he thought we might arrange it at the Marfa National Bank, with which Mr. Cleveland was connected at that time as a stockholder and director. We went to the bank subsequently, and the cashier, Mr. Fennell, told us we could get the money, \$10,000; that Mr. Noyes could get the money."

The money was obtained January 17, 1913. Mr. Cleveland was a witness for the defendants in this case, and testified that he made arrangements for Mr. Noyes to get the money from the bank; that the witness went on his note as security. He testified, further, that in 1912 and the early part of 1913 he would not have loaned the Presidio Mining Company any money without additional security. On January 23, 1913, Wm. S. Noyes wrote from El Paso, Tex., to Mrs. Willis, in San Francisco. Mrs. Willis was then the holder of 36,000 shares of the Presidio Mining Company's stock. Mr. Noyes writes, among other things, as follows:

"I have borrowed the money and got control of section 5—to add to the Presidio later on."

Mr. Noves testified, concerning his discussions with the stockholders and directors of the Presidio Mining Company in regard to the purchase of section 5, as follows:

"In the latter part of 1912 there was a discussion between myself and the stockholders and directors of the company in regard to the purchase of section 5. * * * The discussions were with Mrs. Willis, Miss Doherty, and Mr. Osborn. * * I told Mr. Osborn that, if it came on the market, that I would like to get it to help out the Presidio. I told Mrs. Willis the same thing, and Miss Doherty."

After the purchase, and the discovery of the Osborn shortage, he said:

"After my return here to San Francisco, I went to see Mrs. Willis and Miss Doherty at Mrs. Willis' apartments, and told her there was this shortage, and it left me in a bad scrape, and the company in a worse one; that I had bought this section 5 with money that I had borrowed. The company had then contracts which I had assured my friends were good; and the company could have that mine at cost, if they wanted it; * * * that the company could take the mine at any time they were able to, off my hands at its cost."

Mr. Noves was asked this question:

"In regard to the conditions under which you entered into the agreement with the company in the manner that you have described, to divide the net profits fifty-fifty, was there any statement or promise made by you that the company might at any time buy section 5, when it was in a financial position to do so, or wished to do so, or could do so?"

Mr. Noves' answer was:

"I told them that many times in conversation; that was a part of the conversation that took place when the agreement was made, between Mrs. Willis, Miss Doberty, and Mr. Osborn."

Mr. Noyes was asked on cross-examination if he ever offered section 5 to the company in any formal resolution, to which he replied:

"Well, I offered it— I don't quite understand what you mean by formally offering it to the company. It was put up to them for action at a meeting as an organized body on November 19, 1913, and I am under the impression it was offered, also, in February, when that resolution was passed. It was rather a colloquial offer. They were simply told it was open to the company, if they wanted to take it. The company took no action—that is to say, the company could not do it; it had no money. In November the minutes recite that it had been offered to them; it was offered verbally at that meeting."

Miss Doherty testified:

"Mr. Noyes spoke about this section 5 being on the market, and that he would like to get it for the company. * * Mrs. Willis said she did not see how they could buy anything that way and assume this large debt of installing the cyanide plant. Mr. Noyes said, well, that he would get that, and they could take it over afterwards. He said, whenever the company was able to take it for what he paid for it, why the company could have it, if they wanted to."

The witness was asked whether, at any of the meetings with Mr. Noyes, anything was said as to the terms upon which the company could obtain section 5. Her reply was:

"I think he said, 'Pay him what he had paid for it.' They could buy it from him whenever they wanted it, or words to that effect."

B. S. Noyes, the president of the Presidio Mining Company, testitified concerning the meeting of the board of directors on February 15, 1913, that there was a discussion as to what disposition would be made of section 5, which Mr. Wm. S. Noyes had bought. The witness said:

"Mr. Noyes stated that the company could have section 5 at cost, then or thereafter; and it was informally decided prior to the date of that meeting that the company could not take it, and the suggestion had been made and assented to by all parties that, as Mr. Noyes carried it, the company could take the ore and settle with him on the basis of one-half of the net."

In the report to the board of directors of the corporation by Wm. S. Noyes as vice president and general manager, dated October 6, 1913, he said:

"Early in 1913 section 5, adjoining the Presidio mine, was on the market for sale. This company being unable to buy it, having exhausted its credit on the new installation before mentioned [cyanide plant and tramway], it was purchased by the writer, and an agreement made whereby this company will work it on terms of a division of the net, and perhaps will purchase the same later on. Late developments in section 5 indicate that it will be a source of large revenue."

A copy of this report was sent to all the stockholders of the company, including the plaintiffs. In a report to the stockholders of the company by Wm. S. Noyes as vice president and general manager, dated February 28, 1916, he says:

"The contract to buy ore from section 5 has been a source of good profit to the company, though, of course, much less than it might have been, but for the poor conditions in the silver market. Since it has been in force, January, 1913, to and including December 31, 1915, 54,748.45 tons have been delivered under the contract, and this company has received \$112,889.60, or \$2.06 per ton, as its half of the net proceeds. The writer has received \$63,336.20 on account of his half of the net, and the remainder due him, \$49,553.40, on account of the same net. These sums aggregate \$112,889.60, which amount equals the sum actually received by the company, and corresponds to a royalty of \$2.06 per ton of ore delivered. During the first 10 months of the year, the market for silver was greatly depressed, reaching the record low price in August; but still we made a profit. It may be of interest to our stockholders to know that for the three years, 1913, 1914, and 1915, the shrinkage in the price of silver below the figure assumed in the calculations for the cyanide plant (which figure seemed conservative at the time) amounted to \$155,000 for the silver produced at the mill during that time. But for this last-mentioned decline in the market price for silver the company [Presidio Mining Company] would long ago have acquired section 5, as was originally contemplated in 1913. Provided the market remains at its present level, we should be prosperous during the coming year."

It is clear from this evidence that Noyes purchased section 5 with his own money, but for the benefit of the Presidio Mining Company; that he has always been ready to convey it to the company upon the payment to him of its purchase price, and as late as February 28, 1916, in his last report to the stockholders, he declared in effect that he held the title for that purpose and no other; from all of which it appears that the solution of this controversy obviously lies very near the surface and is found in the terms of the lease of November 19, 1913. It is there provided:

"It is further agreed that this lease shall terminate on 30 days' notice given in writing from either party to the other party to the contract."

It is a curious fact that the question whether this lease was or was not a fair and judicious contract for the board of directors to make was submitted to the accountants, Klink, Bean & Co., who answered in

four lines with practical good judgment the essential question at issue in the case as follows:

"Assuming that the company could not avail itself of the opportunity to acquire the property now known as section 5, the contract of November 19, 1913, was fair enough. Should its operation have proven unprofitable, it could have been terminated on 30 days' notice."

That the company was not in a financial position to avail itself of this provision of the lease during the years 1913, 1914, and 1915, was because of the decline in the price of silver and the expense the company was compelled to incur in the installation of the cyanide process and in making other necessary improvements for the efficient and economical working of the plant. That the company was in a position, however, to avail itself of the opportunity to acquire this property by purchase on the 16th of February, 1918, if not before, is established by the order of the interlocutory decree of that date, directing that it should be purchased, and purchased at the price for which Noyes had always held it for the company.

The only remaining element in the case is the direction of the decree that Wm. S. Noyes shall convey section 5 to the Presidio Mining Company upon the payment to him of the purchase price, with interest, assessments, etc. As this conveyance will terminate the lease, both should be fixed for the same day, namely, as of the date of the inter-

locutory decree, February 16, 1918.

We have been requested by both parties to this action to consider the case on the merits and direct a final decree accordingly. This we think we may do on the pleadings as they stand and the evidence that has been taken upon the issues. The case appears to be here in all necessary detail and in condition upon the evidence material to such issues for such a decree, and such will be the order of this court.

That part of the interlocutory decree providing "that in and by said final decree the said William S. Noyes shall be ordered and directed within 30 days from the date thereof to transfer said section 5 to said Presidio Mining Company by proper deed free and clear of all liens

and incumbrances" will stand affirmed.

That part of the decree relating to the payment of the purchase price of the property to William S. Noyes, providing, "that said William S. Noyes be credited with the purchase price of section 5, together with interest thereon at the rate of 7 per cent. per annum from January 25, 1913, and also any sums which may be found to have been paid by said William S. Noyes for the use and benefit of said Presidio Mining Company, together with interest on said sums at the rate of 7 per cent. per annum from the date of payments," will stand affirmed.

That part of the decree will run against the Presidio Mining Company and its officers and directors, and will be as of the date of February 16, 1918; the amount due thereon to be ascertained by a reference

to the accountants, Klink, Bean & Co.

The final decree will also provide for the payment to William S. Noyes of the amount due him under the lease of November 19, 1913, from January 25, 1913, to February 16, 1918; the amount to be ascertained by a reference to the accountants, Klink, Bean & Co., with di-

rection to extend and complete their schedules as they appear in the record and are there numbered 4, 5, 6, 7, 8, and 9, so as to include in like manner, but in a condensed form, all royalties due and payable to William S. Noyes for the years 1916, 1917, and down to February 16, 1918.

In this computation Wm. S. Noyes will be charged with \$3,500, which we find was in effect paid to him on September 6, 1913, and was applied by his direction to make good a further shortage in the accounts of L. Osborn. This amount is included in the statement made by Noyes that up to December 31, 1915, he had received \$63,336.20. To the amount thus found due William S. Noyes under the lease of November 19, 1913, will be added the amount found due him on the purchase price of section 5, and for the full sum so found due him the final decree will run against the Presidio Mining Company, its officers, and directors.

The interlocutory decree in all other respects not herein mentioned will be reversed and set aside, the interlocutory injunction dissolved, and the receiver discharged. The plaintiffs and defendants will each pay their own costs in this court.

CITY OF LIVINGSTON et al. v. MONIDAH TRUST.

(Circuit Court of Appeals, Ninth Circuit. October 27, 1919.)

No. 3310.

1. ABATEMENT AND REVIVAL \$\infty\$12-Action \$\infty\$69-Stay; other action pending in state court.

Action in federal court, of which it has jurisdiction by reason of diversity of citizenship and amount involved, need not be stayed or dismissed because of pendency in the state court of action concerning the same matter.

- 2. Courts \$\iff 312(8)\$—Federal courts; conveyance to give jurisdiction.

 Right to maintain suit in the federal court is not affected by the fact that property was conveyed to plaintiff to give the parties necessary diversity of citizenship; the conveyance being without reservation of right.
- 3. WATERS AND WATER COURSES \$\infty\$ 188(3)—WATERWORKS FRANCHISE IN PERPETURITY.

Grant by a city to individuals, their successors and assigns, of franchise for waterworks is in perpetuity, in the absence of limitations, though accompanying contract for furnishing the city water for fire hydrants is for only 20 years, with provision for renewal, on terms to be agreed on if city does not exercise option to buy.

 WATERS AND WATER COURSES ⇐⇒ 188(4)—FRANCHISE; PROCEEDING FOR FOR-FEITURE.

Though there be annexed to a waterworks franchise a tacit condition that it may be lost by misuser or nonuser, there must be a proceeding for forfeiture by the state, or by the city on authority given by the state; a resolution declaring such forfeiture being insufficient.

5. JUDGMENT \$== 736-RES JUDICATA; MATTERS INVOLVED.

Relative to question of res judicata, the question of perpetuity of a waterworks franchise *held*, in suit to quiet title to the franchise, not involved or determined in prior suit for specific performance of contract accompanying franchise for renewal at end of 20 years of contract for

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furnishing water to city; it having been merely held that it was a contract incapable of specific performance.

€. WATERS AND WATER COURSES €

\$\infty\$188(4)—WATERWORKS FRANCHISE; CONSTRUCTION OF DECREE QUIETING TITLE.

\$\infty\$188(4)

\$\infty\$188(4

Decree in suit to quiet title to waterworks franchise, that it is perpetual, does not mean that it is not subject to the tacit conditions of the grant, that it may be lost and forfeited by appropriate remedy for misuser or nonuser.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by the Monidah Trust against the City of Livingston and others to quiet title to its franchise under which it is engaged in supplying water to the City of Livingston and to the hydrants, pipes and mains, claimed by the plaintiff as part of its water system. Decree for plaintiff, and defendants appeal. Affirmed.

It is alleged in the bill of complaint filed October 24, 1917, that the defendant the city of Livingston, on or about the 5th of August, 1889, being then without any waterworks plant or system of fire protection and desiring to secure the erection of such waterworks plant for the purpose of procuring water for public and private purposes, including fire protection, passed an ordinance, numbered 24, granting to C. S. Stebbins, Isaac Orschel, and Samuel Bundock, their successors and assigns, the privilege of erecting, maintaining, and conducting a waterworks plant in the city of Livingston, said ordinance providing among other things the regulation, requirements, and conditions under which said plant should be maintained and conducted; that under said ordinance or franchise so granted the said Stebbins, Orschel, and Bundock, their successors and assigns, were to furnish the said city of Livingston with 25 double discharge fire hydrants at the time of the completion of said waterworks and to furnish additional double discharge fire hydrants thereafter as the same might be ordered by the said city; that the said city agreed to pay therefor annual rentals; that at the expiration of 20 years from the date of the completion of said waterworks system the said city might, at its option, purchase the said waterworks plant and all pipes, pumps, reservoirs, and other property rights including the water rights and appurtenances connected with said works, at a price to be agreed upon by three commissioners, one to be appointed by the said city of Livingston, one by the said Stebbins, Orschel, and Bundock, their successors and assigns, and the third to be chosen by these two; that at the expiration of 20 years from the date of the completion and testing of said waterworks, if the city of Livingston did not purchase such waterworks upon the terms mentioned, it would renew the contract with said Stebbins, Orschel, and Bundock, their heirs, successors, or assigns, for a period of 20 years longer upon terms to be then mutually agreed upon, provided however, that such terms should in no case exceed the prices fixed and stipulated by Ordinance No. 24, nor should the renewal of the contract in any case annul the operation of said ordinance in its full force and effect; that said Stebbins, Orschel, and Bundock promised and agreed upon their part to comply with all things required by said ordinance to be done and performed by them, and accepted the terms, conditions, stipulations, and agreements contained in said ordinance; that on the 1st day of June, 1890, said Stebbins, Orschel, and Bundock, and their successors and assigns, did complete and place in operation said waterworks plant, and have since maintained and conducted the same in accordance with the terms and conditions of said ordinance, supplying the said city of Livingston and its inhabitants with pure and wholesome water for public and private uses; that the Monidah Trust is the successor and assignee in interest of said Stebbins, Orschel, and Bundock, and their successors and assigns, and is the owner of said waterworks system and all of the property, reservoirs, water rights, pumping plants, machinery, and apparatus used in connection with the operation and maintenance of said

waterworks system; that more than 20 years have expired from the date of the completion and testing of said waterworks and plant, and the city of Livingston has wholly failed and neglected to exercise the option to purchase the said waterworks system or the other property used in the construction and operation of the same; that since the expiration of said 20-year period mentioned the said city of Livingston has failed, neglected, and refused to renew said contract for the supplying of water to the said city and its inhabitants, and for several years last past has neglected and refused to pay plaintiff the hydrant rentals provided in said ordinance, and has neglected and refused to comply with any of the terms and conditions in said ordinance, claiming the same to be void and unenforceable; that on or about the 30th day of September, 1913, the predecessors in interest of said Monidah Trust (Livingston Waterworks) commenced a suit in the state court (against the city of Livingston and its aldermen) for the purpose of enforcing the terms and conditions of said ordinance; that upon the trial of said cause a judgment was entered in favor of the defendant, wherein it was adjudged that said contract was void and unenforceable; that upon appeal to the Supreme Court of the state the judgment of the trial court was affirmed (Livingston Waterworks v. City of Livingston et al., 53 Mont. 1, 162 Pac. 381, L. R. A. 1917D, 1074); that since the rendition of the judgment and the affirmance by the Supreme Court the plaintiff and its predecessors in interest have offered to sell said waterworks system and the property connected therewith to the city of Livingston upon a fair, just, and equitable appraisement and valuation, but said city of Livingston has refused to consider any of the propositions of sale made by said plaintiff or its predecessors in interest, and has determined to erect an independent municipal waterworks system, and has procured a bond election at which a bond issue to the amount of \$225,000 was voted for the purpose of raising funds for the construction of such independent municipal plant; that said bonds have been issued and sold, and the city threatens to and as plaintiff is informed and believes has actually commenced the erection of said independent municipal plant, and wholly refuses to consider any proposition of sale or purchase of the plaintiff's waterworks system; that plaintiff, because of its failure to negotiate a sale of its waterworks system to the city of Livingston, and because of its failure to procure a renewal of the franchise and contract under which it has supplied water to said city and its inhabitants, and because of the fact that plaintiff's plant will be wholly destroyed by the action of the city in erecting an independent municipal plant, desires to discontinue said waterworks system in said city, withdraw therefrom, and remove all its pipes, machinery, and other personal property used in connection with said waterworks system, and abandon the conduct of its waterworks system in the said city of Livingston; that said city of Livingston refuses to permit plaintiff to discontinue its said waterworks system, or remove its pipes, machinery, and other personal property used in connection with said waterworks system in said city, and refuses to grant plaintiff permission to dig up the mains, pipes, and hydrants belonging to plaintiff and used in connection with said waterworks system, and threatens to use force for the purpose of preventing and restraining plaintiff from removing its said property from the city of Livingston; that said city of Livingston and its board of aldermen claim that plaintiff has no right whatever to the streets or the city of Livingston, and as plaintiff is informed and believes claims the ownership of the pipes, machinery, and hydrants used in connection with said waterworks system, and refuses and will continue to refuse to permit plaintiff to withdraw its property from said city of Livingston.

The prayer of the plaintiff in this original complaint is that the defendant be restrained and enjoined from in any manner interfering with the plaintiff in the disposal of its said property, and that a writ of injunction be issued, pending the suit, enjoining and restraining the defendants from interfering with or preventing plaintiff from discontinuing the conduct of its waterworks system, or from removing and disposing of its property used in connection

In an amended bill of complaint filed November 8, 1917, there are attached as exhibits a copy of Ordinance No. 24, passed April 5, 1889, and also Ordinance No. 25, passed September 22, 1889, amending Ordinance No. 24 by sub-

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stituting for these words in the latter, "and thereby supply said city with pure and wholesome water for public and private uses," the following words: "And thereby supply said city with as good and wholesome water for public and private uses as can be taken from the main Yellowstone river in the vicinity of Livingston."

On a hearing on an order to show cause why an injunction should not issue as prayed for in the bill of complaint, and on a motion on the part of the defendants to dismiss the bill for the reason, among other things, that another suit between the same parties, involving the identical subject-matter and the same controversy, and asking for the same relief, was pending undetermined in the state court at the time this suit was commenced, the motion to dismiss the bill of complaint was denied, and the motion to vacate the order to show cause granted, with 10 days allowed to the plaintiff within which to file an amended bill.

In a second amended bill of complaint, filed December 6, 1917, the allegations of the first amended complaint are repeated in substance, with additional allegations to the effect that defendants claim that Ordinances Nos. 24 and 25, and all rights and privileges claimed by plaintiff thereunder, have fully terminated, and assert that the city is now the owner of all the rights and easements of plaintiff, together with the pipes, mains, conduits, hydrants, and other personal property in the city of Livingston; that the city, acting through its agents, officers, and employes, has entered upon plaintiff's property and with force and arms has torn up and damaged certain mains, conduits, and pipes belonging to plaintiff and used in connection with the said system of waterworks; that defendants assert the right to further tear up, interfere with, and destroy plaintiff's property, and claim and assert that they intend to at some time in the future further interfere with and take possession of the same, and prevent plaintiff from further carrying on and conducting said system of waterworks in said city of Livingston; that defendants' claims are false and groundless, and constitute a cloud on plaintiff's title to the property, franchise, and easements described; that said claims are without any right whatever, and the defendant city has no right, title, or interest in or to said property, franchise, easements, or any part thereof.

The prayer of this last amended complaint is that it be decreed that plaintiff's privileges, rights, franchise, and easements in the streets of said city are perpetual, and plaintiff's title thereunder is good and valid, and that the defendants be enjoined and restrained from asserting any claim whatever into

or to said property.

The defendants, in their answer to the second amended complaint, filed March 29, 1918, deny all the allegations in the amended complaint material to the controversy involved in this appeal, except that the defendants admit that in a suit pending in the state court, brought by the plaintiff against the defendant city, the city does claim an estate and interest adverse to the plaintiff in and to plaintiff's alleged franchise, easements, privileges, rights, and property in connection with said waterworks system; that said claim is set forth in a counterclaim in its answer in that suit, to the extent of the pipes and mains underneath the streets of the city, and also that said rights, privileges, and so-called franchise claimed by plaintiff have been terminated and forfeited.

In the suit in the state court, here referred to, the plaintiff herein brought suit on May 31, 1917, and filed an amended complaint on June 12, 1917, against the city of Livingston, the state board of land commissioners, and the registrar of the state land office, to restrain and enjoin the defendants from proceeding with and completing the sale of certain bonds issued by the city of Livingston for the purpose of procuring water supply and constructing an independent municipal water system for the city.

On June 18, 1917, the application and motion of the plaintiff for an injunction was denied by the state court. An appeal was taken to the Supreme Court of the state from this order, and on the 16th of October, 1917, the appeal was dismissed. In the counterclaim set up in the answer of the city of Livingston to plaintiff's complaint in the state court, and referred to in its answer in this case, it is alleged: "That since said month of June, 1910, said Livingston Waterworks Company has been and now is without any right or

authority to use the streets and alleys in the city of Livingston and the real property of said city of Livingston for the uses and purposes mentioned in said Ordinances Nos. 24 and 25, or otherwise, and that said Livingston Waterworks Company ever since said month of June, 1910, has been and now is a trespasser in and upon the streets, avenues, and alleys of said city of Livingston."

In this answer the defendants prayed for a judgment against the plaintiff, declaring the city of Livingston to be the owner of the pipes and mains and fire hydrants and pipe connections underneath the surface of the streets, avenues, and alleys heretofore used by the plaintiff in connection with its said waterworks in supplying the city and its inhabitants with water and that it be adjudged that the plaintiff has no right, title, or interest therein, and that plaintiff be enjoined and restrained from further using, operating, or interfering with said mains, hydrants, pumps, machines, and machinery on and in the streets and alleys of the said city, and for such other and further relief as might be deemed meet and equitable in the premises.

To this answer and counterclaim the plaintiff appears to have demurred, and

the action is now pending in the state court upon that demurrer.

On August 16, 1917, a deed of conveyance was executed by the Livingston Waterworks and the Livingston Waterworks Company, purporting to convey the whole system of waterworks belonging to the grantors, together with all the mains, pipes, hydrants, and other property connected with the operation and management of the waterworks system to the Monidah Trust, a Delaware

corporation and the plaintiff herein.

As has been stated, on October 24, 1917, the Monidah Trust, plaintiff, filed its original bill of complaint in this case. On the same day it obtained an order upon the defendants to show cause why an injunction should not issue, restraining the defendants from interfering with plaintiff's management, control, and disposition of its waterworks system and all property connected therewith, and from interfering with its right to remove its said property from the city of Livingston, and from in any wise interfering or preventing plaintiff from discontinuing the conduct of its waterworks system in the city of Livingston, or removing or disposing of said property. The defendants moved to discharge the order to show cause on the ground of the said former suit pending in the state court, and also that the transfer of the property to the plaintiff was colorable and a fraud on the jurisdiction of the court. The court overruled the motion to discharge the order to show cause, and, retaining jurisdiction of the case, granted plaintiff permission to amend the bill of complaint, and thereupon it filed its second amended bill of complaint.

Upon the hearing of the case the court directed the entry of a decree in favor of the plaintiff adjudging it to be the owner of the right, privilege, easement, and franchise to construct, maintain, and operate a water system in the city of Livingston for the purpose of supplying said city and its inhabitants with water, granted and conferred by Ordinances Nos. 24 and 25 of said city, and that the right, privilege, easement, and franchise so granted is perpetual; that the plaintiff is also the owner of the water system constructed and installed pursuant to said ordinances, and now used for the purpose of supplying said city and its inhabitants with water. The title of the plaintiff to said right, privilege, easement, and franchise is by the decree quieted against all claims or pretensions of said city, its officers, agents, and representatives, that the same has expired, or has been canceled or forfeited by the city or its representatives, and the title of said plaintiff to said water system is quieted against all claims or pretensions of said city, its officers, agents, or representatives, that said city is the owner of any of the pipes, mains, or other parts of said system, and that the said city, and each and all of its officers, agents, and representatives, are enjoined and restrained from asserting any claim that said franchise is not in full force and effect, or that the said plaintiff is not the owner of said water system and the whole thereof, and from in any manner interfering with the full and free use and enjoyment by said appellee of the right, privilege, easement, franchise, and water system aforesaid. From this decree the defendants have brought the case to this court.

Frank Arnold, City Atty., of Livingston, Mont., and Edward Horsky, of Helena, Mont., for appellants.

James E. Murray, of Butte, Mont., and Gunn, Rasch & Hall, of Helena. Mont., for appellee.

Before ROSS, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The

parties will be designated as in the court below.

[1] It is contended by the defendants that the lower court erred in refusing to stay proceedings in this case pending the disposition of the case of Livingston Waterworks Co. v. City of Livingston et al., No. 4393 in the state court. The action in this court is between citizens of different states, the amount involved is jurisdictional and sufficient, and the case is of such a nature that the decree will not interfere with the jurisdiction of the state court over the property upon which the judgment of the state court would operate.

In Doane v. California Land Co., 243 Fed. 67-70, 155 C. C. A. 597, 600, this court held under the authority of McClellan v. Carland, 217 U. S. 268-282, 30 Sup. Ct. 501, 505, 54 L. Ed. 762, that:

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case.' McClellan v. Carland, 217 U. S. 268-282, 30 Sup. Ct. 501, 505, 54 L. Ed. 762; Falls City Const. Co. v. Monroe County (D. C.) 208 Fed. 482-483; Wolf v. District Court, 235 Fed. 69-74, 148 C. C. A. 563."

[2] It is also contended by the defendants that the jurisdiction of the lower court in this case was fraudulently invoked for the reason that the conveyance by the Livingston Waterworks to the plaintiff was colorable and made for the sole purpose of conferring jurisdiction in the federal court in this case. This question was also involved in Doane v. California Land Co., supra. On this question we held, under the authority of Lehigh Mining & Manufacturing Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, that:

"The privilege of a grantee or purchaser of property, being a citizen of one of the states, to invoke the jurisdiction of a Circuit Court of the United States for the protection of his rights as against a citizen of another state—the value of the matter in dispute being sufficient for the purpose—cannot be affected or impaired merely because of the motive that induced his grantor to convey, or his vendee [vendor] to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which the title passed without the grantor or vendor reserving or having any right or power to compel or require a reconveyance or return to him of the property in question."

There is no evidence in this case that the title passed to the plaintiff with any reservation whatever on the part of the grantors or vendors that there should be a reconveyance or return of the property conveyed. We are of the opinion that the District Court properly exercised jurisdiction in the case.

[3,4] It is next contended that Ordinance No. 24 was a contract for only 20 years, and expired on July 1, 1910. The plaintiff admits the expiration of the contract, but not the expiration of the franchise. It is contended by the plaintiff that, as the grant of the franchise was not limited in its duration either by the grant itself or by the law of the state, it was made perpetual. In support of this contention the plaintiff cites the case of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389, where the Supreme Court held that:

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant [citing a number of cases]. If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights."

But in New York Electric Lines v. Empire City Subway, 235 U. S. 179–194, 35 Sup. Ct. 72, 59 L. Ed. 184, L. R. A. 1918E, 874, Ann. Cas. 1915A, 906, the Supreme Court refers to the tacit conditions annexed to grants of franchises and that they may be lost by misuser or nonuser. But in such a case there must be proceedings by the state for a forfeiture. Whether the state should proceed directly by quo warranto, or whether it should authorize the municipality to pass a resolution or ordinance of repeal or revocation, leaving the propriety of its course to be determined in an appropriate legal proceeding in which the default of the grantee may be adjudicated, was a question of state law with which the court was not concerned in that case.

In the present case the defendants allege in their answer to the second amended complaint, by way of a counterclaim, that on the 25th of March, 1918, a resolution was passed and adopted by the city council of Livingston, and approved by the mayor of said city, declaring forfeited and terminated the said alleged privilege and franchise under said Ordinances Nos. 24 and 25 for, among other things, failure of performance by the plaintiff and its predecessors in interest and failure to do equity. It is not alleged that this resolution was authorized by the state, which alone could authorize proceedings for a forfeiture of a franchise of this character. Without such authority the action of the city council and mayor in passing the resolution was no defense to this action, and the court was right in excluding the evidence of this counterclaim.

[5] The defendants contend that it was determined by the Supreme Court of the state in the case referred to as the "Specific Performance Case" (Livingston Waterworks Co. v. City of Livingston et al.

[No. 3720] 53 Mont. 1, 162 Pac. 381, L. R. A. 1917D, 1074) that the plaintiff had no franchise, but that question was not involved in this case. What the court had before it was the terms of the contract set forth in Ordinances Nos. 24 and 25, and the determination of the court was that it was the settled law of the state of Montana that an agreement to enter into an agreement upon terms to be afterwards settled between the parties could not as a general rule be enforced; that the construction placed upon the ordinances by the grantees that the renewal of the contract implied that the terms should remain unchanged and the contract was to continue for another period of 20 years, subject only to an adjustment of rates did not avoid the difficulty since under such construction the clear contemplation of the contract and its acceptance would be that the grantees had the exclusive right to supply the municipal needs of the city for water for the period of 40 years subject only to an adjustment of rates at the end of 20 years; that as such a contract was not within the power of the city the court would not assume without convincing reasons that any such contract was intended.

The court points out that the contract comprehended other things besides rates and prices, as, for example, conditions of quality, quantity, distribution, pressure, in short the elements that go to make up "service supposed in 1889 to be adequate to the needs of the city for 20 years, but which the experience of that time might demonstrate to be either inadequate or unnecessary." The court was therefore of the opinion that the words "renew the contract" did not mean an extension of the same contract for the additional period, subject only to a rate adjustment; that they were used to signify that, in case the city did not purchase the plant, there should be further contractual relations between the parties for an additional period of 20 years touching the same subject-matter, and having in view the same general purposes, but with such differences in terms-with all the word impliesas the experience of 20 years might lead the parties to insist upon. If this interpretation was correct, the court was of the opinion that the judgment of the lower court was proper. But, assuming that the renewal contract referred only to rates or prices, the court held that it could not be specifically enforced, since its terms were such as the parties themselves should fix, and they could not be made certain by means provided or contemplated by the contract itself. The court concludes its opinion as follows:

"The appellant [Livingston Waterworks Company] is simply left without a contract, and relegated to its rights and duties as a public utility, just as any water company is whose contract has expired. It must rest content in the fact that, possessing the only source of supply in Livingston, it may continue to furnish that city and its inhabitants with all the water needed by them upon a fair and reasonable basis—at least until competition, lawfully established, shall compel it to share the field."

Plainly, neither the franchise nor its duration was involved in that case. All the court did was to recognize its existence and continuance, and this is all we have properly before us in this case. The franchise granted the plaintiff's predecessor in interest, and claimed by it in Or-

dinances Nos. 24 and 25, has not been forfeited by any authorized

legal proceedings, and was not in issue in this case.

With respect to the hydrants, pipes, and mains claimed by the plaintiff as part of its water system, no forfeiture to the defendants has been shown, and no acquisition of title by the defendants appears in the evidence. The ownership of that property, therefore, continues in the plaintiff. The exclusion of the judgment roll in the "specific performance case" and of the remittitur from the Supreme Court of the state in that case was therefore correct. The exclusion of evidence tending to show grounds of forfeiture of the franchise because of the quality of the water supplied from the Yellowstone river and its quantity for fire protection was also correct. This evidence might be relevant and material in proceedings for forfeiture, but not in this case.

[6] Our construction of that portion of the decree of the District Court "that the right, privilege, easement, and franchise so granted is perpetual," is that the franchise, though perpetual, is always subject by appropriate remedy to forfeiture for misuser or nonuser, and we read the decree as in harmony with such limitations. They are the "tacit conditions" annexed to the grant. New York Electric Lines Co. v. Empire City Subway Co., supra.

The decree is therefore affirmed.

PINE HILL COAL CO. v. GUSICKI.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 9.

- 1. Courts \$\infty\$ 344—Service of process in other district confers no jurisdiction.
 - A federal court does not acquire jurisdiction of the defendant in a personal action by service of summons in another district.
- 2. Corporations ← 668(1) Service of process on foreign corporation ineffective.

Service of summons on a foreign corporation in a state where it is not shown to be doing business or to have property, and in which it has not appointed an agent under the state law on whom service may be made, is ineffective.

3. Appearance $\Leftrightarrow 9(1)$ —Special appearance not waiver of objection to jurisdiction of person.

A special appearance, for the purpose of moving to quash the service and to dismiss for want of jurisdiction over defendant, although there was a provision in the order to show cause for an extension of time to appear, demur, or answer, *held* not a general appearance, which waived objection to the jurisdiction.

In Error to the District Court of the United States for the Eastern District of New York.

Action by Mary Gusicki against the Pine Hill Coal Company. Judgment for plaintiff, and defendant brings error. Reversed.

Cravath & Henderson, of New York City (Howard Carter Dickinson and William L. Bowman, both of New York City, of counsel), for plaintiff in error.

Albert Massey, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Julian Gusicki, on the 22d of April, 1914, while in the employ of the plaintiff in error at its mines at Minersville, Pa., met an accidental death, leaving a widow and six minor children. In this action the widow sought to recover damages caused by reason of his death. The laws of Pennsylvania provide a right of action to the widow, and this action was brought in conformity therewith.

The deceased, with other miners, had finished his day's work and was leaving the mine, using a steel cage as a way therefrom, ascending in a perpendicular shaft. The floor of this cage was about 11 feet long by 6 or 8 feet wide, with metal supports running from each corner to an axle above. It was operated upon wooden guide rails, and while it was in the course of ascending the deceased and other miners fell therefrom and lost their lives. It will be unnecessary to discuss or pass upon the cause of their falling, since we are obliged to rule that the court originally was without jurisdiction and that such defect in jurisdiction has not been waived.

The complaint, as served, alleged that the plaintiff in error (defendant below) was a New York corporation and a resident of the Eastern district of New York and that the defendant in error (plaintiff below) was an alien and a subject of the czar of Russia. The answer put in issue the allegation that the plaintiff in error was a New York corporation, and asserted that it was a foreign corporation organized under the laws of the state of Pennsylvania. It further interposed the defense that the court had no jurisdiction of the cause of action or of the plaintiff in error. Process was served on April 21, 1915, upon a vice president of the plaintiff in error, at No. 17 Battery Place, New York City. A motion was made to set aside the service of the summons and complaint and dismiss the action for want of jurisdiction. The attorneys for the plaintiff in error appeared specially for the sole purpose of such proceeding. There was a provision, contained in the order to show cause, wherein the motion was made, for an extension of 20 days in which to "appear, demur, answer, or otherwise act" upon the summons and complaint. On May 27, 1915, this motion was denied, and the ground therefor was stated to be that the plaintiff in error had filed "what was equivalent to a general appearance, and it obtained an extension while making a motion to set aside the service on grounds which can be waived by appearance in the case." A motion for reargument was denied. Then the plaintiff in error filed its formal plea of a demurrer to the complaint. In the demurrer it was asserted that the plaintiff in error did not waive its claim that the court was without jurisdiction. It was overruled.

Thereafter, and as late as December 21, 1917, the plaintiff in error, appearing through its counsel specially, made a motion for reargument

of its first motion to set aside the summons for lack of jurisdiction. asserting that the authorities rendered since the first motion was decided sustained its contention. This application was denied. The case proceeded to trial on February 5, 1918, and the verdict upon which the iudgment has been entered resulted. Throughout the trial the plaintiff in error made motions and objections in respect to the jurisdiction of the court. The defendant in error moved to amend her complaint, alleging that the plaintiff in error is a foreign corporation organized under the laws of the state of Pennsylvania, which motion was granted. Thereupon plaintiff in error moved to withdraw its appearance, and asked to set aside the service of the summons and complaint, "as the pleadings disclosed that the court had no iurisdiction." This application was denied, as was a further application to dismiss the complaint upon the ground that the court had no iurisdiction. During the course of the trial, a motion was made to dismiss the complaint for want of proof that the plaintiff in error was doing business in New York City, or was registered in the state of New York, and especially for want of proof that the plaintiff in error was doing business in the Eastern district of New York. It was denied. The answer was then reinstated, and thereafter motions made, renewing the applications to dismiss for want of jurisdiction, were denied.

It will thus be observed that the plaintiff in error, in numerous ways, attacked the jurisdiction of the court throughout the entire court proceedings. The record discloses that the plaintiff in error had an office address at No. 17 Battery Place, in the borough of Manhattan, New York City, within the Southern district. No proof was offered to show that it in fact transacted business in this state, nor that it filed the customary certificate with the secretary of state entitling it to do business here. Evidence was offered to show that the plaintiff in error had no agent appointed upon whom service of process might be made in this state; also it was offered to establish that the company never had any officer or agent who did any business in the Eastern district of New York. This evidence was erroneously excluded. Plaintiff in error further attempted to show that Mr. Sturgess, upon whom the summons and complaint was served, paid the rent of the office at No. 17 Battery Place, and this likewise was erroneously excluded.

[1] The service of the summons and complaint upon Mr. Sturgess at No. 17 Battery Place, in the Southern district of New York, was not a valid service of process, and failed to give the District Court, out of which the summons was issued, jurisdiction. As was said in Harkness v. Hyde, 98 U. S. 476, 478 (25 L. Ed. 237):

"There can be no jurisdiction in a court of a territory to render a personal judgment against any one upon service made outside its limits. Personal service within its limits, or the voluntary appearance of the defendant, is essential in such cases. It is only where property of a nonresident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action."

To like effect is In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, and, in more recent holdings of this court,

Sewchulis v. Lehigh Valley Coal Co., 233 Fed. 422, 147 C. C. A. 358,

and Rakaukas v. Erie R. Co. (D. C.) 237 Fed. 495.

[2] There was no proof that the plaintiff in error had property in this state, nor that it was doing business in this state, or that it had come into the state of New York for the purpose of doing business Nor did it have an agent in this state upon whom process might be served. Under such facts, service of process would not be effective. Internat. Harvester Co. of America v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479; St. Louis, etc., R. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; Phila. & Reading Ry. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710.

The defendant in error offered in evidence a letter head of the plaintiff in error upon which it appears that under the words "Pine Hill Coal Company, Inc.," was found "17 Battery Place, New York City," and "304 People's Bank Building, Scranton, Pa." But this is the only alleged evidence of the plaintiff in error doing business in New York. There is no proof of its having sold coal, or received money for the sale of coal, in New York. This is not sufficient to constitute doing business within the state. Unless a foreign corporation is engaged in business within the district, it is not brought within the district by its agents. It must be said that the corporation is here, and, once it is established to be here, it may be served. Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915. Therefore, upon the authoritative decisions which control us, we must conclude that it was not proven that this corporation was doing business within the district, in such a sense as to subject it to suit therein. The corporation did not subject itself to the jurisdiction and laws of the district in which the process issued, and in which it is bound to appear, unless a proper agent has been served with process. Unless it can be said that this evidence discloses a waiver of the right to object to the jurisdiction of the court, the judgment below must be reversed.

by securing the extension of time to "demur, answer, or otherwise act upon the summons and complaint," there was a general appearance, and that the plaintiff in error could not therefore, object to the jurisdiction of its person, and providing the court had jurisdiction of the subjectmatter of the action, defendant in error is entitled to succeed. From the outset of the litigation, the plaintiff in error made plain its objection to the jurisdiction of the court, and it did not convert its special appearance into a general one. It did not appear and plead to the merits by obtaining the extension of time. It appeared specially, and was entitled to at any time challenge the jurisdiction of the court on the ground that the suit had been brought in the wrong district, as well as the jurisdiction of the court to the person of the plaintiff in error

or to the subject-matter.

The use of the phrase that it appeared specially for the purpose of setting aside the service of the summons, and at the same time, in the order to show cause extending its time to "appear, demur, or answer, or otherwise act upon the summons and complaint," prevents it from being considered a general appearance. It is only where the plaintiff

in error pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237; Yanuszauckas v. Mallory S. S. Co., 232 Fed. 132, 146 C. C. A. 324.

Having been refused in its application to set aside the service of the summons, the subsequent move of the plaintiff in error to dismiss on the ground that it was a corporation of the state of Pennsylvania did not waive the first objection, nor was there a waiver when the plaintiff in error demurred, and likewise there was no waiver of jurisdiction in filing an answer. Plaintiff in error relied upon the lack of jurisdiction over the person of the action, and therefore withdrew its general appearance, and pleaded specially to the complaint. The exception to the refusal to dismiss the complaint at this stage was well taken. Lehigh v. Washko, 231 Fed. 43, 145 C. C. A. 230.

In Budris v. Consolidated Coal Co. (D. C.) 251 Fed. 673, the court held (Chatfield, J.):

"A special appearance for the purpose of dismissing the particular action for lack of jurisdiction over the defendant, and not on the merits, would not be waived by the mere exercise of the jurisdiction, with the consent of the defendant, necessary to hear the motion," and "it has now been settled, by the case of Meisukas v. Greenough Coal Co., 244 U. S. 54, 37 Sup. Ct. 593, 61 L. Ed. 987, that a defendant does not consent to jurisdiction by a special appearance, even when coupled with an application for extension of time to answer, if the plea be overruled."

We conclude there was no waiver of the jurisdiction of the person of the plaintiff in error or the subject-matter of the action by the language employed in the appearance of counsel, and his objection, being valid, should have been sustained. Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

Judgment reversed.

WHEELER v. TAFT et al.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1919. Rehearing Denied January 24, 1920.)

No. 3370.

1. Appeal and errob \$\iiii 359\$—Writ of error to review action bemoved from \$3 ate court may be allowed by judge in "chambers" in another division.

Notwithstanding Judicial Code, § 53 (Comp. St. § 1035), providing that removal of a suit from the state court shall be to the United States District Court in the division in which is situated the county from which removal is made, a writ of error to review a judgment rendered in such action, granted by the judge "in chambers," which are considered to be where the judge is and is authorized to be engaged in performing his judicial duties, will not be dismissed, because allowed in a division other than that in which is situated the county from which the action was removed. [Ed. Note.—For other definitions, see Words and Phrases, First and

Second Series, Chambers.]

2 APPEAL AND ERROR 5-784-APPEAL ENTERTAINED, THOUGH BEVIEW SHOULD HAVE BEEN BY WRIT OF ERROR.

Under Act Sept. 6, 1916 (Comp. St. § 1649a), the appellate court will not refuse to review the judgment of the lower court merely because appeal was taken, instead of writ of error.

3. Brokers \$\infty 86(8)\$—Evidence showing plaintiff's commission was only ONE DOLLAR AN ACRE AND WAS TO BE DIVIDED.

In an action by a broker to recover commissions for effecting a sale of lands, evidence held to show that the agreed commission was only \$1 an acre, that it was to be divided between plaintiff and another, and was to be paid largely in lands.

4. Costs \$\infty 32(1)\$\to\$Successful plaintiff entitled to costs at law. Plaintiff, who recovers in an action at law, where defendant asserted he was entitled to nothing, should be awarded costs.

In Error to and Appeal from the District Court of the United States for the Western District of Louisiana; George Whitfield Jack, Judge. Action by Harve M. Wheeler against Charles P. Taft, in which H. W. Inscore filed an intervening petition. There was a judgment for

plaintiff for part only of the relief sought, and plaintiff appeals and brings error. Modified, and, as modified, affirmed.

G. P. Bullis, of Vidalia, La. (Hall, Monroe & Lemann, of New Orleans, La., of counsel), for plaintiff in error and appellant.

Henry Bernstein and Allan Sholars, both of Monroe, La., and Henry J. Livingston, of Memphis, Tenn. (Hudson, Potts, Bernstein & Sholars, of Monroe, La., and McGehee, Livingston & Farabough, of Memphis, Tenn., on the brief), for defendants in error and appellees.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

WALKER, Circuit Judge. This suit was brought in a state court of Concordia parish, La., by the plaintiff in error and appellant, Harve M. Wheeler, a citizen of the state of Louisiana (who will be referred to as the plaintiff), against the defendant in error and appellee Charles P. Taft, a citizen of the state of Ohio (who will be referred to as the defendant), for the recovery of an amount claimed to be due to the plaintiff as a commission of \$1.50 per acre for services rendered in bringing about a sale of a tract of more than 17,000 acres of timber land in Louisiana, the title to which stood in the name of the defendant. On the application of the defendant, the case was removed to the Monroe Division of the District Court of the United States for the Western District of Louisiana.

The defendant's original answer to the plaintiff's petition contained a denial that the former was indebted to the latter in any sum whatsoever. After testimony had been taken, and after the defendant in error H. W. Inscore had filed in the cause an intervening petition, which set up a claim that the intervener was entitled to a share of any commission owing by the defendant for services in bringing about the above mentioned sale of land, the defendant's answer to the petition was twice

The trial of the case resulted in a judgment or decree which adjudg-

ed that the plaintiff and Inscore were entitled to equal shares of a commission of \$1 per acre; that the defendant had the option of paying that commission in lands, which were part of those optioned, at the price of \$17.50 per acre; that the defendant convey to the plaintiff and Inscore each an undivided one-half interest in designated lands, which at the price of \$17.50 per acre amounted to \$1,329.41 less than the amount of the commission found to be due; that the sum of \$1,329.41 be paid by the defendant into the registry of the court, to be divided equally between the plaintiff and Inscore; and that all court costs be taxed against the plaintiff.

To obtain a review of that judgment or decree the plaintiff sued out a writ of error, which was allowed by the District Judge at Alexandria, La., on the 5th day of February, 1919. For the same purpose he pray-

ed for an appeal, which was allowed on March 3, 1919.

[1, 2] The defendant moved that the writ of error be dismissed. What is relied on to support that motion is the circumstance that, at the time of his allowance of the writ, the judge was not within the division of his district to which the case was removed from the state court. Attention is called to the provision of section 53 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1035]) that a removal of a suit from a state court shall be to the United States District Court in the division in which the county is situated from which the removal is made. It is contended that an effect of that requirement is to confine the action of the court in a suit at law to the territorial division in which the suit belongs.

We do not think that anything in the provision referred to indicates a purpose to make the validity of the action of a District Judge in allowing an appeal or writ of error dependent upon his being at the time of such allowance within the territory comprising the division of the court in which the decree or judgment to be reviewed was rendered. When the order is one which may be made at the chambers of the judge, it is not necessary that it be made within the territorial limits of the division in which the order is to be effective, if it is made where the judge at the time is performing the duties of his office, as the judge's chambers are considered to be where he is, and is authorized to be, engaged in performing his judicial duties. Ex parte Holtor Parker, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123; Apgar v. United States, 255 Fed. 16, 166 C. C. A. 344.

Even if the writ of error had been subject to be dismissed, as an appeal was sued out within the time allowed, the case would be in this court for review as a consequence of the provision of the Act of Congress of September 6, 1916 (U. S. Comp. St. § 1649a) that:

"No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

[3] The land for services in bringing about a sale of which a commission was claimed was part of a large quantity of Louisiana timber

land, the title to which was taken in the name of the defendant, with whom a number of other persons were associated in the ownership, including S. A. Conn and L. C. Black. It was conceded by the defendant that he was bound by what L. C. Black did in the matter of contracting for a sale of the lands, including the matter of commissions for services rendered. The sale for which a commission was claimed was a result of the exercise in May, 1917, of an option to purchase given in January, 1917. Of the evidence offered to support the claim asserted by the plaintiff no more need be said than that, exclusive of that contained in a letter which will be referred to, it was not such as to require a finding that the defendant was obligated to pay a commission of \$1.50 an acre.

After the option had been in force for some time, and had been renewed, the parties holding it made it known to the plaintiff and the defendant's representative that they would not exercise the option unless a part of the optioned lands not desired by them would be taken by the plaintiff, who was known to be claiming that the defendant would owe him a commission if the option was exercised. One of the option holders had a telephone conversation with the plaintiff on the subject, with the result that the plaintiff said that his commission was \$1 an acre, for which he would accept, at the price per acre stated in the option, part of the optioned lands not desired by the option holders. Following that conversation, plaintiff sent to the other party to it a telegram stating:

"As per conversation over phone will take our commission in land on Tensas river."

The option holders then notified the defendant's representative of their exercise of the option, stating that as an inducement to their doing so the plaintiff had agreed to accept \$1 per acre as commission in part of the optioned land at the price per acre, \$17.50, stated in the option contract. Whereupon the optioned land, except the part agreed to be excluded, was conveyed to the option holders, who paid therefor the price per acre stated in the option. This was done with the understanding that the seller would get the option price per acre for part of the optioned land not taken by the option holders by conveying it to the plaintiff for his commission.

When the above-mentioned conversation occurred it was disclosed to the plaintiff that, as a result of the option not being exercised, he would not get any commission unless it was arranged to relieve the option holders of the necessity of taking and paying for the part of the optioned lands which they did not desire. It well may be inferred that it was contemplated by the plaintiff that his agreement, made under the circumstances stated to induce the exercise of the option, to accept a commission of \$1 per acre, payable in part of the optioned lands not desired by the option holders, would be communicated by the latter to the defendant, and that, as between the principals, the transaction would be closed by the optioned lands, except those so excluded, being conveyed and paid for, leaving in the hands of the

defendant the lands he was to use in paying the commission agreed to

by the plaintiff.

The agreement made by the plaintiff in his conversation with one of the option holders had the effect of conferring on the latter authority to submit the agreement to the defendant for acceptance and action in pursuance of it. Even if, in the absence of the happening of the above-mentioned telephone conversation, the exercise of the option would have had the effect, under a former agreement with the plaintiff, of obligating the defendant to pay to the plaintiff a commission in money, the latter estopped himself from claiming that his commission should be so paid by agreeing to accept for his commission part of the optioned lands at the price per acre stated in the option; the communication to the defendant of the plaintiff's agreement to do so having the effect of inducing the former to sell to the latter, instead of to the option holders, the lands the plaintiff agreed to take for his commission, at the same price per acre as that stated in the option.

In behalf of the plaintiff it is contended that, when the defendant let the option holders buy part only of the lands mentioned in the option contract, he did not do so with the understanding that the plaintiff's commission was to be only \$1 per acre and that all of it could be paid in land. The circumstance principally relied on to support the conclusion that the defendant or his representative, Black, then understood that a commission of \$1.50 per acre was to be paid, is the statement, made in a letter written by Black to one of his co-owners of the land after the option was exercised, that "the net price to be paid for this property is \$16 per acre." The price stated in the option was \$17.50 per acre. In view of that fact it is contended that the above-quoted statement amounted to an admission by Black that a commission of \$1.50 per acre was to be paid.

The evidence disclosed that, before the letter quoted from was written, the defendant and the other owners of the land had agreed to make a payment of 50 cents an acre to F. K. Conn, a son of S. A. Conn; the latter being one of the owners. This payment was agreed to be made because of activities of F. K. Conn or his father in the transactions which led up to a sale of the land. Though in the testimony of the defendant and others associated with him in the ownership, that payment was spoken of as a gratuity, it well may have been regarded by Black as a part of the expense of the sale. It was an outlay incident to the sale of the lands at the gross price of \$17.50 per acre. To say the least, it is not clear that Black, in making the quoted statement, had in mind that a commission of \$1.50 per acre was to be paid to the plaintiff and others who co-operated with him in bringing about the sale. As above indicated, the evidence other than the letter quoted from was not such as to require a finding that the plaintiff was entitled to a commission of \$1.50 per acre.

It was shown practically without dispute that it was understood between the plaintiff and Inscore that, if the commission was \$1 per acre, Inscore, who co-operated with the plaintiff, was to have half of it. This being true, the plaintiff cannot successfully complain of the judgment in so far as it was in favor of Inscore. The judgment

rendered gave effect to what the plaintiff assented to in order to bring about a sale, in the absence of which the defendant would not have

been obligated to pay him anything.

[4] The defendant having contested plaintiff's right to recover anything, it was not proper to tax the costs against the plaintiff, who prevailed in the suit. The judgment will be here modified by taxing the costs against the defendant.

As so modified, it is affirmed.

DAVENPORT et al. v. HICKSON et al.

(Circuit Court of Appeals, Fourth Circuit. October 7, 1919.)

No. 1734.

1. Deeds \$\isim\$123—"Heirs," "Heirs of the body," "issue," meaning children.

Under the law of South Carolina, as settled by decision, the words "heirs," "heirs of the body," or "issue," must be construed to mean children, when the testator or grantor clearly indicates that he used the words in that sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs; Heirs of the Body; Issue.]

2. Deeds \$\infty\$=129(4)—Limitation to "issue" of grantee's body creating life estate in grantee.

A deed conveying land to a daughter "during her natural life, and after her death to the issue of her body," and providing that, if any child or children of the daughter should predecease her leaving a child or children, such child or children should take the share of the parent, but that, if the daughter should die without leaving any issue living, the land should revert to grantor's estate, held to use the word "issue" as meaning children, and as including children of a deceased child, and to vest the daughter with a life estate only.

Appeal from the District Court of the United States for the Western District of South Carolina, at Greensville; Joseph T. Johnson, Judge. Suit for partition by Tully Hickson and others against J. A. Davenport and others. Decree for complainants, and defendants appeal. Affirmed.

See also (D. C.) 248 Fed. 319.

T. P. Cothran and H. J. Haynsworth, both of Greenville, S. C. (Cothran, Dean & Cothran and C. F. Haynsworth, all of Greenville, S. C., on the brief), for appellants.

B. F. Martin and E. M. Blythe, both of Greenville, S. C., for appel-

lees.

Before PRITCHARD and WOODS, Circuit Judges, and WAD-DILL, District Judge.

WOODS, Circuit Judge. On March 10, 1844, Tully Bolling, for the consideration of love and affection, conveyed a tract of land containing 600 acres, more or less, in this language:

"To my said daughter Martha Ann Bolling during her natural life and after her death to the issue of her body." "To have and to hold all and

singular the said premises unto the said Martha Ann Bolling and then to the issue of her body, them, their heirs and assigns forever. But if any child or children of the said Martha Ann should die before she does, leaving issue, then the child or children to take the share the father or mother would have been entitled to if alive. But if the said Martha Ann should die without leaving any living issue at her death, then this tract of land is to revert back to my estate, and be disposed of as directed in my will. And I, the said Tully Bolling, do hereby bind myself, my heirs, executors and administrators, warrant and forever defend all and singular the premises above mentioned unto the said Martha Ann and the issue of her body after my death the right of the property not to be changed till then from myself, and from my heirs and from every person whomsoever lawfully claiming or to claim the same or any part thereof."

Martha Ann Bolling having married William Hickson in 1859, on February 15, 1875, she and her husband, after issue born, undertook to convey the land in fee simple with general warranty to F. M. Davenport. Martha Ann Hickson died October 20, 1915. Several of her children predeceased her unmarried, leaving their father, William Hickson, and their brothers and sisters their heirs at law. The surviving children are the complainants and the defendant Hattie Burry.

In this action for partition the complainants allege that the deed of Tully Bolling conveyed a life estate to Mary Ann with remainder to her children. The defendants, who claim under the deed of Mary Ann and her husband to Davenport, moved to dismiss the bill for lack of equity, on the ground that the deed from Tully Bolling falls under the rule in Shelley's Case, and that the deed of Mary Ann and her husband, made after issue born, carried a good title in fee. The District Court took the view of the complainants and decreed partition.

The rule of the common law generally laid down by the authorities is that, while "issue" is usually a word of limitation in a will, it is a word of purchase in a deed. 2 Wash. on Real Property, 655; 2 Jarman on Wills, 331. It was so held in South Carolina in Williams v. Kibler, 10 S. C. 414; Bradford v. Griffin, 40 S. C. 468, 19 S. E. 76. We should hesitate to hold that these two cases made a fixed rule of property in South Carolina in the face of the numerous later decisions holding explicitly that at common law, in a deed as well as in a will, the word "issue" is a word of limitation, unless the context shows it was used in a more restricted sense to denote purchasers. Holman v. Wesner, 67 S. C. 309, 45 S. E. 206; Williams v. Gause, 83 S. C. 265, 65 S. E. 241; Arledge v. Arledge, 86 S. C. 237, 68 S. E. 549; Sligh v. Sligh, 99 S. C. 307, 83 S. E. 260.

[1] Under these later cases if the granting clause to Martha Ann Bolling during her natural life, and after her death to the issue of her body, stood alone, the word "issue" would be a word of limitation and the title of Martha Ann would be a fee conditional. But it is not necessary to decide that point. The case is governed by another rule entirely free from doubt: The words "heirs," or "heirs of the body," or "issue," must be construed to mean children when the testator or grantor clearly indicates that he has used the words in that sense. Moone v. Henderson, 4 Desaus. (S. C.) 459; Holeman v. Fort, 3 Strob. Eq. (S. C.) 66, 51 Am. Dec. 665; Bailey v. Patterson, 3 Rich. Eq. (S. C.) 156; Duncan v. Harper, 4 S. C. 76; Hayne v. Irvine, 25 S. C. 289; Lott

v. Thompson, 36 S. C. 38, 15 S. E. 278; McLeod v. Tarrant, 39 S. C. 280, 17 S. E. 773, 20 L. R. A. 846; Shaw v. Robinson, 42 S. C. 342, 20 S. E. 161; Reeves v. Cook, 71 S. C. 275, 51 S. E. 93; Smith v. Clinkscales, 102 S. C. 242, 85 S. E. 1064.

[2] We think the grantor clearly said that by issue he meant child or children when, after repeating in the habendum that his conveyance was to Martha Ann Bolling and then to the issue of her body, he con-

tinues:

"But if any child or children of the said Martha Ann shall die before she does, leaving issue, then the child or children to take the share its father or mother would have been entitled to if alive."

Reduced to its simplest form, the grantor said this: I grant the land to Mary Ann for her life, and at her death to her issue, their heirs and assigns; but if any child or children of Mary Ann should predecease her leaving issue, then the child or children to take the share the parent would be entitled to if living. He thus uses "child" and "children" as the equivalent of "issue," not only in referring to the issue of Mary Ann, but to the issue of any child who may predecease her. We think the grantor could hardly have made the matter clearer if he had said in so many words "issue" in these clauses meant "children."

It is true that, when he came to direct the reversion in case "Mary Ann should die without leaving any issue living at her death," he evidently had in his mind the conception that the issue of Mary Ann should include, not only her own children, but the child or children of

any child who might predecease her.

In this latter clause he was providing for the course of the title only in case the previous provisions should fail, and he had before provided that at the death of Mary Ann it should go to her issue, meaning her child or children, and their issue, meaning a child or children of any deceased child, who would take the parent's share. Evidently, therefore when he provides for a reverter for failure of issue of Mary Ann at the time of her death, he means not issue generally, but her child or children and the child or children of any predeceased child. Thus we think the grantor has clearly expressed the definition of issue which was in his mind, and that when he was providing for the contingency which has happened he used it in the sense of children of Mary Ann.

This statement is merely an elaboration of what the grantor clearly said in inartificial language. Happily we are allowed to give effect to the obvious meaning of the deed without violation of any artificial rule of the common law. This construction of the deed renders unnecessary consideration of the question whether the words "them, their heirs and assigns forever," in the habendum "unto the said Mary Ann Bolling and then to the issue of her body, them, their heirs and assigns forever," standing alone, would so break the indefinite line of inheritance as to take the deed out of the rule in Shelley's Case.

Affirmed.

JOHN A. ROEBLING'S SONS CO. OF NEW YORK v. ERICKSON.*

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 26.

1. SRAMEN &= 29(4)—SHIPOWNER LIABLE FOR INJURY TO SEAMAN REGARDLESS OF CONTRIBUTORY NEGLIGENCE.

The relation of master and seaman is peculiar, and different from the ordinary relation of master and servant, in that a seaman injured without willful misconduct is entitled to expenses of maintenance and cure, and wages to the end of the voyage, whether himself guilty of negligence or not; and where his injury is due to failure of the owner to furnish and maintain a seaworthy vessel, with proper appliances, he may recover full indemnity, and in such case, while his negligence does not prevent recovery, it is to be considered in determining the extent of recovery.

2. Seamen $\Leftrightarrow 29(1)$ —Shipowner not liable for injury from master's adopting dangerous method of work.

A shipowner *held* not liable in damages for injury to a seaman through adoption by the master of a dangerous method of discharging cargo, by directing use of sticks furnished for dunnage only for a purpose for which they were not intended or fitted.

3. Seamen &==29(5)—Election of remedies not required in action for injury to seaman.

In an action at law by a seaman to recover for an injury, he cannot be required to elect between recovery of expenses of maintenance and cure and wages to end of the voyage, to which he is entitled in any event, and a claim for indemnity.

In Error to the District Court of the United States for the Southern District of New York.

Action by Alec Erickson against the John A. Roebling's Sons Company of New York. Judgment for plaintiff, and defendant brings error. Reversed.

B. L. Pettigrew, of New York City (Walter L. Glenney, of New York City, and Everett W. Bovard, of Elmhurst, N. Y., of counsel), for plaintiff in error.

S. B. Axtell, of New York City (Arthur Lavenburg, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. The plaintiff, an able seaman on the schooner Florence Thurlow, at Ponce, Porto Rico, while taking out the cargo fall from the snatch block, got his hand caught between the fall and the pulley, and permanently injured. The vessel was discharging heavy sawed logs 30 to 40 feet long from the lower hold to the 'tween-decks and through a square port in the bow to a lighter.

The plaintiff's story is that the discharging had been going on for some days in the usual and safe method, which need not be particularly described, when the master for the sake of speed adopted a new and dangerous one. He directed the men in the hold to put a stick under the after end of the logs, to hold them up while the fall was being disen-

gaged from the snatch block, and gave them a defective one, which broke, causing the after end of the log to drop and bring a sudden strain on the fall, which caused the plaintiff's left hand to be caught in the snatch block as above stated. The stick was shipped with a multitude of others like it as dunnage for the logs, and not for any other purpose.

The court required the plaintiff to elect at the trial whether he would stand upon his right to wages and expenses of maintenance and cure to the end of the voyage, or to stand upon his right to indemnity. He elected the latter, on the ground that the master, as vice principal of the owners, ordered the dangerous method of discharging the logs, and that the vessel was unseaworthy because of the defective and

unsafe stick selected by him.

The court, over the defendant's exception, denied its motion for the direction of a verdict in its favor, and left to the jury the question whether the master adopted an improper method of discharging the cargo, and whether the stick used was defective, instructing them that, if they so found, the owners were liable, and that, while the plaintiff's contributory negligence, if any, would not prevent him from recovering they should consider such negligence as one of the elements in fixing the amount of his indemnity.

- [1] Cases concerning the rights of passengers or of strangers to recover for personal injury on board ship are wholly inapplicable to seamen. The relation of master and seaman is peculiar, and is fully stated by the Supreme Court in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171. A seaman injured without willful misconduct is entitled to wages and expenses of maintenance and cure to the end of the voyage, whether himself guilty of negligence or not. His freedom from liability for his own negligence is not a question of remedy at all, but an essential part of the status of the seaman and of the relation of master and seaman. Upon the foregoing general doctrine has been ingrafted, purely out of tenderness for the seaman and upon no principle, an exception that, where his injuries are due to the failure of the owners to furnish and maintain a seaworthy vessel with proper appliances, the seaman may recover full indemnity. The negligence of the seaman in such case does not prevent his recovery, but may be taken into consideration, as the court below held, in determining the extent of indemnity which he should receive.
- [2] In this case we must take the plaintiff's story to be true. So far as the unusual and dangerous method of discharging the cargo is concerned that was an improvident order of the master, for which the owners are not liable (Chelentis v. Luckenbach S. S. Co., supra); and so far as the use of the stick is concerned, we also think they are not It was furnished for dunnage of the cargo, and not to be used as the master did. The owners are liable to indemnity when the master fails to keep the ship's appliances in order, which may be an example of what Mr. Justice McReynolds had in mind in the Chelentis Case when he said at page 384 of 247 U. S. (38 Sup. Ct. 504, 62 L. Ed.

1171):

"Section 20 of the Seaman's Act [Comp. St. § 8337a] declares 'seamen having command shall not be held to be fellow servants with those under their authority,' and full effect must be given this whenever the relationship between such parties becomes important. But the maritime law imposes upon a ship owner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence therefore to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employés on shore."

There would, however, be little security for careful owners if, after furnishing a seaworthy ship and proper appliances, they were still liable for the act of the master in not using the proper appliances furnished, or in using them for purposes for which they were not furnished.

[3] The plaintiff should not have been required to elect whether to stand upon his claim for indemnity, or upon his right to wages and expenses of cure and maintenance to the end of the voyage. To the latter the seaman is entitled under any and all circumstances, except his own willful misconduct. If he recover indemnity, it will be included; but if he claim indemnity, and fail to get it, he is not for that reason to be deprived of his right to wages and expenses of cure and maintenance to the end of the voyage. On the case as it stood the court should have granted the defendant's motion for a verdict in its favor.

The judgment is reversed, and a new trial ordered.

DRY DOCK, E. B. & B. R. CO. V. PETKUNAS.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 55.

APPEAL AND ERROR & 78(6)—Order setting aside verdict not a final appealable decision.

An order setting aside a verdict for defendant rests within the trial court's discretion, and is not appealable, under Judicial Code, § 128 (Comp. St. § 1120), confining the power of review to final decisions of the District Court.

In Error to the District Court of the United States for the Eastern District of New York.

Action by Mary Petkunas against the Dry Dock, East Broadway & Battery Railroad Company. From an order setting aside a verdict for plaintiff and granting a new trial, defendant brings error. Writ dismissed.

Alfred T. Davison, of New York City (A. C. Mayo, of Brooklyn, N. Y., and W. R. P. Malony, of New York City, of counsel), for plaintiff in error.

B. S. Yankaus, of New York City, for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error, hereinafter called the plaintiff, was injured while a passenger on a car of the defendant (plaintiff in error) on the 6th of May, 1916. The car on which she rode was referred to as a "red" car. It was the color of all the cars operated by the defendant. The defendant's car collided with another car owned by another railway company, on the Williamsburgh Bridge, crossing the East River, and as a result of this collision the plaintiff says she sustained injuries causing her pain and suffering, mental distress, and necessitated her incurring sums of money for medical attention.

The electric car upon which the plaintiff was riding was bound across the Williamsburgh Bridge, en route for Brooklyn. There was a "green" car of the New York Railways Company at a standstill in a dark place on the track ahead, and the car upon which the plaintiff was riding collided with this "green" car. It was a dark and cloudy night, and it is said the "green" car was not lighted. The motorman of the defendant's car had his headlight burning and the advantage thereof. The testimony is that an object could be seen by this headlight at a distance of 35 to 40 feet. When the motorman saw the green car, it was such a short distance away that, with the speed he was maintaining, to wit, 10 miles an hour, he was unable to stop in a space of 40 feet. The motorman said that he did all in his power, using the emergency brakes and his reverse, also making use of sand with which his car was supplied, but with all was unable to avoid the collision.

The court submitted the question of the negligent operation of the car upon which the plaintiff was a passenger to the jury as a question of fact. The jury returned a verdict for the defendant. The District Judge set aside the verdict. Dissatisfied with this result, the defendant

appeals.

It is urged upon us that we have jurisdiction to review this determination of the District Judge, and the reason advanced is that it was the positive duty of the District Court not to set aside the verdict, and that in doing so he exercised unwarranted judicial power, and, if he had any discretion in the premises, his granting the motion to set aside the verdict was an abuse of discretion. The plaintiff moves to dismiss the appeal, contending that the order appealed from is not a final order, and therefore not reviewable on this writ of error.

Under chapter 22, § 2, Act Jan. 28, 1915, amending section 128 of the Judicial Code (Comp. St. § 1120), it is provided that the Circuit Court of Appeals shall exercise complete jurisdiction to review, by appeal or writ of error, final decisions in the District Court. Since this is not a final order, we think the plaintiff can successfully maintain her position that the order is not appealable, and that this writ of error must be dismissed. However erroneous may be the result below in setting aside the verdict of the jury in the District Court, it has been numerous times determined that the grant of a new trial after a verdict of a jury is within the discretion of the trial court, and cannot be reviewed in this court. Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Amer. Trading Co. v. North Alaska S. Co., 248 Fed. 665, 160 C. C. A. 565; Robinson v. Van Hooser, 196 Fed.

620, 116 C. C. A. 294; Big Brushy C. & C. Co. v. Williams, 176 Fed. 529, 99 C. C. A. 102; Farrell v. First Natl. Bank, 254 Fed. 801, 166 C. C. A. 247.

Authorities to which our attention is called by the defendant (Glenwood Irrigation Co. v. Vallery, 248 Fed. 483, 160 C. C. A. 493; Pugh v. Bluff City Excursion Co., 177 Fed. 399, 101 C. C. A. 403) do not change this rule. In the first case, Vallery, receiver of the Colorado & Midland Railroad Company, brought an action to recover for fire damage resulting in the destruction of a bridge. The loss was fixed at \$1,973.89. This was undisputed. The trial judge, in submitting the case to the jury, said that, if they found for plaintiff, the verdict should be for this sum. The jury, however, deducted \$1,200 from the amount. This appeared to be the amount of a policy of fire insurance which in part covered the loss. Their verdict was for \$760.03. Both plaintiff and defendant sued out writs of error. The court simply held that the amount of damages was not a fact tried by the jury within the meaning of the Seventh Amendment of the federal Constitution, and that the verdict was perverse and directly violative of the charge of the court. It was said that this could be reviewed upon appeal, and that it was error for the trial judge to refuse to set aside the verdict for the smaller sum. The court said:

"Nor does such a decision violate the rule that a refusal of the trial court to disturb the verdict on motion for new trial is a matter of discretion, because the duty not to enter judgment upon such a verdict is one of law, and not of discretion."

In Pugh v. Bluff City Excursion Co., supra, the liability of the defendant in an action for loss of life was conceded. The jury question was the amount to be awarded. The deceased was 29 years of age, in good health, capable of earning and did earn \$20 a week at the time of his death. He was supporting his widowed mother. The facts were not seriously disputed. The jury returned, asking if they could find a verdict for the plaintiff and fix the damages at \$1. The court replied that they were authorized to find a verdict for such damages as, under all the evidence and the charge previously given, they thought the plaintiff was entitled to recover. The jury returned a verdict for \$20. The Circuit Court of Appeals held that the answer to the inquiry was correct in point of law, but that the court should have gone further, and prevented the jury from doing what they were contemplating, and held that where the verdict was so inconsistent on its face, and showed the abuse of power on the part of the jury, it was the positive duty of the court to grant the motion to set aside the verdict. It was held that under such facts the obligation was not discretionary. The

"If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceeding and grant a new trial; and such, we think, was the case here."

In the case at bar, the motion was addressed to the discretionary power of the court, and the District Judge exercised that discretion against the defendant. We cannot, under the authorities, review the exercise of that discretion.

The writ is therefore dismissed.

HYMAN V. TROW DIRECTORY PRINTING & BOOKBINDING CO.

Appeal of A. ERDMANN CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 24.

 APPEAL AND ERROR € 1009(4)—Findings in equity case not binding on APPELLATE COURT.

In an equity case, in which a receiver was appointed, findings of fact of the trial court are not binding on appeal, and may be disregarded, if manifestly erroneous or against the weight of the evidence.

2. Corporations \$\iff 566(1)\$—Claim against insolvent company not preferred unless purchase was made, with intent not to pay therefor.

A creditor, who sold coal to an insolvent corporation, making delivery on the day on which bill for appointment of a receiver was filed, is not entitled to a preferred claim, unless the corporation was insolvent at the time of the purchase, and unless it concealed its insolvency and purchased the coal without intention of paying therefor.

3. Corporations 566(1)—Evidence insufficient to support claim of preference on insolvency of corporation.

Where the creditor of an insolvent corporation, having delivered coal on the day a bill was filed against it for the appointment of a receiver, asserted right to a preferred claim, evidence *held* insufficient to show that the corporation concealed its insolvency, etc., so as to entitle the creditor to preference.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by James N. Hyman against the Trow Directory Printing & Bookbinding Company, upon which receiver was appointed. From a judgment denying the petition of the A. Erdmann Company, Incorporated, for preferred claim, petitioner appeals. Affirmed.

Wesselman & Kraus, of New York City (Harry Lesser, of New York City, of counsel), for appellant.

Frank M. Patterson, of New York City (Franklin H. Mills, of New York City, of counsel), for receivers.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a proceeding by the claimant, the A. Erdmann Company, to establish a preferred claim against the estate of the Trow Directory Printing & Bookbinding Company for the sum of \$1,077.44 in payment for 226 tons of coal sold by the claimant to the defendant.

A bill was filed on April 27, 1918, by James N. Hyman against defendant, alleging that the latter was indebted to the former in a sum in excess of \$6,500, and was at the time insolvent, and asking the appointment of receivers. On April 29th defendant filed its answer, admitting the allegations of the complaint, and joining in the prayer of the complaint that receivers be appointed for the dissolution and winding up of the affairs of the defendant corporation.

On May 23, 1918, an order was entered appointing a special master to consider the claim of the claimant, and all other claims, and report. The special master filed his report, in which he found that the claimant had no valid preferred claim against the receivers for the said 226 tons of coal, or for any part of the purchase price thereof, and the claim should be dismissed, with costs. The District Judge confirmed the report.

The coal, the value of which is now sought to be reclaimed, was purchased on April 24, 1918, and was delivered to the defendant on April 27th, which was the very day when the proceedings were instituted for

the appointment of the receivers.

[1] In the argument in this court counsel for the receivers contended that this court is bound by the facts found by the trial court, that those findings have the effect of a verdict, and that this court is not at liberty to consider the weight of the evidence, and a number of cases are cited in the brief to sustain that proposition. It is hardly necessary to say that no one of them has any application to such a case as this. This is a proceeding in equity, and in equity the appellate court is not concluded by the findings of fact, but will disregard them, if it finds them manifestly erroneous, or manifestly against the weight of evidence.

This is not a case, however, in which we find it necessary to disagree with the findings made by the special master, and confirmed by the District Judge. A careful examination of the testimony has convinced us that those findings are fully justified, and should not be disturbed.

[2, 3] In order that the claimant should succeed in establishing his claim to a preference it must appear: (1) That the defendant was insolvent at the time of the purchase of the coal. (2) That defendant concealed its insolvency from the claimant. (3) That defendant at the time it purchased the coal did so without the intention of paying for its

It may be conceded that the defendant was insolvent when the coal was bought. But it is not made out to the satisfaction, either of the court below or of this court, that defendant concealed its insolvency,

or that it bought the coal intending not to pay for it.

The coal was bought by defendant through its manager. The claimant's representative sought out the defendant's manager. The latter did not seek him. An order for 250 or 300 tons of coal was obtained. The agent then asked the manager how it was going to be paid for, and said he wanted it paid for in 30 days. The manager replied that he thought that could be arranged. Nothing else was said according to the manager's recollection. He was asked whether he said at that time that his company was all right, or whether he had any talk about the solvency or insolvency of the company. He replied in the negative. He was asked whether at that time he knew that the company was insolvent and he replied that he knew nothing of it.

The special master, who saw and heard the witness give his testimony, evidently believed him truthful, or was not convinced that he was untruthful. The testimony of the claimant's agent differs in some particulars from the testimony of the manager. But the claimant, if

he is to obtain a preference, has the burden of establishing the three propositions above laid down, and he cannot succeed in a case where the proof is not clear, and it is not in this case.

The judgment is affirmed.

WARNER v. GASTON, WILLIAMS & WIGMORE OF CANADA, Limited. (Circuit Court of Appeals, Second Circuit. November 13, 1919.)

No. 8.

Shipping \$\infty 22\to Broker has right to commission where purchasers failed TO OBTAIN PERMISSION TO PURCHASE UNDER BRITISH DEFENSE OF THE REALM

A broker, who, as authorized, procured purchasers, who entered into a satisfactory contract for purchase of a British steamship, which contract his principal afterward refused to perform, held not deprived of his right to the agreed commission because the purchasers had not obtained permission to purchase, as required by a British Defense of the Realm regulation which made its violation an offense, but did not invalidate the sale, and where the contract was repudiated on different grounds.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Phillip A. Warner against Gaston, Williams & Wigmore of Canada, Limited. Judgment for defendant, and plaintiff brings error. Reversed.

J. P. Nolan, of New York City (J. P. Nolan and Charles L. Cole,

both of New York City, of counsel), for plaintiff in error.

Kirlin, Woolsey & Hickox, of New York City (L. De G. Potter and Cletus Keating, both of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The plaintiff brought this action at law to recover of the defendants commissions as broker for having sold the British steamer Eskasoni for the sum of \$475,000. The employment was evidenced by the following letter, supplemented by testimony that the plaintiff's commission was to be 2½ per cent.:

"December 11, 1916.

"Mr. P. A. Warner, 30 Church Street, New York City-Dear Sir: Referring to our conversation this afternoon, I beg to advise that you are authorized to offer the steamer Eskasoni for sale for four hundred and seventy-five thousand dollars (\$475,000.00). Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers.

"Yours very truly, J. B. Austin, Jr., Vice Pres. & Gen. Mgr."

The plaintiff introduced Philip Templeman and George A. Moulton, who entered into a formal written contract with the defendants, which fixed all "details as to terms of payment, transfer of steamer, etc." It was in the form of a charter party; the hire covering the purchase

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price, and the defendants agreeing upon the expiration of the charter to make a bill of sale to the charterers, provided they had fulfilled all their obligations. The purchasers paid \$5,000 down on the execution of the contract, and the defendants paid the plaintiff his commission thereon.

The defendants are a corporation of the Dominion of Canada, and the purchasers were subjects of Great Britain, residing in Newfoundland. The twelfth article of the contract was as follows:

"Twelfth. Licenses and Permits—The charterers agree to procure from the British or Dominion governments, or the government of Newfoundland, as may be necessary, any licenses or permits which may now be, or which may hereafter become, necessary as a condition of entering into any trade in which the charterers may wish to employ the said steamship, and to comply in all respects with the said licenses and permits and with any laws and governmental proclamations, rules, regulations, and/or restrictions which may be applicable to the said steamship as a British steamship."

The defendants offered in evidence section 39cc. of the British Defense of the Realm Regulations, which reads:

"39cc. A person shall not without permission in writing from the shipping comptroller, directly or indirectly and whether on his own behalf or on behalf of or in conjunction with any other person, purchase or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel.

"If any person acts in contravention of this regulation, or if when any permission of the shipping comptroller has been granted under this regulation subject to any conditions, the person to whom it was granted fails to comply with any such condition, he shall be guilty of an offense against these regulations."

The purchasers had no such permission from the shipping comptroller, and the purpose of the defendants was to show that because of this, the purchasers not being able to buy, the defendants were justified in refusing to carry out the contract. But this regulation was not pleaded. No reliance was placed upon it at the time the defendants refused to perform, and it does not show on its face that the sale, though made without the written consent, was void and unenforceable. The only penalty, so far as the record shows, is that persons not conforming with the regulation will be guilty of a violation of it. There is nothing whatever to show that the British government would prevent performance of the contract. The apparent purpose of the regulation was to enable the authorities to keep track of all such negotiations about British shipping, and not to make sales without permission void.

Whether this is so or not, the only evidence the defendants got into the plaintiff's case as an excuse for their refusal to perform had no relation to the regulation whatever. That excuse was that the British consul at New York advised them not to sell the steamer to Templeman and Moulton, because they had on a previous occasion chartered a vessel to persons not favorably regarded by the British authorities. The trial judge over the plaintiff's exception directed a verdict for the defendants, on the ground that the purchasers were not able to buy because of their failure to comply with the regulation.

We think this was error. The record must be read as favorably to the plaintiff as possible. The sale of the steamer failed because the defendants refused to perform. The plaintiff earned his commission when the contract between them and the purchasers was signed. The sale was then made with persons and on terms satisfactory to the defendants. The plaintiff had nothing to do with the terms of the contract, and was not responsible for the performance of it. The purchasers were in all respects approved by the defendants, the broker's principal. Kalley v. Baker, 132 N. Y. 1, 29 N. E. 1091, 28 Am. St. Rep. 542; Alt v. Doscher, 102 App. Div. 344, 92 N. Y. Supp. 439; Bunnell v. Chapman, 173 App. Div. 108, 159 N. Y. Supp. 381. The motion to direct a verdict for the defendants should have been denied, and if they declined to go on with their case a verdict should have been directed for the plaintiff.

The judgment is reversed.

THE BERN.

(Circuit Court of Appeals, Second Circuit. November 21, 1919.)

No. 40.

Admiralty &=118—Findings on evidence binding on reviewing court.

A finding in an admiralty case that a tug struck a well-known reef, based on the testimony of witnesses seen and heard by the trial court, will not be disturbed by the appellate court, where the fact found was no more incredible than facts found in other similar cases.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by James M. Creighton against the steam tug Bern, her engines, etc., claimed by the Philadelphia & Reading Railway Company. Decree for libelant, and claimant appeals. Affirmed.

Macklin, Brown, Purdy & Van Wyck, of New York City (P. M. Brown, of New York City, of counsel), for appellant.

Park & Mattison, of New York City (S. Park, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. The difficulty of believing that this tug went so near the New Jersey shore as to strike a well-known reef is great, but no greater than similar difficulties resolved in favor of a libelant by Brown, J., in The Ellen McGovern (D. C.) 27 Fed. 868. But no question of law was or is involved, and where, as here, the findings below are based on evidence given by witnesses seen and heard by the trial judge, we are not disposed to disturb his finding. The F. B. Squire, 248 Fed. 470, 160 C. C. A. 479.

DAVEY TREE EXPERT CO. et al. v. VAN BILLIARD et al. (Circuit Court of Appeals, Third Circuit. December 18, 1919.)

No. 2487.

1. PATENTS \$\infty 328—For process for treating wounds in trees valid and infringed.

The Davey patent, No. 890,968, for process of treating a bruise or wound in a tree, by cutting away dead wood and filling the cavity with cement in such manner that it should be self-draining, held valid, and also infringed.

2. PATENTS \$\iff 328\$—For process for treating wounds in trees valid and infringed.

The Davey patent, No. 958,478, for process of reinforcing trunks of trees having cavities therein extending to the exterior and longitudinally of the trunk, by building up within the cavity a filling in sections one above another, is valid as to claims 1, 2, 3, 4, 5, 8, and 11 and infringed; claim 1, which was most general, not being too broad, in view of the fact that the patentee was a pioneer in the field.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the Davey Tree Expert Company and others against Rue J. Van Billiard and another. From a decree for complainants on condition (248 Fed. 718), complainants appeal. Modified.

See, also, 255 Fed. 781, — C. C. A. —.

Bakewell & Byrnes, of Pittsburgh, Pa. (William A. Schnader, of Philadelphia, Pa., and Clarence P. Byrnes, of Pittsburgh, Pa., of counsel), for appellants.

Arthur E. Paige, of Philadelphia, Pa., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

BUFFINGTON, Circuit Judge. In the court below the plaintiffs charged defendants with infringing two patents, viz. claims 3, 4, 6, and 7 of patent No. 890,968, granted June 16, 1908, to John Davey et al., for a process for treating and dressing a bruise or wound in the trunk or live branch of a live tree, and claims 1, 2, 3, 4, 5, 8, and 11 of patent No. 958,478, granted May 17, 1910, to Wellington E. Davey, for a process of reinforcing trees.

[1] Turning our attention first to the earlier patent, we note that the court below, in an opinion reported at 248 Fed. 718, held these claims valid and infringed, and from a decree so adjudging the defendant Van Billiard, took this appeal; his codefendant having suffered a decree pro confesso to be entered against him. After full hearing, we are of opinion the decree so adjudging was right.

The practice of cleaning out the dead wood, fungus, and other matter from trees, and filling such cleaned cavity with cement, is an old and well-recognized one. Generally, the result of such practice was to prevent further decay; but, where water accumulated behind it, the cement filler tended to cause decay more rapidly than would have

been the case had the cavity remained unfilled, for it is evident that thereby air and light were shut out, and hence the growth of fungus and deterioration were correspondingly rapid. To overcome this recognized evil, for which no one had suggested any remedy, the patent was intended.

As in the former art, the patentee carefully cleared out the cavity by removing all decayed matter, and cleaning and, if necessary, cutting down to the live wood; but instead of stopping at the live wood, as the old art had done, and filling this live wood cavity with cement, the patentee took an additional step, quite at variance with former practice—which was to stop when live wood was reached—and cut into the live wood itself around the entire sides and top of the cavity, so as to form a live-wood trench, and thereby, when the cement was poured into the cavity, form in this trench cut a cement dam or barrier, which not only prevented water from going any farther, but carried off such trapped water down to the foot of the cavity, where it passed out to the surface. This novel practice overcame a recognized, but unsolved, evil, and had proved simple and effective. The question of whether it was inventive was decided in the affirmative by the Patent Office, and the plaintiff has the prima facies which arise from such grant. The experienced District Judge of the District of Delaware, who, by assignment, heard the case below, came to the same conclusion. In a suit in the District of New Jersey, involving the same patent, another experienced District Judge came to a like conclusion. Little, if anything, can be added, or, indeed, need be added, to what this latter judge has so convincingly said in his opinion reported in Dayey v. Cutter, 197 Fed. 180:

"The testimony establishes that this step accomplished the object sought, and that it was promptly recognized and adopted by foresters and others in the business of caring for trees, as an effective means of trapping and shedding the water before it reached the cavity. This watershed groove is not a mere duplication or extension of the idea of means disclosed in the enlargement of the cavity. Such enlargement is only for the purpose of removing the decayed wood and to hold in the filler. It could not prevent the trickling or seeping in of water at the outer edge of the cavity. The cutting of the groove is not to remove the decayed wood, and, though it aids in holding intact the filler, that is but incidental. Its purpose, as already stated, is to trap and shed the water ere it reaches the cavity, and is a decided advance on the art."

In accordance with their views, we also are of opinion that the claims in question involve invention and are valid. That they are infringed is also, under the proofs, clear; but in that connection we state that in the present cases the channel which we hold is an infringement is a groove cut into the live wood of the cavity, both sides of which groove are, and are cut into, live wood. No other form or position of groove is before us, or involved in our ruling—a statement we make lest our decision should be regarded as of broader scope than it is, or is meant to be.

[2] The second patent is addressed to another evil, which the cement filling of tree cavities brought to light, namely, where the cavities were large, and the swaying of the tree broke the cement filling.

and thereby permitted moisture to enter through cracks in the filler. This cracking the patentee avoided by the simple, but effective, preventive of building up a filler composed of sectional or cup joints, whereby the solid, unyielding cement column of the old art was replaced by a yielding section, which, like the ball and socket joint of an articulated structure, such as the human spine, was adapted to work as a joint and prevent cracking of the cement, when the inclosing tree swayed under the wind.

Not only do we find no such practice in the prior art, but we find no conception of a jointed, sectional structure functionally designed to yield to the swaying of the trees. So far as any disclosures or practices of the prior art of tree treatment are concerned, that art simply accepted the give of the tree and its effect on a rigid, unyielding cement column as a necessary evil, and made no effort to overcome that evil. The field was therefore an open one, and the patentee, when he entered it, was not only the first to suggest a simple and effective means of preventing the cracking of cement cores, but was the first to even suggest to the tree-planting art that the prevention of cracking was a field of effort. The proofs satisfy us that the patent in question was a very substantial contribution to forestry. Its success is as great as its simplicity is marked, and we disagree with the court that the first claim in the patent was too broad. It described in simple, inclusive terms what the patent first disclosed, viz.:

"An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the cavity of a filling in sections one above another."

And, there being no prior art or practice in that field, the patentee was entitled to a claim as broad as his disclosure and contribution to the art. Finding this claim valid, and agreeing with the court below that the other claims in issue were valid, it follows that the defendant, who was a former employé of the plaintiff company and continued to practice the patented process after he left its employ, must be adjudged an infringer.

We accordingly hold the claims of the two patents in question are valid and infringed, and the decree of the court below will be modified and restated, so as to so adjudge.

UNITED STATES v. MOSSEW.

(District Court, N. D. New York. December 24, 1919.)

CRIMINAL LAW @= 1072-WRIT OF ERROR ALLOWED TO REVIEW CONVICTION WHERE STATUTE PROVIDES NO PENALTY.

Where, on an indictment charging violation of Food Conservation Act Aug. 10, 1917, § 4 (Comp. St. 1918, § 3115½ff), in exacting an excessive price for sugar, defendant at the June term pleaded guilty, and did not at that term or at the succeeding October term move to set aside or quash the indictment, or set aside or vacate the conviction, held that, as the act prescribes no penalty for exaction of unreasonable prices, and as there is no general federal statute fixing a penalty where none is provided in the statute declaring acts unlawful, defendant's application for a writ of error, made at the December term, will be granted, in view of the doubt of the District Court's jurisdiction, despite Judicial Code, § 24, to assess punishment.

Joseph Mossew was convicted of violation of Food Conservation Act Aug. 10, 1917, § 4, after plea of guilty. Writ of error allowed.

Defendant was indicted for a violation of Section 4, Food Conservation Act (chapter 53, Act Aug. 10, 1917), in making unreasonable rates and charges for a necessary, viz. sugar. He pleaded "guilty" to the indictment, and was fined \$500 on three counts; three separate offenses being charged.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., and F. J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y.

Mangan & Mangan, of Binghamton, N. Y., for defendant.

RAY, District Judge. Section 4 of the Act of August 10, 1917 (chapter 53, 40 Stat. 277 [Comp. St. 1918, § 3115½ [f]), relating to conservation of supply and control of disposition of necessaries, destroying, wasting, or monopolizing necessaries, discrimination, unfair, etc., practices, or unjust or unreasonable charges in regard to necessaries, etc., says:

"It is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit * * * deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this act, any necessaries; to monopolize or attempt to monopolize * * * any necessaries; to engage in any discriminatory and unfair or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person; * * * or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section."

Section 5 of the act (section 31151/sg) relates to licensing dealers, etc., and provides a penalty for violation of that section (section 5), but provides that its provisions shall not apply to retail dealers.

Section 6 of the act (section 3115½gg) defines "hoarding" and provides a penalty for the violation of its provisions, but charging an excessive or unreasonable price is not within the definition of "hoarding."

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Section 7 (section 31151/sh) of the act provides for the seizure and condemnation of hoarded articles.

Section 8 (section 31151/8hh) provides a penalty for the destruction of any necessaries for the purpose of enhancing the price or restricting the supply.

Section 9 (section 31151/8i) provides a penalty, etc., for conspiracy

in regard to necessaries.

Section 10 (section 31151/8ii) provides for the requisitioning of necessaries by the President.

Section 11 (section 31151/8j) provides for the purchase of necessaries

by the President.

While by section 4 it is declared to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessaries, it is impossible to find in the act any provision for the punishment of this particular act so made unlawful.

Penalties and punishments are denounced by the act for the doing of certain acts by this section made unlawful as well as for other acts forbidden by other sections of the act, but no penalty is prescribed for doing other of the acts made unlawful by this section.

There is no general provision in the act denouncing a penalty or punishment for a violation of these provisions where no specific penalty or punishment is provided. The result is that, while it is made "unlawful" to make an unreasonable and unjust charge for a necessary, no penalty or punishment is expressly denounced or prescribed for the doing of such unlawful act, and made unlawful by a valid statute.

In United States v. Hudson & Goodwin, 7 Cranch, 32, 3 L. Ed. 259, the defendants were indicted for libel on the President and Congress of the United States under the common law. There was no act of Congress defining such a crime. The court said:

"The only question which this case presents is whether the Circuit Courts of the United States [now District Courts] can exercise a common-law jurisdiction in criminal cases."

And in the opinion the court said:

"The only ground on which it has ever been contended that this jurisdiction could be maintained is that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it. * * * If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative power of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense. Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers."

Then after holding that to fine for contempt, imprison for contumacy, enforce the observance of order, etc., are implied powers, because necessary to the exercise of all others—that is, necessary to the very life of a court—the opinion concludes:

"But all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers."

In Tennessee v. Davis, 100 U. S. 257, 275, 279, 25 L. Ed. 648, it is again declared that the universal rule in the federal courts is that Congress must—

"first make an act a crime, affix a punishment to it, and prescribe what courts have jurisdiction of such an indictment before any federal tribunal can determine the guilt or innocence of the supposed offender. United States v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; United States v. Coolidge, 1 Wheat. 415, 4 L. Ed. 124; 1 Whart. Criminal Law (7th Ed.) § 163."

See, also, United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37. And in Tennessee v. Davis, supra, the court at page 279 of 100 U. S. (25 L. Ed. 648) says:

"Since that decision the law has been considered as settled that the circuit courts have no jurisdiction to try and sentence an offender, unless it appears that the offense charged is defined by an act of Congress, and that the act defining the offense, or some other act, prescribes the punishment to be imposed, and specifies the court that shall have jurisdiction of the offense. U. S. v. Wiltberger, 5 Wheat. 76 [5 L. Ed. 37]."

In United States v. Hall, 98 U. S. 345, 25 L. Ed. 180, the same rule is stated.

In the instant case Congress has defined the act of making an excessive and an unreasonable charge for a necessary by any dealer therein an offense against the law of the United States, and hence the act is denounced as a criminal offense, in that it is declared to be unlawful. The District Courts are given general original power and jurisdiction to try all indictments for crimes committed against the United States. Section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. § 991]). Hence we have a law making the act unlawful and a general law giving to the United States District Court jurisdiction to try and determine the case, but we have in the act itself no penalty or punishment denounced or prescribed for the doing of the unlawful act. By section 4 of the act of Congress referred to, the doing of each of more than half a dozen independent acts is made unlawful; but the act, in no part or section of it, prescribes a penalty or punishment for the commission of several of these unlawful acts. The omission seems to have been *deliberate* and intentional.

I think it doubtful whether the statute makes it a crime or misdemeanor to commit the act charged in the indictment against Mossew; no punishment for the commission of such act being denounced or prescribed, even though the commission of such act is declared to be unlawful. 1 Bouvier (14th Ed.) defines a "crime" as "an act committed or omitted in violation of a public law forbidding or commanding it." But 1 Bishop's Criminal Law, § 43, gives this definition:

"A wrong which the government notices as injurious to the public and punishes in what is called a criminal proceeding in its own name."

However, in 12 Cyc. 142, it is said:

"It has been held in some of the cases that, where an act is a crime solely by statute and no penalty is prescribed in the statute, an indictment will be quashed, or judgment arrested"—citing Curry v. Dist. of Columbia, 14 App. D. C. 423; Cribb v. State, 9 Fla. 409; Gibson v. State, 38 Ga. 571; Rosenbaum v. State, 4 Ind. 599.

Also it is said (same page):

"Other courts have held that where a statute prohibits any matter of public grievance or commands a matter of public convenience, although no penalty is prescribed for disobeying its prohibitions or commands an indictment will be sustained and the offense punished by a fine"—citing State v. Fletcher, 5 N. H. 257; Keller v. State, 11 Md. 525, 69 Am. Dec. 226; People v. Shea, 3 Parker's Cr. Rep. (N. Y.) 562; United States v. O'Connor (D. C.) 31 Fed. 449; 2 Hawkins, P. C. c. 25, § 4; Russell on Crimes, 40; People v. Long Island R. Co., 134 N. Y. 506, 31 N. E. 873.

In United States v. O'Connor, supra, the court, by Thayer, J., said:

"At the beginning of the inquiry it may be further conceded that no statute of this state or of the United States, in so many words, forbids the writing of names in the registration book in the manner charged to have been done by the defendant, or imposes a penalty for so doing. The fact, however, that no penalty has been imposed is unimportant, if the act in question has been in effect prohibited, as an act which is prohibited by law is none the less unlawful, although no penalty is denounced."

This decision in United States District Court was rendered in 1887, and I cannot find that it has ever been cited or referred to.

In New York this subject is fully covered by section 1937 of the Penal Law (Consol. Laws, c. 40) which declares:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

The same provision, except as to penalty which is greater, is made as to felonies by section 1935. Diligent search fails to find any similar provision in the statutes of the United States, or any general provision authorizing punishment for offenses against the law where no

provision for punishment is made in the act creating them.

In this case, on the imposition of the fine of \$500 by the court after plea of guilty, the defendant paid the fine and made no motion in arrest of judgment, nor did the defendant move at that term, nor has he moved at any subsequent time or term, to set aside or quash the indictment, or set aside or vacate the conviction. The plea of guilty was entered, and the fine imposed and paid, at the June term of this court held at Binghamton. That term ended October 7th, when the October term of this court commenced. The October term expired December 2d, when the December term commenced. That term has not expired.

The defendant now applies for a writ of error, and I assume that it is my duty to grant same, and therefore the writ is granted and signed.

EARLY v. EARLY.

(Court of Appeals of District of Columbia. Submitted October 8, 1919.

Decided December 1, 1919.)

No. 3233.

1. WITNESSES \$\ightharpoonup 36\to Competency of husband and wife not affected by divorce statute.

Code, § 1068, making a husband and wife competent to testify for or against each other, is not modified as to divorce actions by section 964, providing that divorce decree shall not be given on the unsupported petition of either party, since the latter section relates only to the weight of the evidence, and does not affect the competency of witnesses.

Under Code, § 975, authorizing Court of Appeals to determine the custody of infant children pending divorce proceedings, the court has jurisdiction to make an order regarding a child's custody while an appeal is pending from the divorce decree.

3. DIVORCE ←302—DUTY TO OBEY ORDER OF APPELLATE COURT AS TO CUSTODY OF CHILD PENDING APPEAL.

Where the Court of Appeals had jurisdiction of the appeal in a divorce case and of the subject-matter, it was appellant's duty to obey an order of the court regarding the custody of a child pending appeal, irrespective of whether the order was erroneous.

4. CONTEMPT &==80—Refusing to Hear oral argument by attorney apparently in contempt.

Where the record shows that appellant is apparently in contempt of the Court of Appeals, the court may decline to hear oral argument from his counsel.

Appeal from the Supreme Court of the District of Columbia.

Divorce action by Ida W. Early against Claude C. Early. Decree for plaintiff, and defendant appeals. Affirmed.

L. H. David, of Washington, D. C., for appellant. M. E. O'Brien, of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is an appeal from a decree granting the appellee a divorce a mensa et thora from the appellant, providing for the care of their child in the Bell Home, Anacostia, at the expense of the father, until further order of the court, and requiring the payment of alimony to the plaintiff and attorney's fees to her counsel. Appellant superseded the decree. After the appeal was docketed an order was made by this court, on the application of the mother, that pending a disposition of the case the child should be placed by the father, who then had its custody, in the Bell Home, so that the mother could see it at stated times when the father was not present; it appearing that the parties could not agree upon a place where this could be done, and that if the parents met in the presence of the child a conflict would probably follow between them, which would result detrimentally to the child's health, he being a sufferer from a nervous disease. When the case was called for argument, counsel for the appellant admitted in open court that the order had not been complied with,

and sought to justify the action of his client by stating that in his opinion the order was beyond the jurisdiction of the court. The court refused to hear counsel for appellant in oral argument, but took a

submission of the case upon his printed brief.

[1] There are 16 assignments of error. All turn upon questions of fact except one, which relates to the competency as witnesses of the parties to the suit. The Code (section 1068) specifically provides that * * * to testify for or "husband and wife shall be competent against each other." Section 964 of the Code, which provides that no decree for divorce can be given on the mere unsupported petition of either husband or wife, has no relation to the competency of the witnesses. In one part of his brief counsel concedes this. The section deals only with the weight of the evidence, and means, as construed by this court, that the testimony of one of the parties would not support a decree in his or her favor, unless supported by "other evidence." Lenoir v. Lenoir, 24 App. D. C. 160. There is other evidence in this case. All the remaining assignments, as we have said, refer in one way or another to questions of fact. The evidence, as usual in cases of this character, is contradictory, and not at all satisfactory. A specific analysis of it would be of no value. We are satisfied that it is sufficient to sustain the decree.

[2-4] Concerning the order made with respect to the custody of the child until the appeal could be passed upon, we have no doubt of our jurisdiction, for section 975 authorizes the court to determine who shall have the care and custody of infant children pending proceedings for divorce. Since the court had jurisdiction of the appellant and of the subject-matter, it was his duty to obey the order, irrespective of whether or not it was erroneous (Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Brougham v. Oceanic Steam Navigation Co., 205 Fed. 857, 126 C. C. A. 321; Jenkins v. State, 59 Neb. 68, 80 N. W. 268; Vanvabry v. Staton, 88 Tenn. 334, 12 S. W. 786); but we may add that we have no misgivings touching its correctness. Appellant is therefore, on the face of the record, in contempt of this court. To refuse to hear him, through his counsel, in oral argument, while he was in that posture, was clearly within our power. Campbell v. Justices of the Superior Court, 187 Mass. 509, 73 N. E. 659, 69 L. R. A. 311, 2 Ann. Cas. 462.

At the bar it was stated that the appellant was then out of the jurisdiction of the court, and nothing has been brought to our attention since which indicates that he has returned to the District. No action, therefore, can be taken at this time with respect to his disobedience which would be effective; but counsel for the appellee is directed to take the necessary steps, as soon as he ascertains that the appellant has come within our jurisdiction, to bring him before the court, to the end that he may be punished for his contumacy, unless he can show good cause why he should not be.

The decree is affirmed at the cost of the appellant.

Affirmed.

PURMAN V. MARSH (261 F.)

PURMAN v. MARSH.

(Court of Appeals of District of Columbia. Submitted November 4, 1919. Decided December 1, 1919.)

No. 3265.

 Landlord and tenant @== 144—Tenant must surrender possession on termination of lease.

It is a tenant's duty to surrender possession when his lease terminates, even if he had made a good tender of the rent then due.

2. Appeal and error \$\iff 440\to Lower court after appeal and supersedeas may not amend judgment.

Where defendant in open court noted an appeal and secured approval of a supersedeas bond, the lower court was without jurisdiction to thereafter amend the judgment appealed from.

8. Appeal and error \$\infty 719(3)\$—Jurisdictional error not assigned will be noticed.

Although appellant did not assign as error the lower court's action in amending the judgment after an appeal therefrom had been taken, yet where it plainly appears upon the face of the record, and since the question is jurisdictional, the Court of Appeals will notice the error upon its own motion under rule 8, § 5.

Appeal from the Supreme Court of the District of Columbia.

Action by Margaret R. Marsh against William J. Purman. Judgment for plaintiff, and defendant appeals. Remanded, with instructions to set aside part of the judgment, and judgment otherwise affirmed.

E. S. Duvall, of Washington, D. C., for appellant.

F. S. Bright and H. S. Hinrichs, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Margaret R. Marsh on January 7, 1919, instituted an action in the municipal court to recover from William J. Purman possession of certain premises known as 2635 Garfield street, N. W. She alleged that the defendant was in arrears of rent, and prayed judgment "for the restitution of said premises and costs of this suit." She secured a judgment for possession and costs. Purman appealed. Marsh filed her affidavit of merit under rule 19 of the Supreme Court of the District, and asked for judgment. Purman filed an affidavit of defense. The court, holding that his affidavit was not sufficient, gave judgment of restitution against him and for \$400 rent due. Purman appeals, and assigns three errors, but they present only two questions, namely: (a) Whether his affidavit of defense raised a question of fact for trial by a jury; and (b) whether Marsh had a right to recover rent in the Supreme Court, in view of the allegations of the complaint in the municipal court.

Purman denies that the appellee was a "bona fide purchaser for her own occupancy." This presents a question under the so-called Saulsbury Resolution (40 Stat. 593), but, as we have held this resolution to be void (Willson v. McDonnell, 49 App. D. C. 280, 265 Fed. 432), the denial is immaterial.

[1] It is admitted that according to the terms of Purman's lease his right to possession ceased on September 30, 1918, and even if he had made a good tender of the rent due, as he claims, it was his duty to surrender possession on that date. We doubt that appellee claimed any rent in the municipal court, as required by rule 19. Certainly she made no request for a judgment for rent, and the judgment which she received did not cover rent. But, however that may be, we are of opinion that the judgment of the Supreme Court, so far as it awards rent, must be set aside.

[2, 3] On March 7th the court entered judgment for possession and costs of suit. Defendant thereupon in open court noted an appeal to this court, and on March 8th gave the supersedeas bond provided for in the judgment, and on that date it was approved. Four days later the court, on the suggestion of appellee that the judgment gave her only possession, and did not award rent, amended the judgment by including the latter. Upon authority of decisions of this court and other courts we held, in Lasier v. Lasier, 47 App. D. C. 80, 83, that where a party noted his appeal in open court and filed the necessary appeal bond, which was later approved, it had the effect of removing the judgment "from the jurisdiction of the lower court to this court. After that it was not competent for the lower court to make any change in the decree." In view of this the court had no authority to amend the judgment in the case before us so as to include rent. While appellant did not assign this as error, it plainly appears upon the face of the record, and, as it relates to a jurisdictional question, we notice it sua sponte. Rule 8, § 5.

The case, therefore, will be remanded, with instructions to the Supreme Court to set aside that part of the judgment relating to the rent, but in all other respects the judgment is affirmed, at the cost of

the appellant.

Affirmed.

HALBACK et al. v. HILL.

(Court of Appeals of District of Columbia. Submitted October 6, 1919. Decided December 1, 1919.)

No. 3274.

1. HABEAS CORPUS \$\infty\$99(3)—Infant's Welfare determines custody.

In habeas corpus proceeding to determine the custody of a child, the infant's welfare governs, although the writ confers no jurisdiction to appoint guardians for minors,

2. WITNESSES \$\iii 4, 83\)—COMPETENCY OF PARENT IN ACTION TO RECOVER POSSESSION OF CHILD.

In habeas corpus proceeding by a husband to recover possession of his child from its grandparents, the petitioning husband was not only a competent witness in his own behalf, but a compellable one on behalf of respondents, under the direct provisions of Code, § 1063.

3. WITNESSES \$\infty\$=194\to Wife's LETTERS TO HUSRAND BEFORE MARRIAGE ADMISSIBLE; "CONFIDENTIAL COMMUNICATIONS."

Letters written by a wife to her husband before their marriage are not "confidential communications," within Code, § 1069, making a husband and wife incompetent to testify as to confidential communications between them during marriage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confidential Communication.]

4. WITNESSES \$\sim 53(1)\$—Competency of Husband and wife.

Code, § 1068, making a husband and wife competent, but not compellable, witnesses for or against each other, was designed to remove, and not increase, grounds of incompetency, and therefore confers no greater privilege than existed at common law.

5. Witnesses \$\iff 52(8)\$—Husband, petitioning for custody of child, required to produce wife's letters.

In habeas corpus proceeding by a husband to recover possession of his child from its grandparents, respondents may require the petitioning husband to produce and identify letters written him by his second wife before their marriage, to show her unfitness to care for the child, since the husband as a party to the action is a compellable witness, under Code, § 1063, and the letters were not privileged under sections 1068, 1069, relating to the competency of husband and wife, etc.

Appeal from the Supreme Court of the District of Columbia.

Habeas corpus proceeding by George Cooper Hill against Edward H. Halback and Etta Tanksley Halback. Judgment for petitioner, and respondents appeal. Reversed and remanded for a new trial.

W. W. Millan, George F. Williams, and R. E. L. Smith, all of Washington, D. C., for appellants.

H. R. Burton, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is by respondents in a petition for a writ of habeas corpus from a judgment of the court below transferring the custody of an infant granddaughter of the appellants to the custody of the petitioner, the father.

It appears from the evidence that the mother of the child died when she was two weeks old; that respondent Etta Tanksley Halback, the grandmother of the child, took her at the request of the father and cared for her up to the date of the order made in this case, a period of about three years. In the return, respondents allege that the petitioner voluntarily gave the child to the grandmother, assuring her that he would not interfere with the child in any way; that, during the period since the grandmother has had the care and custody of the child, respondents have borne the greater part of the expense of her care and maintenance; that the relation between the grandmother and child is to all intents and purposes that of mother and daughter; that it would be highly injurious to the child to take her out of the custody of the respondents; that petitioner, the father, had remarried on the day the petition was filed; and that they had reason to believe that his wife is not a fit or suitable person to have the responsibility of the care and education of the child.

[1] While the writ of habeas corpus confers no jurisdiction to appoint guardians of infants, yet the court in such a proceeding, in determining merely the question of the right of custody as between the parties to the action, will look to the welfare of the infant. As was said by this court in Seeley v. Seeley, 30 App. D. C. 191, 193 (12 Ann. Cas. 1058):

"The welfare of infants is a matter of paramount consideration at all times and under all circumstances. Courts of competent jurisdiction will always extend their arms to protect infants. The interest of infants is even paramount to the claim of both parents. This is the predominant question to be considered by the tribunal before whom the infant is brought. The rights of parents must in all cases yield to the interest and welfare of the infant. No certain rule can be laid down, but the courts must hold the best interests of the children as of primary importance. Their custody is one largely of judicial discretion, and that discretion is never reviewed by an appellate court, unless it has been manifestly abused."

The jurisdiction of courts of law to determine the custody of infants in habeas corpus proceedings, as between the parties to the litigation, was upheld and considered at length by this court in Goldsmith v. Valentine, 36 App. D. C. 63.

[2-5] To sustain the averments of the return, to the effect that the present wife of petitioner is not a fit or suitable person to have the responsibility of the care and education of the child, certain letters written by the wife to the husband before their marriage were offered in evidence; the husband being called upon on the witness stand to identify the handwriting. One of these letters was produced by respondents, and the others were produced by petitioner pursuant to notice. The letters were ruled out by the court below upon the theory that their production and identification amounted to compelling the husband to testify against the wife.

The policy of the law in the District of Columbia as to the right of a husband or wife to testify against the other is expressed in sections 1068 and 1069 of the Code. Section 1068 provides:

"In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other."

Section 1069 provides:

"In neither civil nor criminal proceedings shall a husband or his wife be competent to testify as to any confidential communications made by one to the other during the marriage."

The sole question here involved is one of the competency of a witness to testify under given circumstances. In this case the wife is neither a witness nor a party to the action. The husband, a party to the action, was giving testimony, and in course thereof was called upon to produce the letters and identify them as being in the handwriting of his wife.

The letters were excluded "on the ground that to admit them would have the effect of compelling the husband to testify against his wife." "There seems to be no difference in principle between compelling a witness to produce a document in his possession, under a subpœna duces tecum, in a case where the party calling the witness has a right to the use of such document, and compelling him to give testimony, when the facts lie in his own knowledge." Bull v. Loveland, 10 Pick. (Mass.) 9, 14. What here occurred was not the wife testifying against the husband, but the husband producing and identifying letters written by the wife to the husband before marriage. The husband was a witness in a suit to which he was a party and to which the wife was not a party. The husband, petitioner, was not only a competent witness in his own behalf, but a compellable one on behalf of respondents. Code D. C. § 1063.

At common law, with certain exceptions unnecessary here to mention, "when either spouse was a party to the record, the other could not * * * Where the interests of either husband or wife, though not a party, were directly involved in an action and would be concluded by a verdict, the other spouse could not testify." Jones on Evidence, § 733. See, also, Greenleaf on Evidence (15th Ed.) §§ 334, 335, 341. "The law does not seem to be entirely settled, how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. Nor whether, in such a case, she may not be asked questions as to facts, that may, in some measure, tend to criminate her husband, but which afford no foundation for a * * * It is, however, admitted, in all the cases, that the wife is not competent, except in cases of violence upon her person. directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse." Stein v. Bowman. 13 Pet. 209, 10 L. Ed. 129. The weight of modern authority is that, at common law, "in collateral proceedings not immediately affecting their mutual interests, either husband or wife might be a witness, although the evidence of one tended to criminate the other, or to contradict the other, or to subject the other to a legal demand." Jones on Evidence, § 742.

In Sayler v. Walter, 30 Pa. Super. Ct. 370, an action brought for the conversion of certain chattels, objection was made to the competency of the plaintiff as a witness, on the ground that he had admitted on his voir dire that his wife also claimed the ownership of the chattels. The court said:

"In the first place, she was not a party to the issue on trial. This, it is true, would not be conclusive of the question; but as the case was presented at the time the ruling of the court was made it did not appear that she was under moral or legal obligation to defend the action, or that she was in fact defending it, or that she was connected directly or remotely with the alleged taking of the chattels from the plaintiff's possession, or that for any other reason she would be directly or indirectly benefited by a verdict in the defendant's favor, or be prejudiced by a verdict against him. This being so, the fact that her husband, who proposed to give testimony which would be inconsistent with and contradictory of her claim of exclusive ownership of the chattels, was the plaintiff in the action, cannot affect the question. The rule which would exclude him from giving such testimony in the present case would also exclude him from giving it, if the action had been brought by another, and all the other conditions above referred to were the same. But, though at common law husband and wife were not admissible as witnesses against each other, where either was directly interested in the event of the proceeding, yet-according to the doctrine stated by Greenleaf-in collateral proceedings, not immediately affecting their mutual interests, their evidence was receivable, notwithstanding it might tend to contradict, or to show a legal demand against, the other. 1 Greenl. Ev. (15th Ed.) \$ 342."

And in Edwards v. Dismukes, 53 Tex. 605, involving the question of the wrongful delivery of a deed by the husband of plaintiff, where objection was made to the competency of the wife, the court said:

"They object, however, that Mrs. Dismukes was not competent to testify as to what instructions she gave her husband, or as to a fraud practiced on her by her husband. We remark that the husband was not a party to the suit at the trial; that the communication from the wife to the husband does not appear to have been of a confidential nature; and that we know of no rule of law which forbids the wife, in support of her rights against a third party, from testifying as to fraudulent acts of her husband."

In the case at bar the wife is not a party to the record, nor has she any interest in the outcome of the case, either directly or indirectly. The testimony sought to be adduced from the husband does not criminate her, or even tend to criminate her, or subject her to any civil liability. The letters were introduced for the purpose of showing the atmosphere into which the child would be brought due to the presence of the wife. While reflecting upon the fitness of the wife to be associated with the child, they were not evidence against any one directly interested in the outcome of the case. Nor can they be considered confidential communications under section 1069 of the Code, since they were written prior to marriage.

The purpose of section 1068 of the Code, providing that "husband and wife shall be competent but not compellable to testify for or against each other," was to remove grounds of incompetency, and not increase them. "The modern tendency of the law is not to multiply valid objections to the competency of witnesses." Thomas v. Maddan, 50 Pa. 261. Therefore a husband or wife, under this statute, can claim no greater privilege than existed at common law. Petitioner would have been a competent and compellable witness at common law in regard to these letters, except for the fact of his interest in the case, which cause of disqualification has been removed by section 1063 of the Code.

We think the letters were material, relevant, and competent, as showing a situation which might forbid the court, in its discretion, from granting the writ prayed in this case. The judgment is reversed, with costs, and the case remanded for a new trial.

Reversed and remanded.

AMERICAN FEED MILLING CO. v. M. C. PETERS MILL CO.

(Court of Appeals of District of Columbia. Submitted November 10, 1919. Decided December 1, 1919.)

No. 1239.

TRADE-MARKS AND TRADE-NAMES @= 43-PRIOR USE OF DEVICE DEFEATING

RIGHT TO REGISTRATION.

Where an application to register the words "Big Chief," associated with representation of an Indian with a gun on horseback, was opposed by a concern previously using the word "Arab," with a representation of an Arab with a spear on horseback, the horses being similar and the men similar in size, position, and manner of holding a weapon, although their dress was different, and the marks were used on burlap sacks, where the differences would be difficult to detect, held, the decision of the Commissioner of Patents denying registration was correct.

Appeal from a Decision by the Commissioner of Patents.

Application by the American Feed Milling Company to register a trade-mark, opposed by the M. C. Peters Mill Company. From a decision of the Commissioner of Patents, denying registration, the applicant appeals. Affirmed.

Raymond J. Mawhinney and Robert J. Mawhinney, both of Washington, D. C., for appellant.

T. Walter Fowler, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is an appeal from the decision of the Commissioner of Patents in a trade-mark opposition.

The mark of applicant, American Feed Milling Company, a North Carolina corporation, consists of the words "Big Chief," associated with the representation of a man on horseback concentrically inclosed within a single circle. The mark of the opposer, M. C. Peters Mill Company, a Nebraska corporation, consists of the word "Arab," associated with the representation of a man on horseback concentrically inclosed within two circles. The man in the mark of applicant is intended to represent an Indian chief armed with a gun, while the man in opposer's mark represents an Arab armed with a spear.

The sole question presented is the likelihood of confusion in trade. Applicant alleges use of its mark since 1914, while opposer shows use of its mark prior to that date. The dominating feature of each mark is the horse with an armed man mounted upon it. The horse in each mark is similar in size, style and appearance. While the dress of the men is different, they are similar in size, position, and the respective

manner of holding the spear and gun. These striking similarities bring this case within the rule announced in Bickmore Gall Cure Co. v. Karns Mfg. Co. (C. C.) 126 Fed. 573, where the conflicting marks consisted of representations of horses attached to the same class of goods. In that case the court said:

"Both pictures are used on boxes containing the salve. The complainant's trade-mark cannot confer a monopoly to every representation of a horse upon a medicine of that character. Such a mark would be generic in character. Its right is restricted to the particular horse designated in the registration, or one of substantially similar appearance, style, or position."

Opposer's mark discloses an Arabian horse of unusual appearance, style, and position, while the horse of applicant is similar in all its details and dimensions.

The respective marks are used on burlap sacks containing horse feed, displaying at best a dull impression of the mark, and forbidding to a large extent the detection of distinguishing features. The similarity of the dimensions and general appearance of the marks emphasizes the improbability of accidental selection by applicant. As was said by Judge Lurton in Paris Co. v. Hill Co., 102 Fed. 148, 151, 42 C. C. A. 227, 230:

"When there are found strong resemblances, the natural inquiry for the court is, why do they exist? If no sufficient answer appears, the inference is that they exist for the purpose of misleading. Taylor v. Taylor, 2 Eq. Rep. 290. We are to remember that the average purchaser has seldom the opportunity of making a close comparison; that he is apt to act quickly, and is therefore not expected to exercise a high degree of caution. Pllsbury v. Flour-Mills Co., 64 Fed. 841, 12 C. C. A. 432."

The decision of the Commissioner of Patents, sustaining the opposition, is affirmed, and the clerk is directed to certify these proceedings as by law required.

Affirmed.

In re ALVAH BUSHNELL CO.

(Court of Appeals of District of Columbia. Submitted November 11, 1919. Decided December 1, 1919.)

No. 1248.

1. TRADE-MARKS AND TRADE-NAMES \$\infty 11-"SAFE T SEAL" CANNOT BE REG-

ISTERED AS TRADE-MARK FOR ENVELOPES.

The word symbol "Safe T Seal," as a trade-mark for envelopes, etc., cannot be registered, in view of prior patents for safety envelopes, and relating to a safety seal for envelopes, since it must be assumed that the patented goods are known as safety envelopes, or safety seal envelopes.

2. Trade-marks and trade-names \$\iff 3(4)\to "Safe T Seal" as trade-mark FOR ENVELOPES IS DESCRIPTIVE, WITHIN PROHIBITION OF TRADE-MARK ACT. The word symbol "Safe T Seal," as a trade-mark for envelopes, wallets, etc., would identify the goods on which it was used as either safety seal envelopes or safe seal envelopes, and is not entitled to registration, because descriptive, within Trade-Mark Act, § 5 (Comp. St. § 9490).

Appeal from a Decision by the Commissioner of Patents.

Application by the Alvah Bushnell Company to register a trade-mark. From a decision of the Commissioner of Patents, refusing registration, the applicant appeals. Affirmed.

E. T. Fenwick, L. L. Morrill, and C. R. Allen, all of Washington, D. C., for appellant.

T. A. Hostetler, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents refusing registration of the word symbol "Safe T Seal" as a trade-mark for envelopes, wallets,

letter files, jackets, etc.

[1] Counsel for the Commissioner discloses the existence of patent to D'Agostina, dated February 8, 1916, for safety envelopes, and also patent to Halloran, dated July 25, 1905, which is described as relating "to a safety seal for envelopes." It must be assumed that the goods of the respective patentees are known to the trade as "safety envelopes," or "safety seal envelopes." This designation, having been established by virtue of the patents, even if arbitrary, would not be available as a trade-mark for either of the patentees for goods of the same class as those patented. It follows that, if by their use the marks could not be registered as trade-marks by the persons first applying them to the patented articles, a stranger could not adopt either of them as a trade-mark for the same class of goods.

[2] Treating the mark independently, the test here is the impression which it would make upon the public. It is clear that the trade would identify the goods bearing the mark either as safety seal envelopes or safe seal envelopes. In either case the mark is descriptive of the goods, and comes within the prohibition of section 5 of the Trade-Mark Act of February 20, 1905 (33 Stat. 725, c. 592 [Comp. St.

§ 9490]).

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as required by law.

Affirmed.

L. OTZEN & CO. v. J. K. ARMSBY CO.

(Court of Appeals of District of Columbia. Submitted November 11, 1919. Decided December 1, 1919.)

No. 1249.

1. Trade-marks and trade-names \$\iff 45\frac{1}{2}\$, New, vol. 6A Key-No. Series—Prior use of dominating feature defeats attempt to cancel registration.

The petition to cancel a trade-mark registration cannot be granted on the ground that it had as the dominating feature the word "Sunshine," where the registrant had used the word "Sunshine" alone as a trade-mark before petitioner had registered its mark containing that word.

2. Trade-marks and trade-names \$\iff 43\$—Probable confusion between marks "Blossom and Sunshine" and "From the Land of Sunshine." The Patent Office tribunals were correct in holding that the mark "From the Land of Sunshine" is not so similar to the mark "Blossom and Sunshine," associated with the representation of blossoms and a sunburst, as probably to result in confusion in trade, although both marks were used on dried fruits.

Appeal from a Decision by the Commissioner of Patents.

Petition by L. Otzen & Co. to cancel a trade-mark registration, opposed by the J. K. Armsby Company. From a decision of the Commissioner of Patents denying the petition, the petitioner appeals. Affirmed.

A. P. Greely, of Washington, D. C., for appellant.

E. T. Fenwick and L. L. Morrill, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is an appeal from the Commissioner of Patents in a trade-mark cancellation proceeding, in which the petitioner, L. Otzen & Co., is seeking the cancellation of the registration of the mark "From the Land of Sunshine," granted to the registrant March 31, 1914.

Petitioner's mark consists of the words "Blossom and Sunshine," associated with the representation of blossoms and a sunburst. Both

marks are used on identical goods—dried fruits.

[1] It is contended by petitioner that the word "Sunshine" is the dominating feature of each mark. Registrant, however, answers this by way of a counterclaim that petitioner's registration of the mark in issue in 1906 was illegally secured, because of a prior use by registrant of a mark for fruits consisting of the word "Sunshine" alone. The use of this mark, registrant claims, was prior to any rights acquired by petitioner in its present mark. This would seem to foreclose conclusively petitioner's right to demand cancellation of registrant's mark on

the ground that its dominating feature is the word "Sunshine," since

prior rights to the use of that word are in the registrant.

[2] This, however, does not decide the issue of probable confusion arising from the use of the marks in question. We agree with the tribunals below that there is nothing inherent in the appearance of the marks, or in the proof adduced by petitioner, to justify an adjudication that the marks are so similar as to be likely to lead to confusion in trade.

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.

Affirmed.

COWLES v. RODY.

(Court of Appeals of District of Columbia. Submitted November 13, 1919. Decided December 1, 1919.)

Patent Appeal No. 1260.

PATENTS \$\infty\$ 113(2)-Order dissolving interference proceeding not appealable.

A Patent Office decision, dissolving an interference proceeding on the ground that the junior party's claims were not patentable, because barred by previous public use, and not passing upon the question of priority, is not appealable, because not a final order.

Appeal from a Decision by the Assistant Commissioner of Patents. Interference proceeding in the Patent Office between Franz A. Rody and Alfred H. Cowles. From a decision of the Assistant Commissioner of Patents, dissolving the proceeding, Cowles appeals. Appeal dismissed.

W. H. Finckel, Jr., of Washington, D. C., and Seabury C. Mastick, of New York City, for appellant.

J. C. Pennie and F. E. Barrows, both of New York City, for appellee.

SMYTH, Chief Justice. Cowles appeals from a decision of the Assistant Commissioner of Patents dissolving an interference to which he was a party. The subject-matter, which was a method for treating feldspar and the like, is expressed in nine counts. In view of the conclusion which we have reached, it is not necessary to set out any of them.

Rody was granted a patent August 24, 1915, on an application filed October 11, 1913. Cowles' application was not filed until November 20, 1915, nearly three months after Rody's patent had issued. Cowles was therefore the junior party. The Examiner of Interferences awarded priority to Rody on all the counts. This was reversed by the Examiners in Chief as to counts 1 to 4, and affirmed as to the remainder. In granting the reversal, the examiners held that, while Cowles was prior to Rody with respect to the first-named claims, he was anticipated by a patent to one Adolf Kayser, and announced that

they would so notify the Commissioner of the apparent statutory bar to the granting of a patent to Cowles with claims corresponding to the counts 1 to 4. On appeal by Cowles, the Assistant Commissioner held that he had in effect admitted publication of his invention in 1912, or more than two years before he filed his application. He further said:

"If the Cowles publications, taken in connection with the previous Kayser patent, * * * or otherwise, disclose the invention of Cowles as he claims it, then the possibility of granting a patent to Cowles disappears, and there is no applicant before this office with allowable claims to this matter, and consequently there is no interference."

The Assistant Commissioner found that the publications disclosed the invention, and he in consequence dissolved the interference. Rody moves to dismiss on the ground that the court has no jurisdiction to consider the appeal.

We are without authority in an interference proceeding to reverse the Commissioner's ruling that Cowles' claims are not patentable, because barred by the statute of public use. He did not pass upon the question of priority, and that is the only question reviewable by us in this kind of a proceeding. His action in dissolving the interference simply placed the parties back where they were before he had declared the interference, and we have no power to disturb it. It is not a final order. This has been often announced by us. In re Fullagar, 32 App. D. C. 222; Cosper v. Gold, 34 App. D. C. 194; Carlin v. Goldberg, 45 App. D. C. 540; Field v. Colman, 47 App. D. C. 189. In the last case it is said:

"We have held in many cases that this court is without jurisdiction to entertain an appeal in an interference case except from a judgment of priority" (citing cases).

As a result the motion to dismiss in this case for want of jurisdiction must be sustained.

Affirmed.

BADER v. BURROUGHS.

(Court of Appeals of District of Columbia. Submitted November 17, 1919.

Decided December 1, 1919.)

No. 1266.

In interference proceeding, where the senior party is a patentee, the burden of proof is heavily on the junior party to establish his priority of invention.

2. PATENTS \$\sim 91(4)\$—EVIDENCE INSUFFICIENT TO ESTABLISH PRIORITY IN JUNIOR PARTY.

In an interference proceeding over an eyeglass mounting improvement, evidence *held* not to sustain findings by the board and Assistant Commissioner of Patents awarding priority to the junior party, in view of evi-

dence that the patentee's attorneys had forwarded drawings of the device for a search as to patentability on the same day the junior party claimed to have disclosed the invention.

Appeal from a Decision by an Assistant Commissioner of Patents. Interference proceeding in the Patent Office between Gustav A. Bader and Emor Ridley Burroughs. From a decision by an Assistant Commissioner of Patents awarding priority to Burroughs, Bader appeals. Reversed, and priority awarded Bader.

C. S. Davis, of Rochester, N. Y., for appellant. Howard P. Denison and E. A. Thompson, of Syracuse, N. Y., for appellee.

ROBB, Associate Justice. Appeal from a decision of an Assistant Commissioner of Patents in an interference proceeding awarding priority of invention to the junior applicant; he having copied the claim of appellant's patent, reading as follows:

"In an eyeglass mounting, the combination with a bridge provided with a noncircular opening and a flat surface surrounding the opening, of a pivot stud comprising a portion fitting in and conforming to the noncircular opening, a cylindrical bearing portion, a shoulder at the junction of the bearing portion with the noncircular portion, said shoulder engaging the flat surface of the bridge, and a flange spaced from said flat surface; a screw engaging the post and the bridge and holding the shoulder against the flat surface, a nose clamp lever pivoted to the stud and engaging the flange and the flat surface of the bridge, and a spring secured at one end to the stud and at the other end to the nose clamp lever."

[1, 2] At the time the invention was made the parties were in the employ of the Standard Optical Company, of Geneva, N. Y., Burroughs as superintendent and Bader as an expert designer of eyeglass mountings. Burroughs was not an inventor, while Bader had taken out several patents relating to this art. It is conceded that Bader was the inventor of a structure like the device of the issue, except that the end of the post supporting the guard was offset, and hence not readily removable. In other words, in the device of the issue a screw has been substituted for the offset. For this substitution or change each of the parties claims credit. The Examiner of Interferences awarded priority to Bader, while the Board and Assistant Commissioner found for Burroughs.

At the time the controversy arose, and thereafter until Bader canceled the license, the company was paying him a royalty on the mounting, minus the screw feature. Some complaint was made because the guard was not removable, and, on the 13th of April, 1915, two representatives of the Geneva Optical Company were in conference with Burroughs at the factory of the Standard Optical Company. During the latter part of this interview, which took place after lunch, some one suggested that by putting a screw in place of the offset or rivet the mounting could be more easily repaired. Burroughs says he made this suggestion. The two representatives of the Geneva Company do not remember who made it. One of them testified, under cross-examination, that most mountings of this character were made with a screw, and that the substitution of the screw for the fixed head or off-

set "was the obvious thing." Bader was called in, and the matter discussed. Burroughs at first testified that the interview terminated between 4 and 4:30 in the afternoon, and that he thought Bader was there at that time.

Later Mr. Dorsey, the attorney who prepared the application for Bader at Rochester, N. Y., a very frank witness and entirely disinterested at the time of his testimony, produced for Bader a drawing of the invention, dated April 13, 1915, and which he testified was on that day sent to his correspondent in Washington for the purpose of a search as to patentability. To the best of Mr. Dorsey's recollection, the drawing was made "from a description furnished by Mr. Bader at some time before making the search." Judging from the appearance of the sketch, the witness was certain it had been done when he had plenty of time on his hands, and not in the course of an interview with Bader. The witness was quite sure that the communication from Bader was at a personal interview; that, had the fact been otherwise, he in all probability would have remembered it. The stenographer, to whom the letter accompanying the drawing was dictated by Mr. Dorsey on the date mentioned, stated that her notebook showed she had taken other dictation that day after the letter in question was dictated to her.

Following this testimony Mr. Burroughs was recalled to the stand, and asked whether he knew where Mr. Bader was in the afternoon of April 13th, and, notwithstanding his former statement that Bader was at the factory when the interview closed at 4 o'clock, or later, replied that he did not. He further stated that it was Bader's habit to go to Rochester from Geneva by motorcycle, a distance of approximately 46 miles. Bader testified positively that he was not in Rochester on the 13th, and that his disclosure to Mr. Dorsey was prior to that time. We do not deem it necessary further to discuss the evidence, save to say that the bill for the filing of Bader's application was paid by the Geneva Company.

Since Bader is a patentee, the burden is heavily on Burroughs, and in our view he has entirely failed to sustain it. He does not even claim to have done more than suggest a slight and, according to his own witness, obvious modification of one of the elements of a structure admittedly Bader's and he really is not corroborated as to that, while the testimony of Mr. Dorsey and the drawing produced by him conclusively establish, we think, that Bader was in possession of the invention before the interview at which Burroughs says he (Burroughs) first disclosed it. Moreover, this "obvious thing" was more likely to occur to Bader, the expert, than to any one else.

The decision is reversed, and priority awarded Bader.

Reversed.

MANDES v. MIDGETT.

(Court of Appeals of District of Columbia. Submitted November 4, 1919. Decided December 1, 1919.)

No. 3272.

 MASTER AND SERVANT \$\igchip\$ 302(1)—AUTOMOBILE DRIVER'S ACT CREATING LI-ABILITY FOR INJURY TO THIRD PARTY.

One engaged to make deliveries for another, who furnished an automobile for the purpose, *held* properly found by jury to have been engaged in his duties in going to a filling station for gasoline shortly after completing deliveries, but before returning with car, so as to render employer liable for injuries to one struck at the station.

2. Master and servant €=330(3)—Automobile driver injuring third party shown to be servant of owner.

Conflicting evidence *held* to warrant a verdict that the driver of an automobile, which struck plaintiff, was defendant's servant, and not the owner of the car.

3. Trial &=260(1)—Requests covered by other instructions properly refused.

Refusal of requested instructions, fully covered by other instructions, is not error.

4. Appeal and error & 981—Denial of New Trial not disturbed unless discretion is abused.

Refusal to grant a new trial on the ground of newly discovered evidence will not be disturbed on appeal, except where there is a manifest abuse of discretion.

5. New trial \$\infty\$=104(1)—Refusal for newly discovered cumulative evidence discretionary.

The trial court did not abuse its discretion in refusing defendant a new trial on the ground of newly discovered evidence, which was largely cumulative in nature.

Appeal from the Supreme Court of the District of Columbia.

Action by Thomas O. Midgett against Louis Mandes and another. Judgment for plaintiff against defendant Mandes, the action having abated as to defendant Suraci on account of his death, and defendant Mandes appeals. Affirmed.

E. F. Colladay and H. S. Barger, both of Washington, D. C., for appellant.

E. S. Duvall, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This action was brought by appellee, plaintiff below, in the Supreme Court of the District of Columbia to recover a judgment for damages for personal injuries. The suit was brought jointly against defendant Mandes and one Suraci. Suraci died before the case came on for trial, and the action abated as to him.

It appears that Mandes, at the date of the accident, September 9, 1916, was conducting a lunchroom business in the city of Washington. On the morning of that day he engaged Suraci to deliver supplies to three of his restaurants, located in different sections of the city. In doing this work Suraci used an automobile, which Mandes had for

that purpose. After making the deliveries, Suraci, who was engaged in the oyster and fish business, went to his place of business, took one of his employés with him, and proceeded to a gasoline filling station to procure a supply of gas for the car. In entering the station he struck plaintiff and ran over him, inflicting the injuries here com-

plained of.

- [1] The first defense is based upon the ground that, assuming that the relation of master and servant existed between Mandes and Suraci, the servant deviated from the course of the master's business in going to the supply station for gasoline, and that in so doing he was not engaged in performing the duties assigned him by Mandes, and for any accident occurring as a result thereof Mandes could not be held liable. We think this contention is untenable; since defendant had delegated Suraci to make the deliveries in question and furnished him the means, to wit, the automobile, with which to make them. It was while engaged in this work, or shortly after its completion, but before the return of Suraci to Mandes' place of business, that Suraci went to the gasoline station where the accident occurred. We think the evidence fully supports the inference that the trip to the filling station was incidental to the use of the automobile in connection with the performance of defendant's business. This issue of fact was submitted to the jury under careful instructions by the court, and the jury found against the defendant. No reason is disclosed in the record for disturbing its conclusion.
- [2] A second defense was interposed by Mandes, on the ground that a day or two previous to the date of the accident he had entered into an agreement for the sale of the automobile to Suraci, and therefore Suraci on the day in question was using his own car, making the deliveries, not as an employé or servant of defendant, but as an accommodation. The car had not been delivered to Suraci, and, according to Mandes' testimony, when Suraci started to make the deliveries on the morning in question he instructed Suraci, when he got through, either to return the car or to keep it. On this defense, which is purely a question of fact, Mandes' own testimony is contradictory. There is a decided conflict in the evidence both of the witnesses and the inferences to be drawn from the circumstances disclosed by the record. As in the first defense, the issue was presented to the jury under careful instructions, and the jury found against defendant. We find no reason, from an examination of the record, to disturb their verdict.
- [3] Objection is made by counsel for defendant to the refusal of the court to grant certain prayers submitted at the trial. We deem it unnecessary to consider these objections in detail, since the material points covered in the prayers refused were fully covered, either in other prayers requested by the defendant and allowed by the court, or in the instructions given by the court.
- [4, 5] Error is assigned in the refusal of the court to grant a new trial because of certain alleged newly discovered evidence. An examination of the affidavits in support of this motion discloses that what is referred to as the newly discovered evidence is largely cumulative of evidence adduced at the trial and passed upon by the jury. But.

aside from this, the settled rule of the federal courts is that the refusal of a trial court to grant a new trial because of newly discovered evidence will not be disturbed, except in a case where there is a manifest abuse of discretion, and no such case is presented in this instance.

The judgment is affirmed, with costs.

Affirmed.

BRANDENBURG et al. v. DANTE.

(Court of Appeals of District of Columbia. Submitted November 4, 1919.

Decided December 1, 1919.)

No. 3266.

EXECUTORS AND ADMINISTRATORS ©==216(2)—ESTATE LIABLE FOR FEES OF ATTORNEYS EMPLOYED BY COLLECTOR.

Under Code of Law, §§ 306, 307, authorizing the collector of an estate to bring certain suits, and section 308, providing that collector shall not be liable in actions by creditors of deceased, attorneys rendering services to the estate at the collector's request may collect their fees from the estate in an action at law against the collector in his representative capacity.

Appeal from the Supreme Court of the District of Columbia.

Action by Edwin C. Brandenburg, Clarence A. Brandenburg, and F. Walter Brandenburg, copartners trading under the firm name and style of Brandenburg & Brandenburg, against William J. Dante, as executor of the estate of Stilson Hutchins, deceased. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

E. C. Brandenburg, of Washington, D. C., C. A. Brandenburg, of Denver, Colo., and F. W. Brandenburg, of Washington, D. C., in proper.

Geo. E. Sullivan, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District sustaining appellee's demurrer to appellants' declaration, in which appellants sought compensation for professional services rendered appellee as collector of the estate of Stilson Hutchins.

According to the averments of the declaration, appellants were retained by the appellee, Dante, as collector of the estate, to advise and assist him, as attorneys and counselors at law, in and about the performance of his duties as such collector, and to render him such other legal services as might be necessary in and about the collector, and preservation of the estate. The inventory filed by the collector showed the value of the personal estate to exceed \$1,000,000. In pursuance of their employment appellants rendered the legal services necessary or required by appellee as such collector, including counsel and advice and the conduct of litigation involving him as collector; the employment covering a period from June of 1912 to April of 1916, when appellants by leave of court withdrew as counsel. Thereupon, after rendering their account to appellee, appellants ap-

plied to the Supreme Court of the District, holding a probate court, for an order requiring the payment by the collector of the amount justly due them; but the court, "on objection made by said defendant [appellee], dismissed said application, but without prejudice to the right of the plaintiffs [appellants] to sue at law to recover the amount justly due them."

It thus appears that the question for our determination is whether a collector or special administrator may be sued at law in his representative capacity by an attorney, who at his request has rendered

necessary professional services for the benefit of the estate.

The right and duty of a collector, in certain circumstances, to employ counsel, are conceded, and are recognized in sections 306 and 307 of the District Code, for section 306 authorizes the bringing of suits by a collector "for debts or other property, as an administrator may do," and section 307 authorizes an executor or administrator, when the powers of a collector shall have ceased, to prosecute any suit commenced by the collector, as if the same had been begun by the executor or administrator. In section 308 it is provided that "such collector shall not be liable to an action by any creditor of the deceased." In Berry & Whitmore Co. v. Dante, 43 App. D. C. 110, it was ruled that under this provision a creditor of a decedent may not maintain an action against a collector, but the question here involved was not before the court.

Many authorities, while recognizing the undoubted right of an executor or administrator to employ counsel and to be reimbursed for counsel fees, hold that the attorney must look for his compensation to the personal representative who employed him, in his individual and not in his representative capacity. Taylor v. Crook, 136 Ala. 354, 34 South. 905, 96 Am. St. Rep. 26; Goldengate Undertaking Co. v. Taylor, 168 Cal. 94, 141 Pac. 922, 52 L. R. A. (N. S.) 1152, Ann. Cas. 1915D, 742; Brown v. Quinton, 80 Kan. 44, 102 Pac. 242, 25 L. R. A. (N. S.) 71, 18 Ann. Cas. 290; Thompson v. Mann, 65 W. Va. 648, 64 S. É. 920, 22 L. R. A. (N. S.) 1094, 131 Am. St. Rep. 987; 11 R. C. L. p. 235. But in the event of the insolvency of the executor or administrator, the attorney, by appropriate proceedings in equity, may compel such executor or administrator to enforce the claim against the estate for the benefit of the attorney. Clopton v. Gholson, 53 Miss. 466; Mosely v. Norman, 74 Ala. 422; Dickinson v. Conniff, 65 Ala. 581; Norton v. Phelps, 54 Miss. 467; Hewitt v. Phelps, 105 U. S. 393, 26 L. Ed. 1072. The theory underlying this doctrine is that whatever allowance is to be made from the estate to such executor or administrator for the services of an attorney must be made by the probate court to the executor or administrator. But there are many authorities that sustain the right of an executor or administrator to bind the estate for reasonable attorney's fees covering services necessarily or properly rendered in preserving or otherwise benefiting it, and these authorities of course recognize the right of the attorney to proceed directly against the estate. Miller v. Tracy, 86 Wis. 330, 56 N. W. 866; Long v. Rodman, 58 Ind. 58; Jackson v. Leech, 113 Mich. 391, 71 N. W. 846; Marx v. McMorran, 136 Mich. 406, 99 N. W. 396; Nichols v. Reyburn, 55 Mo. App. 1; Matson v. Pearson, 121 Mo. App. 120, 97 S. W. 983; Wilson's Appeal, 3 Walk. (Pa.) 216; Portis v. Cole, 11 Tex. 157; Crim v. England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826. It will be observed that the result of the decisions is ultimately to charge the estate with the attorney's reasonable and proper fees; some courts requiring that to be done by indirection, and others permitting a direct action.

We are of the view that in the District of Columbia an attorney whose services are rendered an estate at the request of a collector or special administrator may look to the estate for his compensation. The Code contemplates that such services may be necessary for the protection of the estate, and it would be unreasonable to require the attorney to look to the collector rather than to the estate for his compensation. In other words, the provisions of the Code leave no room for doubt that services rendered under conditions such as are alleged in this declaration are proper charges against an estate, and hence that attorneys rendering such services may look directly to the estate for their compensation. These services, if performed as alleged in the declaration, were a proper charge against the estate, yet the probate court, at the instance of appellee as collector, refused to recognize that liability. Sections 306 and 307 of the Code contemplate, as we have held, that the collector may bind the estate for the services of counsel. Recognizing that the creation of a liability would be practically valueless without a remedy for its enforcement. Congress, in section 308, was careful to use words that in no way abridged the right to pursue such a remedy of one in whose favor the remedy was inferentially recognized in the preceding sections. Under this ruling the rights of both parties will be fully protected and a trial had in the only tribunal now open to such proceeding; the probate court having denied appellants' claim.

Judgment reversed, with costs, and cause remanded for further

proceedings.

Reversed and remanded.

PRESIDIO MINING CO. et al. v. OVERTON et al. (Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3253.

APPEAL AND EBBOR 6-60(2)—CERTIORARI FOR DIMINUTION OF BECORD NOT GRANTED WHERE MOTION WAS NOT MADE AT FIRST TERM OF ENTRY OF CAUSE.

A motion for diminution of the record, seeking to bring up a master's report, not passed upon by the trial court, to which no reference was made in the argument on appeal, and not material to the questions there determined, will be denied, especially where made after the term when the cause was heard, in view of rule 18, requiring such motions to be made at the first term of the entry of the case, unless the delay be satisfactorily accounted for.

On application of appellees W. S. Overton and Carl A. Martin for diminution of record.

For former opinion, see 261 Fed. 933, — C. C. A. —.

Harding & Monroe and J. J. Dunne, all of San Francisco, Cal., for appellants.

William F. Rose, Denman & Arnold and William B. Acton, all of San Francisco, Cal., and Chas. Clyde Spicer, of Los Angeles, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

PER CURIAM. The diminution of record mentioned by the appellees is the conclusions, findings, and opinion of the standing master, filed in the court below on November 30, 1918, and after the filing and docketing of the appeal herein in this court, and relates to matters upon which the lower court has not passed judgment, and was therefore not then, and not now, a part of the record to be brought to this court on the appeal heard by this court.

Upon the hearing in this court no suggestion was made, either orally or in the briefs, that there was an additional record in the lower court that the parties desired to have considered by this court. The case was submitted on the merits on the record before the court. Rule 18 of this court (208 Fed. x, 124 C. C. A. x) provides that—

"Motions for certiorari for diminution of record must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay."

There is no satisfactory, or any, accounting for the delay in presenting this motion. The appellees knew of this record in the court below, and participated in its proceedings, and yet it was not brought to the attention of this court during the term when the case was heard. Furthermore, it does not appear that the record is relevant to any question before the court.

In the original bill of equity, complainants sought on behalf of the Presidio Mining Company to recover from W. S. Noyes the mining claim designated as section 5, adjoining section 8, owned by the company, on the ground that the money paid therefor by Wm. S. Noyes was money belonging to the corporation. Upon the hearing before Judge Dooling on sufficiency of the bill charging that Noves had purchased section 5 with money belonging to the corporation, the bill was dismissed, but with leave to amend. In the amended bill the charge was repeated that the money used in the purchase of section 5 was the money of the corporation, with some enlargement of the complaint; but the complainants failed to establish that fact, and the court below accordingly found and held that section 5 was purchased by Wm. S. Noves for the company, but out of his own funds, and the decree provided that he should transfer the title to the company and that he was to be paid therefor the full amount, together with interest, assessments, Noyes admitted that he purchased section 5 for the company. and was ready to transfer it to the company upon payment of the purchase price.

There was in the record a report of an official accountant, stating an account between Noyes and the company from January 1, 1913, to December 31, 1915, the purpose of which was to show that Noyes had received large sums of money by reason of the ownership of section 5. There was no exception or objection to this report. This court found the facts as reported by the official accountants, and also found that the money received and due Noyes was money that was due him under the contract of November 19, 1913, and if the division of the profits obtained from the working of ores taken from section 5 was unsatisfactory to the stockholders, they should have had the company terminate the lease or agreement upon 30 days' notice, as provided for in that agreement, and that in failing to do that the contract continued until it was terminated by the decree of the District Court directing that Noyes should convey to the company, and the company should pay him for the amount he had paid for section 5.

In affirming the decree, this court provided that there should be an accounting from December 31, 1915, down to the date of the entry of the decree, and that the court below should enter a judgment in accordance with such an accounting. The motion for diminution of record, if granted, will bring up the master's report, that has not been passed upon by the District Court, and will include matters involved in the original decree; but it does not appear that appellees are entitled to have this report of the master considered by this court until it has been considered by the District Court.

With respect to the auditing of the books of the company by the new accountants, it is sufficient to say that it appears from the papers submitted to the court on this motion that this auditing was done by direction of the receiver at the request of Capt. Overton, but that Capt. Overton, in a letter written by him to his counsel, W. F. Rose, dated February 10, 1919, said:

"The audit has no possible connection with the suit of which the receiver is a part. Said suit is ended so far as new evidence is concerned, and should further irregularities be discovered new steps must be taken for recovery, which steps could be taken by the stockholders or directors, including any of the defendants in the present suit. Therefore the position that this audit has any bearing on the present suit is, to my mind, untenable."

It will be seen from this letter, and from the report of the special accountants, that such audit is not relevant to anything before this court. The case of U. S. v. Adams, 76 U. S. (9 Wall.) 661, 19 L. Ed. 808, seems to dispose of the motion for diminution of record, even if it was otherwise meritorious.

It may be that the judgment of this court should be modified, so as to give the court below authority to consider whatever matters may be brought to its attention in a proper way; but we think the application for certiorari to bring up the initial record should be denied.

So ordered.

261 F.--65